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PRACTITIONERS BEWARE: UNDER AMENDED TRAP 47, "UNPUBLISHED" MEMORANDUM OPINIONS IN CIVIL CASES ARE BINDING AND RESEARCH ON WESTLAW AND LEXIS IS A NECESSITY

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This Article examines the history and current status of unpublished and memorandum intermediate appellate court opinions in Texas civil cases.[1] Specifically, it critiques the 2003 and 2008 amendments to Texas Rule of Appellate Procedure (TRAP) 47, the rule that governs the issuance, citation, and precedential value of unpublished and memorandum opinions.[2] The 2003 amendment was seemingly designed to make the law more readily available by prohibiting the issuance of unpublished opinions in civil cases and authorizing memorandum opinions in place of unpublished opinions.[3] Despite this intention, the 2003 amendment has failed to make the law in civil cases more readily available because the newly created memorandum opinions are only available electronically via Westlaw, Lexis, and the court websites, even though these opinions are designated for publication. Also, the 2008 amendment has now made memorandum opinions issued in civil cases since 2003 fully precedential.[4] As a result, to competently research binding law in civil cases, Texas attorneys must now have access to Westlaw or Lexis because the court websites lack sophisticated search engines necessary to conduct competent legal research.[5] This monumental

1. The Article focuses on unpublished and memorandum opinions in civil cases, only touching on unpublished and memorandum opinions in criminal cases.

2. TEX. R. APP. P. 47, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008).

3. The rule allowed for the continued issuance of unpublished opinions in criminal cases. TEX. R. APP. P. 47, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008).

4. *See* TEX. R. APP. P. 47 cmt. to 2008 change (stating that memorandum opinions issued prior to 2003 are not precedent).

5. *See generally Meeting of the Supreme Court Advisory Committee*, 4146 (June 15, 2001) (statement of Justice Nathan Hecht), *available at* http://www.supreme.courts.state.tx.us/rules/scac/archives/2001/transcripts/061501am.pdf (referring to Justice Hecht's comments about publishers and the publication of all opinions stating that "they're in the

shift in Texas law occurred without proper study into its effects upon Texas lawyers, and this Article recommends a reconsideration of that amendment. In so doing, the Article is divided into five sections.

The first section explores the origins of unpublished opinions, with a special focus on unpublished and memorandum opinions in Texas. In the 1970s and 1980s, intermediate appellate courts in many jurisdictions began issuing unpublished opinions as a means to cope with an exponential growth in the volume of appellate cases. The issuance of unpublished opinions was designed to conserve judicial resources by quickly disposing of easy cases. Although Texas intermediate appellate courts have a longer history of issuing unpublished and memorandum opinions, Texas courts also began issuing these opinions to cope with an increased volume of cases.[6] In Texas, these shorter memorandum and unpublished opinions were also designed to resolve easier disputes. The unpublished opinions were not widely distributed or accessible, but they were distributed to the parties and available at the courts. They were also non-precedential and non-citable and, for many years, constituted a small percentage of the total number of intermediate appellate opinions. Primarily for this reason, they remained relatively uncontroversial. Over time, as the number and complexity of decisions issued via unpublished opinions skyrocketed, many attorneys and judges became dissatisfied with this increasingly unusable and, some would say, "secret" body of law. Recently, this dissatisfaction led many jurisdictions, including both Texas and the federal courts, to change their rules regarding the issuance, citation, and precedential value of unpublished opinions.[7] Many jurisdictions now allow citation of unpublished

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publishing business, so they will probably publish it one way or another"); William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429, 442 (2003) ("Free Websites that include collections of court opinions typically offer only a very limited and rudimentary set of retrieval mechanisms.").

6. *Cf.* David M. Gunn, *"Unpublished Opinions Shall Not Be Cited As Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L.J. 115, 117 (1992) (discussing the use of per curiam opinions to mitigate the increasing amount of case law).

7. After several years of intense debate, Federal Rule of Appellate Procedure (FRAP) 32.1 became effective on December 1, 2006, and barred any prohibitions on the citation of unpublished opinions issued after January 1, 2007. FED. R. APP. P. 32.1; *see also* Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules*

opinions for persuasive value and a few jurisdictions even allow citation of unpublished opinions for precedential value.

The second section traces the 2003 amendment to TRAP 47.[8] Prior to 2003, TRAP 47 allowed Texas appellate courts to issue unpublished opinions, but these opinions were non-precedential and non-citable. After much debate, the Texas Supreme Court Advisory Committee recommended several significant changes to TRAP 47 that were approved by the Texas Supreme Court. This Article focuses on the changes to civil cases because these changes were the most sweeping and dramatic. Most importantly, the amendment prohibited the issuance of unpublished opinions.[9] To replace unpublished opinions, the rule authorized the issuance of memorandum opinions. Despite giving clear guidance that civil opinions could not be labeled as unpublished and could be cited, the rule did not give clear guidance regarding two important questions related to these newly created memorandum opinions: (1) where would memorandum opinions be available, and (2) what would be their precedential value?

The third section examines the practical consequences of the 2003 TRAP amendment with respect to civil cases and shows that, in terms of issuance, availability, and precedential value, the newly labeled memorandum opinions were identical to the previously labeled unpublished opinions.[10] This section first shows that the percentage of memorandum opinions issued after the amendment has been nearly identical to the percentage of unpublished opinions issued prior to the amendment. It then shows that memorandum opinions issued after the amendment, just like unpublished opinions issued prior to the amendment, are only available via Westlaw, Lexis, and the court websites. Finally, it

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Governing Publication and Citation of Opinions: An Update, 6 J. APP. PRAC. & PROCESS 349, 351–57 tbl.1 (2004) (showing a recent compilation of jurisdictions that have updated their rules regarding publication and citation standards).

8. TEX. R. APP. P. 47.4(b), 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008).

9. According to the 2003 amendment to TRAP 47, regular and memorandum opinions in civil cases could not be labeled as unpublished ("not for publication"), and all opinions needed to "be made available to public reporting services." The courts could still issue unpublished opinions in criminal cases. TEX. R. APP. P. 47, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008).

10. *See* TEX. R. APP. P. 47.4, 60 TEX. B.J. 925, 925 (Tex. 1997, amended 2008) (listing the requirements of a memorandum opinion); TEX. R. APP. P. 47.4(b), 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008) (same).

shows that courts have treated both memorandum opinions issued after the amendment and unpublished opinions issued prior to the amendment as non-precedential. Thus, in effect, the 2003 amendment changed nothing with respect to the issuance, availability, and precedential value of opinions in civil cases; it merely changed most opinions from unpublished to memorandum.

The fourth section examines the recently enacted 2008 amendment to TRAP 47, an amendment that was not vetted or recommended by the Texas Supreme Court Advisory Committee.[11] The 2008 amendment makes one major change—it specifically states that "[a]ll opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value."[12] This amendment effectively overrules the case law that had treated memorandum opinions, in civil cases issued after 2003, as non-precedential.

The fifth and final section explores the consequences of the flawed 2008 amendment to TRAP 47 and recommends a reexamination of that rule. The amendment is flawed because it makes memorandum opinions precedential even though those opinions are only readily researchable via Westlaw and Lexis. This has occurred in an era when only 60% of attorneys use fee-based online research services (i.e., Westlaw or Lexis) for state case law research.[13] For this reason, a large percentage of Texas attorneys cannot competently research most of the recent binding civil law—memorandum opinions issued since 2003. To combat this problem, this Article recommends one of three changes: (1) making all opinions readily available on a sophisticated, widely available, and unified website for the Texas courts of appeals; (2) requesting the West Publishing Company publish memorandum opinions issued in civil cases since 2003 in the *South Western Reporter* or a specialty reporter devoted to memorandum opinions, thereby making these memorandum opinions readily available to attorneys without access to Westlaw or Lexis; or (3) returning memorandum opinions in civil cases to their non-precedential status. Any of these three changes would be fairer than the current system, which has now made a significant portion

11. TEX. R. APP. P. 47.

12. TEX. R. APP. P. 47 cmt. to 2008 change.

13. 5 LEGAL TECH. RESEARCH CTR., A.B.A., 2008 LEGAL TECHNOLOGY SURVEY REPORT: ONLINE RESEARCH 31 (2008).

of binding Texas case law readily available only to those attorneys using Westlaw or Lexis.

I. THE CASE LAW EXPLOSION AND THE EMERGENCE OF UNPUBLISHED OPINIONS

For centuries, judges and scholars have been concerned about the proliferation of case law. In the early 1600s, Francis Bacon first suggested that cases of a repetitive nature should be excluded from the case reports.[14] Then, in 1671, Sir Matthew Hale, the Lord Chief Justice of England, first warned about the dangers of ever-expanding case law:

> Thus, as the rolling of a snow-ball, it increaseth in bulk in every age, till it become utterly unmanageable .... It must necessarily cause ignorance in the professors and profession itself; because the volumes of the law are not easily mastered.[15]

Over time, and across continents, this concern about the proliferation of case law has grown[16] and has resulted in two primary areas of attention: (1) the ability of appellate courts to function effectively with an ever-expanding number of cases; and (2) the ability of lawyers to purchase, research, and comprehend this burgeoning body of case law.[17] As a practical matter, these problems caused courts to spend too much time writing opinions in cases that did not meaningfully advance the development of the law.[18] It also caused attorneys to spend too much money

14. *See* Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 545 (1997) (discussing Francis Bacon's early views about excluding certain cases from the case reports).

15. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 141 (1963).

16. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 440–41 (spec. ed. O'Halsted 1986) (1826) (discussing the volume of law faced by law students in the early days of America); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 53–64 (1996) (showing, via statistics, the explosive growth in the caseloads of federal appellate courts since 1960); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 478 (1988) (discussing an 1824 article that lamented the increase in reported decisions was more than could be borne).

17. *See* Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 188–89 (2007) (discussing the problems for both the courts and practicing attorneys created by the explosion in the volume of appellate case law).

18. *See* David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1141–42 (2002) (discussing the inability of courts to function effectively with an increased workload as detailed in the 1964 *Annual Report of the Director of the Administrative Office of the United States Courts*).

purchasing the law, and too much time researching and understanding this ever increasing body of case law.[19] In 1972, nearly three hundred years after Sir Matthew Hale's warning, one commentator noted that "there are limits on the capacity of judges and lawyers to produce, research, and assimilate the sheer mass of judicial opinions. Those limits are dangerously near at present and in some systems may already be exceeded."[20] These limits were caused by the dramatic increase in appellate case filings with the number of federal appeals in 1930 being 2,974,[21] and the number increasing to 10,669 by 1970.[22]

In the early 1970s, primarily because of the exponential growth in the volume of intermediate appellate cases, a consensus emerged that the issuance of unpublished opinions provided an easy and logical solution to the vast increase in the number of appellate opinions that needed to be written.[23] Thus, as a matter of practical necessity, many courts enacted rules for issuing unpublished opinions.[24] For the most part, these rules allowed for

19. *See* J. Myron Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 791 (1975) ("[V]ery few of the profession can afford to purchase, and none can read all the books which it is thought desirable, if not necessary, to possess.").

20. Charles W. Joiner, *Limiting Publication of Unpublished Opinions*, 56 JUDICATURE 195, 195 (1972).

21. ADMIN. OFFICE U.S. COURTS, WORKLOAD STATISTICS FOR THE DECADE OF THE 1970S, at ii (1980).

22. *Id.* at tbl.B1 (showing the number of cases disposed). The explosive growth has continued into recent times. For the twelve-month periods ending on September 30, 2006, and September 30, 2007, the number of federal appeals filed was 66,618 and 58,410, respectively. U.S. COURT OF APPEALS, APPEALS COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2006 AND 2007 tbl.B (2007), http://www.uscourts.gov/judbus2007/appendices/B00 Sep07.pdf.

23. *See* William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 577–78 n.15 (1981) (citing BD. OF THE FED. JUDICIAL CTR., RECOMMENDATION AND REPORT TO THE APRIL 1972 SESSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE PUBLICATION OF COURTS OF APPEALS OPINIONS (1972)) (discussing the emerging consensus that the publication of appellate opinions needed to be limited). Although some federal circuit courts of appeals, in the 1940s, considered issuing unpublished opinions as a means to manage exploding caseloads, the federal circuits published virtually every case decision well into the 1960s. *See* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990) ("It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small.").

24. At the federal level, by 1974, each federal circuit began to implement plans for issuing unpublished opinions. "In 1974, the Judicial Conference reported that the various

the issuance of unpublished opinions in easy cases—those not involving new or novel issues concerning matters of great public importance.[25] More specifically, in deciding whether to publish a decision, most courts considered four factors: (1) whether the decision created a new rule of law or altered an existing one; (2) whether the decision involved a legal issue of continuing public interest; (3) whether the decision criticized existing law; and (4) whether the decision resolved an apparent conflict of authority.[26] Although the precise guidelines for issuing unpublished opinions varied slightly from jurisdiction to jurisdiction, unpublished opinions were usually reserved for cases involving the routine application of well-established existing law to non-unique factual scenarios. In most jurisdictions, these unpublished opinions were also non-citable, non-precedential, and non-controversial.

A. *Unpublished and Memorandum Opinions in Texas*

Unlike many jurisdictions which started issuing unpublished opinions in the 1970s or 1980s, Texas has a longer history of unpublished opinions.[27] In 1886, the West Publishing Company published the first volume of the *South Western Reporter*, a reporter devoted to the published state case opinions from Texas, Arkansas, Missouri, Tennessee, and Kentucky. At that time, unpublished Texas opinions already existed and were available in

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plans developed by the courts of appeals were successfully eliminating unnecessary publication of opinions." COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 8 (2004), *available at* http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf.

25. In more sophisticated legal terminology, the guiding principle was whether the court's ruling served its "dispute-settling" or "law-making" function. *See* William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1182–83 (1978) (explaining the two distinct functions of appellate decision-making as dispute-settling and law-making). If a court's ruling applied well-established and uncontroversial principles of law to ordinary facts, then the decision primarily served the court's "dispute-settling" function and would be unpublished. *Id.*

26. *See* COMM. ON USE OF APPELLATE CT. ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 15–17 (1973) (providing a recommendation for when courts should issue unpublished opinions).

27. *See* David M. Gunn, *"Unpublished Opinions Shall Not Be Cited As Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L.J. 115, 127–30 (1992) (tracing the history of unpublished opinions in Texas).

Posey's *Texas Unreported Cases*.[28] Later, in 1904, Edmund Samson Green published the *Digest of the Decisions of the Appellate Courts of the State of Texas*, which claimed that it was "a *complete* digest of all the decisions, civil and criminal, reported and unreported, of the appellate courts of Texas from the earliest times to the decisions reported in volume 75 of the [*South Western Reporter*]."[29] In these early years, "[i]t appears that judges themselves controlled the determination of whether to publish [their decisions and] ... [t]he courts' regard for these [unpublished] cases remains unclear."[30] In fact, no definitive guidance existed as to when Texas courts should issue unpublished opinions, when those unpublished opinions could be cited, and what precedential value, if any, should be attached to those opinions. Furthermore, despite these efforts to accumulate the published and unpublished opinions, many Texas practitioners, scholars, and judges became concerned about the quantity of decisional law. In 1923, Professor McCormick described Texas case law as a "mountainous pile" and cautioned that the legal system was "fast verging upon a state of legal chaos."[31]

Finally, in 1941, when the state's first Rules of Civil Procedure were promulgated,[32] Rule 452 gave the first definitive guidance on the issuance of unpublished (and memorandum) opinions in Texas. According to that rule:

> Opinions of the Courts of Civil Appeals shall be as brief as practicable, and shall avoid as far as possible lengthy quotations from other decisions or texts; and where the issues involved have been clearly settled by authority or elementary principles of law, the court shall write only brief memorandum opinions. Opinions shall be ordered not published when they present no question or

28. S.A. POSEY, TEXAS UNREPORTED CASES (St. Louis, Gilbert Book Co. 1886); *see* David M. Gunn, *"Unpublished Opinions Shall Not Be Cited As Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L.J. 115, 128 (1992) (discussing the availability of early Texas unpublished opinions).

29. 1 EDMUND SAMSON GREEN, DIGEST OF THE DECISIONS OF THE APPELLATE COURTS OF THE STATE OF TEXAS, at iii (1904).

30. David M. Gunn, *"Unpublished Opinions Shall Not Be Cited As Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L.J. 115, 129 (1992).

31. C.T. McCormick, *Stemming the Tide of Judicial Opinions*, 1 TEX. L. REV. 450, 450–51 (1923) (discussing the problems inherent in an increased body of law).

32. *Order of the Supreme Court of Texas Adopting Rules of Practice and Procedure Governing Civil Actions in the Various Courts of this State*, 3 TEX. B.J. 522, 522 (1940).

application of any rule of law of interest or importance to the jurisprudence of the State.[33]

Unfortunately, in providing the first definitive guidance on unpublished opinions, the new rule also created confusion by including a new classification of opinions—memorandum opinions.[34] It was not clear whether the new rule was equating memorandum opinions with unpublished opinions. It is at least arguable that an opinion could fit the definition for a memorandum opinion, yet not the definition for an unpublished opinion—an opinion could dispose of "clearly settled" issues (making it qualify as a memorandum opinion) yet still be "importan[t] to the jurisprudence of the state" (making it qualify as a published opinion). Despite the possibility that an opinion could qualify as both a memorandum and a published opinion, it appears that all memorandum opinions were in fact unpublished.[35] Rule 452, as originally enacted, also did not provide any guidance regarding the citation or precedential value of either memorandum or unpublished opinions.

With regard to this lack of guidance, Rule 452 remained unchanged from 1941 until 1982. Then, in 1982, Rule 452 was amended and included for the first time a prohibition against citing unpublished opinions: "[u]npublished opinions shall not be cited as authority by counsel or by a court."[36] It was still unclear whether the rule was equating memorandum opinions with unpublished opinions. The rule also did not explicitly address the precedential value of unpublished opinions, but presumably such opinions were

33. TEX. R. CIV. P. 452, 3 TEX. B.J. 596 (1941, amended 1943 and 1982, repealed 1986). A 1943 amendment to Rule 452 required the Texas Supreme Court to order the publication of previously unpublished courts of appeals opinions whenever the court ordered a writ granted or refused. In 1982, this automatic publication provision was revised, and the court could use its discretion in deciding whether to order publication when the writ was granted or refused. The automatic publication provision was restored in 1990, after Rule 452 had been redesignated Appellate Rule 90. *See* David M. Gunn, *"Unpublished Opinions Shall Not Be Cited As Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L.J. 115, 130 (1992) (describing the shifting protocols for when the Texas appellate courts were required to publish their opinions).

34. *See* Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89, 105 (2007) (recognizing that memorandum opinions came into existence in 1941).

35. A Westlaw search failed to reveal any published opinions that were designated as memorandum opinions. So, it seems as though all memorandum opinions were unpublished.

36. TEX. R. CIV. P. 452(f), 45 TEX. B.J. 789 (1982, repealed 1986).

non-precedential because attorneys were prohibited from citing them. By prohibiting citation, the rule effectively limited the precedential value of unpublished opinions because non-citation essentially ensures non-precedential status.[37]

In 1986, Rule 452 was amended and redesignated as Rule 90 of the newly enacted Texas Rules of Appellate Procedure.[38] TRAP 90(a) specifically provided that "brief memorandum opinion[s]" should issue when the "issues are clearly settled" and these opinions "should not be published."[39] TRAP 90(c) provided additional guidance on the standards for issuing published opinions. According to that rule, an opinion should be published only if it: "(1) 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; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority."[40]

TRAP 90(i) also stated that "[u]npublished opinions shall not be cited as authority by counsel or by a court."[41] It still was not entirely clear whether TRAP 90 was equating memorandum with unpublished opinions—neither memorandum nor unpublished opinions could be cited, but seemingly different standards applied to their issuance. Memorandum opinions were reserved for "clearly settled issues,"[42] whereas unpublished opinions were reserved for when the court was: (1) not creating or modifying an existing rule, nor applying an existing rule to a new fact scenario likely to recur; (2) not ruling on a matter of continuing public

37. *See* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 196 (1999) (noting that limiting citation "will serve as a de facto cap on any precedential value an unpublished decision might have").

38. TEX. R. APP. P. 90, 49 TEX. B.J. 583, 583–84 (Tex. 1986, amended 1990, repealed 1997).

39. TEX. R. APP. P. 90(a), 49 TEX. B.J. 583, 583 (Tex. 1986, amended 1990, repealed 1997) ("The court of appeals shall decide every substantial issue raised and necessary to disposition of the appeal and hand down a written opinion which shall be as brief as practicable. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.").

40. TEX. R. APP. P. 90(c), 49 TEX. B.J. 583, 583 (Tex. 1986, amended 1990, repealed 1997).

41. TEX. R. APP. P. 90(i), 49 TEX. B.J. 583, 584 (Tex. 1986, amended 1990, repealed 1997).

42. *See* TEX. R. APP. P. 90(a), 49 TEX. B.J. 583, 583 (Tex. 1986, amended 1990, repealed 1997) ("Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.").

interest; (3) not criticizing existing law; and (4) not resolving a conflict of authority.[43] TRAP 90 also did not explicitly address the precedential value to be accorded to memorandum opinions, though unpublished opinions could not be cited as "authority."[44]

In 1997, the Texas Rules of Appellate Procedure underwent a major revision, and many provisions of TRAP 90 were renumbered as part of TRAP 47.[45] TRAP 90(a) essentially became TRAP 47.1, which still stated that brief memorandum opinions ("no longer than necessary") should issue "[w]here the issues are settled" (as opposed to "[w]here the issues are clearly settled" from the prior rule), but removed the prohibition against publishing memorandum opinions.[46] This would seem to indicate that a difference existed between memorandum and unpublished opinions because memorandum opinions could be published and were thus seemingly binding. In addition, TRAP 47.4 set forth the standards for when opinions should be published, and these standards precisely mirrored the publication standards originally set forth in Rule 90(c).[47]

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43. TEX. R. APP. P. 90(c), 49 TEX. B.J. 583, 583 (Tex. 1986, amended 1990, repealed 1997).

44. *See* TEX. R. APP. P. 90(i), 49 TEX. B.J. 583, 584 (Tex. 1986, amended 1990, repealed 1997) ("Unpublished opinions shall not be cited as authority by counsel or by a court.").

45. TEX. R. APP. P. 47, 60 TEX. B.J. 925, 925 (Tex. 1997, amended 2002). The official comment to the 1997 change stated:

> This is former Rule 90. Subdivision 47.1 makes clear that a memorandum opinion should not be any longer than necessary. Subdivision 47.5 is amended to make clear that only justices who participated in the decision may file an opinion in the case. Judges who are not on a panel may file an opinion only in respect to a hearing or rehearing en banc. Former Rule 90(h), regarding publication of opinions after the Supreme Court grants review, is repealed.

TEX. R. APP. P. 47 cmt. to 1997 change, 60 TEX. B.J. 925, 925 (Tex. 1997, amended 2002).

46. TEX. R. APP. P. 90(a), 49 TEX. B.J. 583, 583 (Tex. 1986, amended 1990, repealed 1997); TEX. R. APP. P. 47.1, 60 TEX. B.J. 925, 925 (Tex. 1997, amended 2002).

47. TEX. R. APP. P. 47.4, 60 TEX. B.J. 925, 925 (Tex. 1997, amended 2002). The rule provided:

> Standards for Publication. An opinion should be published only if 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 a legal issue of continuing public interest;
>
> (c) criticizes existing law; or
>
> (d) resolves an apparent conflict of authority.

Id.

As this history shows, the Texas rules regarding the issuance, citation, and precedential value of unpublished opinions conformed to the rules established by most jurisdictions. Into the late 1990s, similar to most jurisdictions, unpublished opinions were issued in relatively easy cases, and the opinions were non-citable and non-precedential. The only real difference between Texas and other jurisdictions was that Texas had both unpublished and memorandum opinions, and the practical difference between those opinions was unclear.

B. Anastasoff *and the Changing Rules Regarding Unpublished Opinions: The Prelude to the 2003 Amendments to TRAP 47*

For many years, in both Texas and elsewhere, the issuance of unpublished opinions was relatively uncontroversial. It was uncontroversial because unpublished opinions constituted a small percentage of the decided cases; the vast majority of opinions were published and precedential. In addition, most members of the legal community had accepted the legitimate justifications for issuing unpublished opinions. Most notably, appellate judges did not have the time or resources to write an opinion of precedential and publishable quality in every case.[48] The chief judge of the Sixth Circuit summarized:

> 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.[49]

Thus, as a practical necessity and means for coping with the exponential growth in the volume of appeals, courts issued unpublished opinions. Unpublished opinions were seen as necessary to preserve the cohesiveness of the law because the theory of precedent depended "on the existence of a comfortable number of precedents, but not too many."[50] Finally, unpublished

48. *See* Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 17, 18 (2000) (exploring the debate over unpublished opinions and precedence).

49. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 189 (1999).

50. Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1041 (1961) ("When the number of printed cases becomes like the number of grains of sand on

opinions were justified as providing "economies for the bar and the law librarian."[51]

During the late 1990s and into the early part of the new century, however, many jurisdictions began to re-examine the justifications for the issuance, citation, and precedential value of unpublished opinions. This re-examination occurred for a variety of reasons, but it was undoubtedly sparked by the increase in the percentage of intermediate appellate court opinions that were being issued as unpublished opinions. In the early 1980s, the vast majority of intermediate appellate court decisions in most jurisdictions were issued as officially published opinions—for example, in 1981 the federal courts of appeals published 89% of their opinions.[52] By 2000, however, the landscape had changed dramatically, and the vast majority of intermediate appellate court decisions in most jurisdictions were issued as unpublished opinions. In 2000, the federal courts of appeals issued 80% of their decisions via unpublished opinions.[53] Similarly, in 2000, the Texas courts of appeals issued 85% of their decisions via unpublished opinions.[54]

As intermediate appellate courts began to issue a greater number and percentage of their decisions via unpublished opinions, many lawyers and judges began to question the efficacy of issuing so many non-precedential and non-citable opinions. The

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the beach, a precedent-based case-law system does not work and cannot be made to work.").

51. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1181 n.88 (1978) (discussing the economic justifications for issuance of unpublished opinions).

52. *See* Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 204 tbl.2 (2001) (setting forth the statistics for unpublished opinions for the years 1981–1987 and 1991–1999 from the Administrative Office of the United States Courts).

53. *See id.* at 202–03 tbl.1 (2001) (providing the statistics for unpublished opinions for the years 1990–2000 from the Administrative Office of the United States Courts).

54. *See* COURTS OF APPEALS, ANALYSIS OF ACTIVITY FOR THE YEAR ENDED AUGUST 31, 2000 (2000), *available at* http://www.courts.state.tx.us/pubs/AR2000/COA/COANAR00.pdf (showing that, for fiscal year 2000, the Texas courts of appeals issued 10,863 unpublished opinions of 12,798 total opinions). The Texas judiciary has compiled statistics for published and unpublished opinions only since 1991. In 1991, 67.1% of civil opinions issued by the Texas courts of appeals were unpublished opinions. E-mail from Angela Garcia, Judicial Info. Manager for the Tex. Judiciary, to Author (July 23, 2008, 11:13 CST) (on file with the *St. Mary's Law Journal*) (reporting, in an accompanying Excel spreadsheet, the number of published and unpublished opinions in civil cases for fiscal years 1991–2007).

primary concern was the unfairness to litigants caused by the abrogation of stare decisis.[55] In essence, the vast increase in the number of cases that were non-precedential and non-citable created the likelihood and probability that "like cases will be decided in unlike ways."[56] It also became increasingly apparent that unpublished opinions were being issued in cases that were not routine and ordinary applications of existing law. The statistics showed a growing number of reversals, dissents, and concurrences in unpublished opinions, and this seemingly proved that unpublished opinions were no longer reserved for "routine applications of existing law with which all judges would agree."[57] Other critics

55. *See* Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 134 (1994) ("An unpublished, uncitable decision cannot fit with the definition of stare decisis ...."); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 579–80 (1981) (explaining that each and every case is a unique, specific factual scenario that contributes to the development of the law and precedent); Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 238 (2006) (showing a specific example of doctrinal inconsistency created by non-precedential, unpublished opinions); Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 OHIO ST. L.J. 645, 649 (2006) (showing that non-precedential unpublished opinions abrogate stare decisis); Drew R. Quitschau, Note, Anastasoff v. United States*: Uncertainty in the Eighth Circuit—Is There a Constitutional Right to Cite Unpublished Opinions?*, 54 ARK. L. REV. 847, 878 (2002) ("[T]he no-citation rule violates stare decisis .... Our forefathers never intended the courts to have such unbridled discretion ... as prescribed by the no-citation rule."); Marla Brooke Tusk, Note, *No-Citation Rules As a Prior Restraint on Speech*, 103 COLUM. L. REV. 1202, 1207 (2003) ("No-citation rules have effectively taken unpublished opinions outside the realm of stare decisis ... [and] [t]hese rules explicitly strip unpublished opinions of any binding precedential force ....").

56. *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 119–21 (2001) (noting that "failing to give unpublished opinions precedential effect raises the very specter ... that like cases will be decided in unlike ways" and "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 like cases"); *see also* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997 (1994) ("[T]he precept that like cases should be treated alike ... [is] rooted both in the rule of law and in Article III's invocation of the 'judicial Power' ...."). *See generally* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 259 (spec. ed. 1983) (1765) (recognizing that judges who fail to follow stare decisis will be "regulated only by their own [personal] opinions").

57. Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 222 (2001) (providing evidence that unpublished opinions often contain concurring or dissenting opinions); *see* David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*,

of unpublished opinions lamented the inability of judges to identify the important cases from the unimportant ones,[58] questioned whether unpublished opinions diminished judicial legitimacy and accountability because it allowed for the unequal treatment of similarly situated litigants,[59] and cautioned against this growing body of unusable and "secret" body of law.[60] It was also widely theorized that unpublished opinions had become readily available because of electronic databases.[61]

This growing criticism of unpublished opinions was further

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73 U. CIN. L. REV. 817, 826 (2005) (showing the trend toward more reversals in unpublished opinions); *see, e.g.*, 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) (setting forth empirical research showing significant unpublished opinions accompanied by dissents). *See generally* Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 259, 261–63 (2002) (discussing unpublished opinions that contain dissents).

58. *See* William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 581 (1981) (arguing that judges cannot predict the future precedential value of their opinions); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1192 (1978) ("'A rule which authorizes any court to censor future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product.'" (quoting Justice John Paul Stevens, Address to the Illinois State Bar Association's Centennial Dinner (Jan. 22, 1977), *in* 65 ILL. B.J. 508, 510 (1977))); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 125 (1995) ("A system of precedent exists to adapt rules to society's changing needs. Requiring judges to determine which cases will have future import ignores the purpose of an evolutionary system of rule-making.").

59. *See* Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 776–77 (1995) (articulating that the legitimacy of the judiciary depends upon the public's approval and belief that similarly situated litigants will be treated similarly); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 132 (1995) (noting that non-publication creates the "appearance of arbitrariness").

60. *See* County of L.A. v. Kling, 474 U.S. 936, 938 (1985) (Marshall, J., dissenting) (referring to unpublished opinions and no-citation rules as "secret law").

61. *See* Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141, 173 (2006) ("In all circuits and in many states, 'unpublished' opinions are readily available on court websites and on Lexis and Westlaw."); Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 109 (2004) ("It is now the case that 'unpublished' opinions generally are as readily available as those designated as 'published' . . . .").

sparked by one event—the Eighth Circuit's 2000 decision in *Anastasoff v. United States*.[62] In *Anastasoff*, the Eighth Circuit held that its rule,[63] which stated that "[u]npublished opinions are not precedent and parties generally should not cite them," was unconstitutional because it violated Article III of the United States Constitution.[64] According to Article III, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[65] The Eighth Circuit concluded that the doctrine of stare decisis was part of this "judicial [p]ower" conferred to the courts by Article III.[66] The court noted that the Framers were well aware that "the judge's duty to follow precedent derives from the nature of the judicial power itself."[67] As a result, the court viewed adherence to precedent, even unpublished precedent, as a constitutional requirement that could not be ignored.[68] This differed from the prevailing notion that adherence to precedent was an equitable or prudential principle, rather than a constitutional one.[69]

Even though the *Anastasoff* ruling was ultimately vacated as moot and found unpersuasive by other courts,[70] it caused a

62. Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

63. *See id.* at 899 ("We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III . . . ."); *see also* 8TH CIR. R. 32.1(A) (originally enacted as 8TH CIR. R. 28(A)(i)) (setting forth the Eighth Circuit's rule regarding the issuance and citation of unpublished opinions).

64. *See Anastasoff*, 223 F.3d at 899 (holding that Article III incorporates the doctrine of precedent and that a judicially established rule barring citation of unpublished opinions is therefore unconstitutional).

65. U.S. CONST. art. III, § 1.

66. *See Anastasoff*, 223 F.3d at 900 (emphasizing the limitations placed on judicial power by the Constitution).

67. *Id.* at 901.

68. *See id.* at 900 (detailing the historical basis for adherence to precedent). The view that unpublished opinions have precedential significance was originally set forth in an article by the author of the *Anastasoff* opinion, Judge Richard S. Arnold of the Eighth Circuit. *See generally* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222 (1999) (emphasizing the importance of all judicial decisions).

69. *See generally* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43, 43–44 (advocating for the continued use of no-citation rules).

70. *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1160 (9th Cir. 2001) (disagreeing with *Anastasoff* and finding no constitutional or other problem with the issuance of unpublished, non-precedential opinions).

widespread re-examination of the rules regarding unpublished opinions.[71] This re-examination occurred for a variety of reasons, but primarily resulted from a confluence of four factors: (1) the increased issuance of unpublished opinions; (2) the increased availability of unpublished opinions resulting from technological advances; (3) rules that prohibited the citation of unpublished opinions; and (4) rules that relegated unpublished opinions to a non-precedential status. The dynamics and interplay between these factors called into question a fundamental principle of the American legal system—stare decisis. As a result of this re-examination, many jurisdictions have recently changed their rules regarding unpublished opinions.[72] At the time of the *Anastasoff* decision, most jurisdictions allowed for the issuance of unpublished opinions, but treated them as non-citable and non-precedential. Since that time, many jurisdictions, including all federal courts, now allow unpublished opinions to be cited.[73] Some jurisdictions, such as the D.C. Circuit and the state of Utah, allow unpublished opinions to be cited as precedential authority.[74]

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71. Interestingly, the *Anastasoff* ruling is premised on the first sentence of Article III of the United States Constitution. *See Anastasoff*, 223 F.3d at 900 (asserting the ideas of Article III of the United States Constitution). The same language appears in article V, section 1 of the Texas constitution:

> The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

TEX. CONST. art. V, § 1. So, under similar reasons as *Anastasoff*, non-precedential opinions could be unconstitutional under the Texas state constitution. *See generally id.* (addressing the judicial power of the courts).

72. *See* Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349, 351–57 tbl.1 (2004) (setting forth the latest update of the rules regarding publication and citation standards).

73. *See, e.g.*, FED. R. APP. P. 32.1(a)(i) (allowing for the citation of unpublished opinions). Newly adopted Federal Rule of Appellate Procedure 32.1 provides that courts may not prohibit the citation of unpublished federal judicial decisions "issued on or after January 1, 2007." FED. R. APP. P. 32.1(a)(ii).

74. *See* D.C. CIR. R. 32.1(b)(1)(B), *available at* http://www.cadc.uscourts.gov/internet/home.nsf/content/Court+Rules+and+Operating+Procedures ("All unpublished orders or judgments of this court . . . entered on or after January 1, 2002, may be cited as precedent."); *see also* Grand County v. Rogers, 44 P.3d 734, 738 (Utah 2002) (holding that an unpublished Utah Supreme Court opinion "may be presented as precedential authority to a lower court").

II. THE 2003 AMENDMENT TO TRAP 47: THE ABOLITION OF UNPUBLISHED OPINIONS IN CIVIL CASES?

In the early 2000s, Texas contemplated changing its rule, TRAP 47, regarding unpublished and memorandum opinions.[75] The initial study into the possible changes to TRAP 47 was conducted by the Texas Supreme Court Rules Advisory Committee, a committee that "assists the Supreme Court in the continuing study, review, and development of rules and procedures for the courts of Texas."[76] At that time, TRAP 47 allowed for the issuance of unpublished opinions,[77] but prohibited the citation of these non-precedential opinions.[78] The rule also explicitly allowed for the issuance of memorandum opinions when the issues were "settled,"[79] but did not give any guidance regarding the citation or precedential value of these memorandum opinions. In truth, it was not clear whether the rule was equating memorandum and unpublished opinions. So, one of the primary tasks faced by the

75. Texas Rule of Appellate Procedure 47 only applies to opinions from the Texas courts of appeals. *See* TEX. R. APP. P. 47 (addressing the issuance of appellate opinions and publications). This Article does not address Texas Rule of Appellate Procedure 77, which governs unpublished opinions from the Texas Court of Criminal Appeals. *See generally* TEX. R. APP. P. 77.1, 77.3 (providing the rules for unpublished opinions from the Texas Court of Criminal Appeals).

76. *See In the Supreme Court of Texas Misc. Docket No. 06-9019: Supreme Court Rules Advisory Committee* (Mar. 1, 2006), at 1–3 (setting forth the charge for the Rules Advisory Committee and appointing its members). The Rules Advisory Committee was first constituted in 1939 following the Texas legislature's passage of the Rules of Practice Act, which gave the supreme court "full rule-making power in the practice and procedure in civil actions." Act of May 15, 1939, 46th Leg., R.S., ch. 25, § 1, 1939 Tex. Gen. Laws 201, 201 (codified at TEX. GOV'T CODE ANN. § 22.004(a) (Vernon 2004)). In 1940, the Texas Supreme Court appointed the Rules Advisory Committee to assist in this rulemaking process. More recently, in 1999, 2000, 2003, and 2006, the Texas Rules Advisory Committee has been reconstituted to assist the supreme court in its rulemaking function. *See, e.g.*, *In the Supreme Court of Texas Misc. Docket No. 06-9019: Supreme Court Rules Advisory Committee* (Mar. 1, 2006), at 1 (establishing the new Texas Supreme Court Rules Advisory Committee); *In the Supreme Court of Texas Misc. Docket No. 03-9023: Supreme Court Rules Advisory Committee* (Apr. 2, 2003), at 1 (announcing a reconstitution of the Rules Advisory Committee for the Texas Supreme Court).

77. TEX. R. APP. P. 47.4, 60 TEX. B.J. 925, 925 (Tex. 1997, amended 2002) (setting forth four criteria for issuing unpublished opinions).

78. TEX. R. APP. P. 47.7, 60 TEX. B.J. 925, 925 (Tex. 1997, amended 2002) ("[Unpublished opinions] have no precedential value and must not be cited as authority by counsel or by a court.").

79. TEX. R. APP. P. 47.1, 60 TEX. B.J. 925, 925 (Tex. 1997, amended 2002) ("Where the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it.").

Advisory Committee was to clarify the distinction, if any, between memorandum and unpublished opinions.

In 2002, after much debate and deliberation, the Texas Supreme Court and Texas Court of Criminal Appeals approved several significant amendments to TRAP 47 that had been recommended by the Texas Supreme Court Advisory Committee.[80] Some of these changes applied to all intermediate appellate cases; some of these changes applied only to criminal cases;[81] and some of these changes applied only to civil cases. The most significant change was the elimination of unpublished opinions in civil cases. The official "Notes and Comments" section to the 2003 amendment stated that "the rule is substantively changed to discontinue the use of the 'do not publish' designation in civil cases" and "to require that all opinions of the court[s] of appeals be made available to public reporting services."[82] This presumably meant that all civil cases would or should be published,[83] a significant change because, prior to the amendment, 75% of all opinions were issued as unpublished opinions.[84] The other significant change

80. TEX. R. APP. P. 47, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008).

81. The TRAP 47 changes that applied only to criminal cases are not the focus of this Article. These changes made it clear that intermediate courts could continue to issue unpublished opinions in criminal cases. *See* TEX. R. APP. P. 47.2(b), 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008) ("[E]ach opinion in a criminal case must bear the notation 'publish' or 'do not publish,' as determined—before the opinion is handed down—by a majority of the justices who participate in considering the case."). These unpublished opinions in criminal cases, like the unpublished opinions issued under the prior rule, were non-precedential. But, under the new rule, these unpublished opinions could be cited. TEX. R. APP. P. 47.7, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008) ("Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, '(not designated for publication).'"). Thus, for criminal cases, the new rule continued to allow for the issuance of unpublished opinions, but also allowed for the citation of these non-precedential opinions.

82. TEX. R. APP. P. 47 cmt. to 2002 change, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008).

83. Although these opinions are not designated as "do not publish," they are still only available in electronic form via Westlaw, Lexis, or the court websites. *Cf.* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 185 (1999) (describing the phrase "unpublished opinion" as "almost a term of art" because "unpublished" opinions of the federal courts of appeals "are part of the public record" and typically available through Westlaw and Lexis).

84. For the fiscal year ending on August 31, 2002, the Texas courts of appeals issued 8,982 unpublished opinions and 11,959 total opinions. Thus, 75.1% of the opinions were unpublished. OPINIONS WRITTEN BY JUSTICES OF THE COURTS OF APPEALS, FOR THE YEAR ENDED AUGUST 31, 2002, http://www.courts.state.tx.us/pubs/AR2002/coa/opinion_

allowed for the citation of unpublished opinions in civil cases (i.e., the unpublished opinions issued under the prior rule) and deemed these opinions as non-precedential.[85]

Other changes applied to both civil and criminal opinions. These changes focused on distinguishing between memorandum and unpublished opinions, and included the following:

(1) requiring all opinions be labeled as either a "memorandum opinion" or "opinion,"[86]

(2) creating a preference for memorandum opinions,[87] and

(3) allowing for the citation of all opinions, regardless of their designation.[88]

III. THE UNANSWERED QUESTIONS AFTER THE 2003 AMENDMENT TO TRAP 47: ISSUANCE, PUBLICATION AND AVAILABILITY, AND PRECEDENTIAL VALUE

The 2003 amendment to TRAP 47 clearly answered several questions related to unpublished and memorandum opinions, but also left several important questions unanswered. The amendment prohibited the issuance of unpublished opinions in civil cases and allowed for the citation of unpublished opinions.[89] Despite this clear guidance, the amendment failed to address three significant issues related to the issuance, publication and availability, and precedential value of memorandum opinions in civil cases:

(1) *The issuance question*: Would memorandum opinions under the new rule be issued in the same types of cases as unpublished opinions under the old rule?

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summary.pdf (last visited Mar. 31, 2009).

85. TEX. R. APP. P. 47.7, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008). As already addressed, the rule also allowed for the continued issuance of unpublished opinions in criminal cases and for the citation of these unpublished criminal opinions.

86. TEX. R. APP. P. 47.2(a), 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008).

87. TEX. R. APP. P. 47 cmt. to 2002 change, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008) ("The rule favors the use of 'memorandum opinions' . . . .").

88. TEX. R. APP. P. 47.7, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008). The 2003 amended version of 47.7, entitled "Citation of Unpublished Opinions," read as follows: "Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, '(not designated for publication).'" *Id.* This section was designed to apply to unpublished opinions in criminal cases issued under the current amendment, and unpublished civil and criminal opinions issued prior to the amendment.

89. TEX. R. APP. P. 47 cmt. to 2002 change, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008).

(2) *The publication and availability question*: Where would memorandum opinions be published and available?

(3) *The precedential value question*: Would these memorandum opinions be precedential?

Interestingly, the answers to these questions showed that memorandum opinions in civil cases after the amendment were nearly identical to unpublished opinions in civil cases prior to the amendment—they were issued in the same number of cases; they were available only electronically; and they were non-precedential. Thus, for all practical purposes, the 2003 amendment did nothing except change the name of unpublished opinions to memorandum opinions and allow for the citation of these opinions.

A. *The Issuance of Memorandum Opinions in Civil Cases*

The 2003 amendment prohibited the issuance of unpublished cases, but authorized the issuance of memorandum opinions in accordance with nearly identical criteria that had been previously used for the issuance of unpublished opinions. Prior to the amendment, TRAP 47.4 stated that an opinion qualified as an unpublished opinion unless the opinion:

> (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 legal issues of continuing public interest;
> (c) criticizes existing law; or
> (d) resolves an apparent conflict of authority.[90]

Under the amended rule, whether an opinion would take "memorandum" form was dictated by the same four criteria as the earlier "unpublished" form, except that subsection 47.4(b) was changed slightly to: "involves issues of constitutional law or other legal issues important to the jurisprudence of Texas."[91] Thus, with the minor exception of prohibiting the issuance of memorandum opinions in cases involving constitutional issues, the amended rule merely changed the designation of unpublished opinions to memorandum opinions. Instead of issuing unpublished opinions, courts would issue memorandum opinions.

Not surprisingly, the number of memorandum opinions issued

90. TEX. R. APP. P. 47.4, 60 TEX. B.J. 925, 925 (Tex. 1997, amended 2002).
91. TEX. R. APP. P. 47.4(b), 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008).

subsequent to the amendment has been nearly identical to the number of unpublished opinions issued prior to the amendment, as the accompanying charts illustrate.

Chart 1: Civil Cases from Texas Courts of Appeals Issued As Unpublished Opinions[92]

Fiscal Year	Total Number of Civil Opinions	Number of Unpublished Opinions in Civil Cases	Percentage of Unpublished Opinions in Civil Cases
1998	4521	3322	73.5%
1999	5206	3962	76.1%
2000	5478	4202	76.7%
2001	5509	4201	76.3%
2002	5545	4369	78.8%

Chart 2: Civil Cases from Texas Courts of Appeals Issued As Memorandum and Unpublished Opinions[93]

Fiscal Year	Total Number of Civil Opinions	Number of Memorandum Opinions in Civil Cases (+ Number of Unpublished Opinions in Civil Cases)	Percentage of Memorandum Opinions in Civil Cases (Percentage of Memorandum & Unpublished Opinions in Civil Cases)
2004	5366	3453 (+ 111)	64.3% (66.4%)
2005	5409	4008 (+ 139)	74.1% (76.6%)
2006	5541	4133 (+ 265)	74.7% (79.4%)
2007	5446	4074 (+ 273)	74.8% (79.8%)
2008[94]	5326	3988 (+ 158)	74.8% (77.8%)

These charts illustrate that, with respect to the issuance of opinions in civil cases, nothing has changed except the label attached to these opinions. Prior to TRAP 47.4's amendment, the courts issued approximately 75% of their decisions in civil cases as unpublished opinions. Subsequent to the amendment, the courts have issued approximately 75% of their decisions in civil cases as

92. E-mail from Angela Garcia, Judicial Info. Manager for the Tex. Judiciary, to author (July 23, 2008, 13:27 CST) (on file with the *St. Mary's Law Journal*) (setting forth, in an accompanying Excel spreadsheet, the number of published and unpublished opinions in civil cases for fiscal years 1991–2007).

93. E-mail from Angela Garcia, Judicial Info. Manager for the Tex. Judiciary, to author (July 23, 2008, 14:06 and 14:23 CST) (on file with the *St. Mary's Law Journal*); E-mail from Sandra Mabbett, Judicial Info. Specialist for the Tex. Judiciary, to author (Dec. 23, 2008, 9:55 CST) (on file with the *St. Mary's Law Journal*). These e-mails show that some courts have still been issuing unpublished opinions in civil cases.

94. Opinions of the Courts—Numbers, Fiscal Year to Date, September 1, 2007 to August 31, 2008, http://www.courts.state.tx.us/pubs/AR2007/toc.htm#appellate.

memorandum opinions. So, as a practical matter, with respect to the issuance of opinions in civil cases, the amended rule has merely changed the title of these decisions from unpublished opinions to memorandum opinions.

B. *The Publication and Availability of Memorandum Opinions in Civil Cases*

The second issue that remained unresolved following the 2003 amendment to TRAP 47 related to the publication and availability of these memorandum opinions. Prior to the 2003 amendment to TRAP 47, approximately 75% of civil opinions were designated as unpublished opinions and only available via Westlaw, Lexis, and the intermediate appellate court websites. The 2003 amendment made it clear that courts could no longer issue unpublished opinions in civil cases.[95] The amendment also made it clear that all opinions would be "made available to public reporting services."[96] Yet the amendment did not explicitly address how the West Publishing Company (West) would make these memorandum opinions available to the public and practicing attorneys. In other words, the amendment did not explicitly address where memorandum opinions would be published.

The uncertainty as to how West would treat memorandum opinions in civil cases was discussed, but not resolved, by the Texas Supreme Court Advisory Committee when it recommended the amendments to TRAP 47. With respect to the publication of memorandum opinions in civil cases, the committee discussed three possibilities:

(1) memorandum opinions would be published in the *South Western Reporter*, alongside regular opinions from the Texas courts of appeals;

(2) memorandum opinions would be published in a specialty reporter devoted to the publication of memorandum opinions from the Texas courts of appeals (perhaps similar to the *Federal Appendix*, a specialty reporter devoted to the publication of unpublished opinions from the federal courts of appeals[97]); or

95. *See* TEX. R. APP. P. 47 cmt. to 2002 change, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008) ("The rule is substantively changed to discontinue the use of the 'do not publish' designation in civil cases.").

96. TEX. R. APP. P. 47.3, 65 TEX. B.J. 692, 692 (Tex. 2003, amended 2008).

97. By 2005, the full text of nearly every federal appellate unpublished opinion was

(3) memorandum opinions would not be published in a book reporter, but would be available online via Westlaw, Lexis, court websites, and perhaps other online providers.

Despite disagreeing upon a specific course of action regarding publication, one of the Advisory Committee members, Texas Supreme Court Justice Nathan L. Hecht, suggested the seemingly prevailing view that West would likely publish memorandum opinions in a book, either in the *South Western Reporter* or a specialty Texas reporter devoted to memorandum opinions.[98] Other members of the Advisory Committee seemingly agreed that all of the opinions would be published,[99] but remained unclear

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published in the *Federal Appendix*, a set of book reporters devoted, ironically, to the publication of unpublished federal appellate decisions. *See* Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 259, 259–60 (2002) (reviewing the coverage of unpublished cases in the *Federal Appendix*). Thus, the *Federal Appendix* made the label "unpublished" federal circuit opinion a misnomer because every federal circuit opinion is now published in a book reporter, either the *Federal Reporter* or the *Federal Appendix*. Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 220–21 (2006) (noting that the publication of unpublished opinions makes the label "unpublished" a misnomer). But the *Federal Appendix* does not, however, contain various other orders issued by the courts.

> Rather, it contains those orders that previously were published in print in a "table" format, with full text available in most instances on Westlaw. Other court orders may or may not be furnished to West and other publishers, but those that are furnished to West are currently only included on Westlaw and are not published in the Federal Appendix. For the most part these are summary orders or routine procedural orders with little or no legal reasoning or discussion of the facts.

E-mail from Katherine MacEachern, Westlaw Attorney Editor, to author (Feb. 27, 2009, 16:50 CST) (on file with the *St. Mary's Law Journal*).

98. *See Meeting of the Supreme Court Advisory Committee*, 4146 (June 15, 2001) (statement of Justice Nathan Hecht) ("[T]hey will probably publish [memorandum opinions] one way or another. Now, whether they will have a Texas sup[plement] like the New York sup[plement] or something and put these in there, they're not sure. They don't know if they will put them in the [*South Western Reporter*]."). *But cf. Meeting of the Supreme Court Advisory Committee*, 4331 (June 15, 2001) (statement of Justice David Peeples) ("I would just say for myself that if it turns out that West puts in the hard copy books everything or close to everything that the Courts of Appeals put out, then we're doing something very, very bad here. I mean, if that happens, we will regret this decision.").

99. *Meeting of the Supreme Court Advisory Committee*, 4141, 4165 (June 15, 2001) (statement of Justice Jan Patterson) ("[T]he great virtue of the rule is that everything is now published ... [W]hat we were changing is that everything is going to be published...."); *Meeting of the Supreme Court Advisory Committee*, 4170–71 (June 15, 2001) (statement of Justice Sarah Duncan) ("Once everything is published—let's get

about the medium for that publication.[100]

The Advisory Committee was also conflicted about whether it could tell West in what medium to publish memorandum opinions. The prevailing sentiment was that the Advisory Committee should not advise West about how or where to publish memorandum opinions. This sentiment was again espoused by Justice Hecht who specifically stated that the Committee should not "tell[] West what to do."[101] Other members seemingly agreed that the Committee should not take an official position on whether West should publish memorandum opinions.[102]

At least part of the uncertainty regarding publication stemmed from the changing nature of legal research and what constituted publication. In the 1970s and 1980s, when most courts started to issue unpublished opinions, these opinions were never really unpublished—there was a written opinion and it was delivered to the parties, the lower court, and to anyone in the general public who sought it from the issuing court.[103] Thus, because all opinions were published in the sense that there was a written product available to the public, an "unpublished opinion" was really a term of art that referred to an opinion that was not

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ourselves in that mindset . . . it's all going to be published."); *Meeting of the Supreme Court Advisory Committee*, 4273 (June 15, 2001) (statement of Richard Orsinger) ("[T]here won't be any more unpublished."); *Meeting of the Supreme Court Advisory Committee*, 4276 (June 15, 2001) (statement of Charles Babcock, Chairman, Tex. Sup. Ct. Advisory Comm.) ("[T]here are not going to be any more unpublished opinions going forward.").

100. *Compare Meeting of the Supreme Court Advisory Committee*, 4336 (June 15, 2001) (statement of Charles Babcock, Chairman, Tex. Sup. Ct. Advisory Comm.) (originally guessing that West would "create a secondary reporter system" for memorandum opinions), *with Meeting of the Supreme Court Advisory Committee*, 4336 (June 15, 2001) (statement of Richard Orsinger) (venturing a bet that "it's going to be electronic" because books would not be economically feasible).

101. *Meeting of the Supreme Court Advisory Committee*, 4334–35 (June 15, 2001) (statement of Justice Nathan Hecht) (urging that the committee preserve its "advisory role").

102. *Cf., e.g.*, *Meeting of the Supreme Court Advisory Committee*, 4334 (June 15, 2001) (statement of Charles Babcock, Chairman, Tex. Sup. Ct. Advisory Comm.) ("We don't advise West.").

103. *See* Weirich v. Weirich, 867 S.W.2d 787, 788 (Tex. 1993) ("*[A]ll* opinions, regardless of the 'publish' designation, are available to the public."); *Meeting of the Supreme Court Advisory Committee*, 4242 (June 15, 2001) (statement of Charles Babcock, Chairman, Tex. Sup. Ct. Advisory Comm.) ("'[P]ublished' 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 [the] parties. That's publication. Now, how widely it's published is another matter.").

published in a book reporter.[104] So, the real question was not whether the opinion would be published, but rather how widely it would be circulated and how attorneys could research or gain access to these opinions.[105]

Another important component of the availability question revolved around computer-assisted legal research.[106] In the early 1970s, at the time that courts started to issue "unpublished opinions," Lexis and Westlaw were in their infancy.[107] By modern technological standards, these early versions of Lexis and Westlaw remained relatively primitive for many years.[108] So, for many years, unpublished opinions were not available online. In more modern times, Westlaw and Lexis have become increasingly sophisticated and have revolutionized legal research. Today, many legal sources are available in print and can also be easily retrieved via Westlaw and Lexis.[109] Not surprisingly, the availability of unpublished opinions has also improved dramatically and most

104. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 185–86 (1999) (describing the phrase "unpublished opinion" as a term of art because "unpublished" opinions are part of the public record and typically available through Westlaw and Lexis).

105. *See Weirich*, 867 S.W.2d at 789–90 (Doggett, Gammage & Spector, JJ., dissenting) (expressing concern for "the public interest in discouraging an expanding body of semi-secret law").

106. *See generally* William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW LIBR. J. 543 (1985) (describing the early history of computer-assisted legal research); Cary Griffith, *An Overview of Computer-Assisted Legal Research Services*, LAW. PC, Jan. 1, 1991, at 2–3 ("In its simplest form, computer-assisted legal research is . . . research facilitated by the use of a computer . . . . The most obvious examples of [computer-assisted legal research] services are [Lexis] and [Westlaw] . . . [which] consist of central computers with large databanks of information that can be searched by many people [simultaneously].").

107. Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 556 (1997) ("Lexis, the first commercially available computer-assisted legal research service, was introduced to the market in April 1973. . . . In 1975, Lexis' first competitor entered the market when a primitive Westlaw product was introduced."); *see also* L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 721 (1989) (describing the emergence of Westlaw and Lexis).

108. Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1696 (2000) ("The early iterations of [Lexis] and [Westlaw] were exceptionally clumsy by today's standards . . . . The[se] online systems lurched and groped their way for almost fifteen years.").

109. *See* Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 556 (1997) (noting the improvement in computer-assisted legal research services).

"unpublished" opinions are now widely available through both Westlaw and Lexis.[110] In Texas, unpublished opinions from the Texas courts of appeals are available on Westlaw and Lexis, but the coverage varies considerably by district.[111]

Chart 3: Westlaw's Current Coverage of Unpublished Texas Court of Appeals Opinions[112]

Texas Court of Appeal	Year Unpublished Opinion Coverage Began
First (Houston)	1986
Second (Fort Worth)	2001
Third (Austin)	1996
Fourth (San Antonio)	1986
Fifth (Dallas)	1991
Sixth (Texarkana)	1999
Seventh (Amarillo)	1996
Eighth (El Paso)	2000
Ninth (Beaumont)	1994
Tenth (Waco)	2003
Eleventh (Eastland)	1993
Twelfth (Tyler)	2001
Thirteenth (Corpus Christi/Edinburg)	1997
Fourteenth (Houston)	1986

In addition to Westlaw and Lexis, unpublished opinions are now also readily available via court websites. In 2002, the E-Government Act required that all federal circuits put their

110. *See* Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 709–10 (2006) (noting that most federal unpublished opinions are now "accessible through electronic legal databases").

111. According to the Texas Supreme Court, "the assumption that unpublished opinions from all the courts of appeals are equally available" is not true because the fourteen Texas courts of appeals "have different policies, over different time periods, on how unpublished opinions are made available." Collins v. Ison-Newsome, 73 S.W.3d 178, 184 (Tex. 2001). Furthermore, a recent study highlighted the chaotic availability of unpublished opinions in Texas. The study concluded that the availability of unpublished opinions from Texas's fourteen intermediate appellate courts "varies considerably from court to court." MARK E. STEINER, AFTER THE FLOOD: LEGAL RESEARCH IMPLICATIONS OF THE TRAP AMENDMENTS 19.1, 19.6 (2003), http://tex-app.org/articles/steiner-trap47.pdf; *see also* Charles Herring, Jr., *Tomb of the Unknown Precedent: Appellate Rule 90 and the Rash of Unpublished Opinions*, TEX. LAW., Oct. 8, 1990, at 24 (noting that releasing unpublished opinions to electronic databases appears to be somewhat inconsistent).

112. E-mail from Tim Gamble, Westlaw Dir. of Content Operations, to author (May 6, 2008, 16:23 CST) (on file with the *St. Mary's Law Journal*) (setting forth, in an accompanying Excel spreadsheet, the coverage of unpublished opinions by court of appeals district).

opinions, including unpublished opinions, onto their websites in a "text searchable" format.[113] Similarly, in Texas, each of the fourteen Texas courts of appeals has placed their opinions on their websites. Unfortunately, the websites do not indicate the precise starting date for these opinions and the search capabilities remain relatively primitive.[114]

After the 2003 amendment to TRAP 47, and possibly because of the technological advances and the increased reliance on computerized legal research, West decided against publishing memorandum opinions in the *South Western Reporter* or in a new reporter devoted to memorandum opinions (similar to the *Federal Appendix*).[115] Instead, West made these memorandum opinions available only online via Westlaw. This seems curious because the 2003 amendment clearly eliminated unpublished opinions in civil cases. Yet West decided to make memorandum opinions available only electronically in the identical manner as the previously designated unpublished opinions.[116] Thus, with respect to the

113. E-Government Act of 2002, 44 U.S.C. § 3501 (Supp. IV 2004) (requiring that the federal courts establish and maintain websites that provide "[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format").

114. For example, most of the websites for the Texas courts of appeals allow for the retrieval of cases by entering the case number or the date of the decision. Alternatively, the websites allow a researcher to conduct rudimentary searching by entering search terms into a box entitled "opinion text." But, the websites do not explain how the search engine processes those search terms. The websites also do not explain what cases and what years are covered (and not covered) in the websites' databases. They also give no indication as to whether the website covers regular, memorandum, and unpublished opinions. None of the websites contain a "help" feature that explains these search features and coverage. *See, e.g.*, Tenth Court of Appeals Opinion Search Page, http://www.10thcoa.courts.state.tx.us/opinions/opsrch.asp (showing these limited search options).

115. In 2001, Thomson-West began publishing a new reporter for "unpublished" opinions from the federal courts of appeals. This reporter, known as the *Federal Appendix*, now contains all of the "unpublished" opinions issued by the federal courts of appeals. Officially published opinions from the federal courts of appeals are published in the *Federal Reporter* (F., F.2d, F.3d) and unpublished opinions are published in the *Federal Appendix*.

116. Even though the amended TRAP rule prohibited unpublished opinions in civil cases, West did not receive a specific statement from the court requesting print publication. According to a content operations manager at West, such a request would have been "taken into account and given serious consideration." E-mail from Tim Gamble, Westlaw Dir. of Content Operations, to author (May 6, 2008, 16:23 CST) (on file with the *St. Mary's Law Journal*). But, the Texas Supreme Court Advisory Committee and the rule itself did not specifically request print publication. The rule merely stated that courts would discontinue using the "do not publish" designation and that all opinions would be made available to the public reporting services.

availability of opinions, the 2003 amendment changed nothing. Prior to the amendment, unpublished opinions were available only via Westlaw, Lexis, and the court websites. Subsequent to the amendment, memorandum opinions are available only via Westlaw, Lexis, and the court websites. So, as a practical matter, the publication and availability of these opinions have remained unchanged—the only real difference is that these opinions are now called memorandum opinions instead of unpublished opinions. This is similar to the issuance question where nothing changed except for the label attached to these opinions.

C. *The Precedential Value and Citation of Memorandum Opinions in Civil Cases*

The third—and probably most significant—issue not resolved by the 2003 amendment to TRAP 47 was the precedential value to be afforded to memorandum opinions in civil cases. With respect to this issue, the Texas Supreme Court Advisory Committee contemplated three possibilities:

(1) memorandum opinions would be fully precedential,

(2) memorandum opinions would be less precedential than "regular" opinions,[117] or

(3) memorandum opinions would be non-precedential.

Despite discussing these possibilities, the Advisory Committee never reached a consensus regarding the precedential value to be afforded to memorandum opinions in civil cases.

Not surprisingly, because of this lack of consensus, the approved amendment did not explicitly address the precedential value to be afforded to memorandum opinions in civil cases.[118] The amendment only explicitly relegated unpublished opinions, under

117. *See Meeting of the Supreme Court Advisory Committee*, 4169–70 (June 15, 2001) (statement of Charles Babcock, Chairman, Tex. Sup. Ct. Advisory Comm.) ("[W]e speculate or anticipate that there's going to be 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.").

118. The amendment also did not explicitly address the precedential value to be afforded to memorandum opinions in criminal cases. But most, if not all, memorandum opinions in criminal cases were also unpublished (a designation that was still permissible for criminal cases), and the rule explicitly relegated these unpublished opinions to a non-precedential status. *See* TEX. R. APP. P. 47.7 (Tex. 2003, amended 2008) ("Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value . . . .").

these and prior rules, to a non-precedential status. This included unpublished criminal opinions under the current and prior rule, and unpublished civil opinions under the prior rule. The amendment did not, however, explicitly address the precedential value of memorandum opinions in civil cases. This lack of specificity led many attorneys to believe that all other civil opinions (including memorandum opinions) had full precedential value.[119] This made logical sense because the amended rule only relegated unpublished opinions to a non-precedential status.

Despite this logic, the few cases that have addressed the precedential value of memorandum opinions in civil cases subsequent to the 2003 amendment have treated those opinions as non-precedential. Most of the cases have treated memorandum and unpublished opinions as non-precedential, without giving much explanation into the reasoning for doing so. For example, in *Spates v. Wal-Mart Stores, Inc.*,[120] the court rejected Wal-Mart's reliance on a 2004 memorandum opinion in a civil case.[121] The court specifically stated that the memorandum opinion "has no precedential value for any court because it is a memorandum opinion. Accordingly, we need not address its holding."[122] In another similar ruling, the First Court of Appeals found that a 2004 memorandum opinion in a civil case was "not binding precedent."[123] These decisions downplay the significance of the 2003 amendment because they treat memorandum opinions issued after the amendment as non-precedential, just like unpublished opinions issued prior to the amendment. So once again, this time with respect to precedential value, the 2003 amendment seemingly changed nothing except the label of the opinions from unpublished to memorandum.

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119. *See, e.g.*, MARK E. STEINER, AFTER THE FLOOD: LEGAL RESEARCH IMPLICATIONS OF THE TRAP AMENDMENTS 19.1, 19.8 (2003), http://tex-app.org/articles/steiner-trap47.pdf ("I'm assuming that a memorandum opinion will be fully precedential to the extent anyone can figure out what happened in the case.").

120. Spates v. Wal-Mart Stores, Inc., 144 S.W.3d 657 (Tex. App.—Corpus Christi 2004), *rev'd on other grounds*, 186 S.W.3d 566 (Tex. 2006).

121. *See id.* at 660 n.2 ("In its motion for rehearing, Wal-Mart refers this Court to a recent opinion by the San Antonio court. . . . That opinion, however, has no precedential value for any court because it is a memorandum opinion." (citation omitted)).

122. *Id.* (citing TEX. R. APP. P. 47.7).

123. Greanias v. Isaiah, No. 01-04-00786-CV, 2006 WL 1550009, at *11 (Tex. App.—Houston [1st Dist.] June 8, 2006, no pet.) (mem. op.).

IV. THE 2008 AMENDMENT TO TRAP 47: MEMORANDUM OPINIONS IN CIVIL CASES BECOME PRECEDENTIAL

Five years after the 2003 amendment, it became apparent that the amendment had not really accomplished anything other than changing the label for most opinions in civil cases from unpublished to memorandum, and allowing for the citation of all opinions. Part of the problem was the 2003 amendment's lack of specificity with respect to the issues of availability and precedential value. The 2003 amendment did not specifically address where memorandum opinions would be available, and it did not explicitly address the precedential value to be afforded to these memorandum opinions.[124]

In 2008, the Texas Supreme Court's rules attorney, Jody Hughes, recommended several changes to TRAP 47.[125] As previously detailed, the Advisory Committee recommended the 2003 amendment to TRAP 47 after extensive study. In 2002, after notice to the public, the deliberations of the Advisory Committee were held in public and a record of the proceedings was available for the public to review. Unlike the extensive study, oversight, and deliberation by the Advisory Committee with respect to the 2003 amendment however, the 2008 amendment was passed without any oversight or involvement by the Advisory Committee. The 2008 amendment was merely recommended by the rules attorney for the supreme court, who then sought public commentary.[126]

Despite not being vetted by the Advisory Committee, the Texas Supreme Court, after a confidential administrative conference, subsequently approved several changes to TRAP 47, which became effective on September 1, 2008.[127] The first change clarified that both opinions and memorandum opinions in criminal

124. *See generally* MARK E. STEINER, AFTER THE FLOOD: LEGAL RESEARCH IMPLICATIONS OF THE TRAP AMENDMENTS 19.6 (2003), http://tex-app.org/articles/steiner-trap47.pdf (showing that the 2003 amendment to TRAP 47 explicitly addressed only the precedential value of unpublished opinions, but did not explicitly address the precedential value to be afforded to memorandum opinions).

125. *In the Supreme Court of Texas Misc. Docket No. 08-9017: Order Amending Texas Rules of Appellate Procedure*, 71 TEX. B.J. 286, 294 (2008) (setting forth the changes to TRAP 47 recommended by the rules attorney for the Texas Supreme Court).

126. *Id.* (setting forth the changes to TRAP 47 recommended by the rules attorney for the Texas Supreme Court and soliciting public commentary).

127. TEX. R. APP. P. 47.

cases needed to bear the notation published or unpublished.[128] The second change made it clearer that both opinions and memorandum opinions in criminal cases that were labeled as unpublished had no precedential value but could be cited.[129] The third change made it clearer that opinions and memorandum opinions issued in civil cases after January 1, 2003, could not be designated as unpublished opinions.[130] This change was a direct response to the courts that had continued to issue unpublished opinions in civil cases.[131] The fourth and most significant substantive change clarified that all memorandum opinions in civil cases issued after January 1, 2003, had full precedential value.[132]

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128. TEX. R. APP. P. 47.2(b) (entitled "Designation and Signing of Opinions; Participating Justices"). The rule states:

> (b) *Criminal Cases.* In addition, each opinion *and memorandum opinion* in a criminal case must bear the notation "publish" or "do not publish" as determined—before the opinion is handed down—by a majority of the justices who participate in considering the case. Any party may move the appellate court to change the notation, but the court of appeals must not change the notation after the Court of Criminal Appeals has acted on any party's petition for discretionary review or other requests for relief. The Court of Criminal Appeals may, at any time, order that a "do not publish" notation be changed to "publish."

Id. (emphasis added).

129. TEX. R. APP. P. 47.7(a) (entitled "Citation of Unpublished Opinions"). The rule states:

> (a) *Criminal Cases.* Opinions *and memorandum opinions* not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, "(not designated for publication)."

Id. (emphasis added).

130. TEX. R. APP. P. 47.2(c) (entitled "Designation and Signing of Opinions; Participating Justices"). The rule states: "Opinions and memorandum opinions in civil cases issued on or after January 1, 2003 shall not be designated 'do not publish.'" *Id.*

131. Some courts continued to issue unpublished opinions in civil cases. For the fiscal year 2004, Texas appellate courts issued 111 unpublished opinions in civil cases; for the fiscal year 2005, the courts issued 139 unpublished opinions in civil cases; for the fiscal year 2006, the courts issued 265 unpublished opinions in civil cases; for the fiscal year 2007, the courts issued 273 unpublished opinions in civil cases; and for the fiscal year 2008, the courts issued 158 unpublished opinions in civil cases. The vast majority of these opinions were issued by the Seventh District (Amarillo) and the Eleventh District (Eastland). E-mail from Angela Garcia, Judicial Info. Manager for the Tex. Judiciary, to author (July 23, 2008, 14:06 and 14:23 CST) (on file with the *St. Mary's Law Journal*); E-mail from Sandra Mabbett, Judicial Info. Specialist for the Tex. Judiciary, to author (Dec. 23, 2008, 9:55 CST) (on file with the *St. Mary's Law Journal*). For this reason, the 2008 amendment attempted to make it even clearer that unpublished opinions should not be issued in civil cases.

132. TEX. R. APP. P. 47.7(b) (entitled "Citation of Unpublished Opinions"). The rule states:

The official comment to the 2008 amendment stated that "subdivision 47.7 is revised to clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated 'do not publish' should be considered 'unpublished' cases lacking precedential value. All opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value."[133]

V. THE PROBLEMS WITH THE 2008 AMENDMENT TO TRAP 47 AND SOME RECOMMENDATIONS

On a theoretical level, the 2008 amendment to TRAP 47, which gave precedential value to memorandum opinions in civil cases, made logical sense because the 2003 amendment made sweeping changes but had accomplished very little. As a practical matter, the 2003 amendment only made memorandum opinions (and the previously issued unpublished opinions) citable. Nothing else changed in terms of issuance, availability, or precedential value, except the vast majority of opinions in civil cases were designated as memorandum opinions rather than unpublished opinions.[134] If the primary goal of the 2003 amendment was to make all opinions citable, then the rule could have been easily amended to accomplish that goal. This was the precise route taken by the recently enacted federal rule regarding unpublished opinions, Federal Rule of Appellate Procedure (FRAP) 32.1.[135] After several years of study,[136] FRAP 32.1 accomplished one thing: it

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(b) *Civil Cases.* Opinions and memorandum opinions designated "do not publish" under these rules by the court of appeals prior to January 1, 2003 have no precedential value but may be cited with the notation, "(not designated for publication)." If an opinion or memorandum opinion issued on or after that date is erroneously designated "do not publish," the erroneous designation will not affect the precedential value of the decision.

Id.

133. TEX. R. APP. P. 47 cmt. to 2008 change.

134. *Cf. id.* (noting that the rule "favors the use" of memorandum opinions).

135. FED. R. APP. P. 32.1.

136. *See* Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 28–29 (2005) (detailing the years of debate over a unified federal rule that would govern the citation of unpublished opinions); Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 901–06 (2008) (detailing the long history of FRAP 32.1).

allowed for the citation of all federal appellate unpublished opinions, starting with the opinions issued on or after January 1, 2007.[137] FRAP 32.1 did not prohibit or change the standard for issuing unpublished opinions, it did not create a new classification of opinions (i.e., memorandum opinions), it did not address the citation of unpublished opinions issued prior to January 1, 2007, and it did not address the precedential value to be afforded to unpublished opinions.[138]

In contrast to the simplicity of the newly created FRAP 32.1, the 2003 amendment to TRAP 47 made sweeping changes. These changes seemed to indicate that the rule was designed to have a greater impact. The amendment specifically restructured and renamed the majority of opinions issued in civil cases from unpublished to memorandum opinions.[139] This change seemed

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137. FED. R. APP. P. 32.1. The text of the rule reads as follows:

> 32.1. Citing Judicial Dispositions
> (a) *Citation Permitted.* A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
> (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
> (ii) issued on or after January 1, 2007.
>
> (b) *Copies Required.* If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Id.

138. FED. R. APP. P. 32.1 advisory committee's note. The advisory committee's note stated that:

> Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as "unpublished" or "non-precedential"—whether or not those dispositions have been published in some way or are precedential in some sense.

Id.; *see also* Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 744–45 (2008) (explaining the limited nature of FRAP 32.1).

139. As a practical matter, the publication and availability of these opinions have remained unchanged—the only difference is that these opinions are now called memorandum opinions instead of unpublished opinions. MARK E. STEINER, AFTER THE FLOOD: LEGAL RESEARCH IMPLICATIONS OF THE TRAP AMENDMENTS 19.8 (2003), http://tex-app.org/articles/steiner-trap47.pdf.

enormously significant because it was accompanied by the explicit elimination of unpublished opinions, a term of art that had come to mean opinions that were only available electronically (online) and that were non-citable and non-precedential.[140] Thus, the 2003 amendment was seemingly designed to make the law more readily available by eliminating unpublished cases while also making the newly created memorandum opinions fully precedential. Despite these intentions, the 2003 amendment did not make the law more readily available because the new memorandum opinions were only available electronically in the identical fashion as the previously issued unpublished opinions.[141] In addition, the amendment, as interpreted by the courts, failed to ensure that "like cases would be treated alike" because the courts treated the new memorandum opinions as non-precedential.[142] Because of these failures, the 2008 amendment to TRAP 47 seemed to make logical sense. After all, it achieved one of the original goals of the 2003 amendment—to give precedential effect to memorandum opinions, thereby eliminating non-precedential civil opinions.

The theory of providing precedential or stare decisis effect to memorandum opinions, however, makes sense only if citizens or their attorneys can readily research these opinions. As one commentator has noted:

> If the average person, even through his attorney, does not have access to a decision, he certainly cannot take it into account in ordering his affairs. The use as precedent of an unpublished opinion, to which even the average man with counsel does not have access, would make the law capricious and unpredictable.[143]

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140. *See* Lee Faircloth Peoples, *Controlling the Common Law: A Comparative Analysis of No-Citation Rules and Publication Practices in England and the United States*, 17 IND. INT'L & COMP. L. REV. 307, 321 (2007) ("The availability of unpublished opinions has improved so much so that the term 'unpublished' is only accurate as a term of art, and not as a description of physical location.").

141. *See* MARK E. STEINER, AFTER THE FLOOD: LEGAL RESEARCH IMPLICATIONS OF THE TRAP AMENDMENTS 19.8 (2003), http://tex-app.org/articles/steiner-trap47.pdf ("West has decided that memorandum opinions aren't going to be published in [the *South Western Reporter*].").

142. *See, e.g.*, Spates v. Wal-Mart Stores, Inc., 144 S.W.3d 657, 660 n.2 (Tex. App.—Corpus Christi 2004), *rev'd on other grounds*, 186 S.W.3d 566 (Tex. 2006) (showing that courts treated memorandum opinions issued after the 2003 amendment as non-precedential).

143. George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 485–86 (1988).

So, in order to evaluate the efficacy of the 2008 amendment, it is important to evaluate how attorneys conduct legal research and whether Texas attorneys can effectively research these precedential memorandum opinions that are now only available electronically via Westlaw, Lexis, and court websites.[144]

A. *Current Trends in How Attorneys Conduct Legal Research and Their Implications: The Intersection Between Researchability and Precedential Value*

The most comprehensive data regarding the legal research habits of attorneys is contained in the ABA's *Legal Technology Survey Report*.[145] Since 1990, the ABA has surveyed law firms on their use of technology; since 2001, the survey has targeted lawyers exclusively. More specifically, the survey attempts to gauge how attorneys use online and print formats for conducting legal research. It specifically tries to cover a broad spectrum of firm sizes, practice areas, lawyering experience, and ages.[146] Even though the survey does not give specific insight into the research done by Texas attorneys, its findings are still instructive.

The 2008 ABA *Legal Technology Survey Report* contains the following interesting facts about the current state of online and print legal research:

(1) Most attorneys use fee-based Internet/online services (e.g.,

144. Some members of the Texas Supreme Court have warned against the "barriers to access" and cautioned against a system where there was "no mechanism for comprehensive tracking" of opinions to "determine their subject matter or even that they have been released." Weirich v. Weirich, 867 S.W.2d 787, 790 (Tex. 1993) (Doggett, Gammage & Spector, JJ., dissenting) (arguing against publication of opinion).

145. *See generally* 5 LEGAL TECH. RESEARCH CTR., A.B.A., 2008 LEGAL TECHNOLOGY SURVEY REPORT: ONLINE RESEARCH (2008) (containing data regarding the research done by attorneys).

146. In terms of firm size, 22% of the respondents were solo practitioners, 22% were from firms of 10–49 attorneys, 6% were from firms of 50–99 attorneys, and 20% were from firms of 100 or more attorneys. The leading practice areas were litigation (37%), corporate (19%), real estate (19%), estate, wills, and trusts (19%), contracts (16%), commercial (16%), general practice (13%), employment/labor (11%), intellectual property (11%), and personal injury (11%). *Id.* at vi–vii. In terms of lawyering experience, 25% had been admitted to the bar for thirty or more years, 26% had been admitted for 20–29 years, 18% for 10–19 years, 14% for 5–9 years, and 18% for less than five years. Finally, in terms of age, 6% of the respondents were between the ages of 25–29, 22% were between the ages of 30–39, 22% were between the ages of 40–49, 29% were between the ages of 50–59, 17% were between the ages of 60–69, and 4% were 70 or older. *Id.* at vii.

Westlaw/Lexis) for legal research:[147]

-65% "regularly use" fee-based Internet/online services[148]
-17% "occasionally use" fee-based online legal research services
-18% "seldom or never use" fee-based online legal research services
-10.5% "seldomly" use it and 7.8% "never" use it.

Not surprisingly, solo practitioners regularly use fee-based Internet services at the lowest rate (48%).

(2) About one-half of attorneys still regularly use print materials for legal research:[149]

-52% "regularly use" print materials for legal research[150]
-35% "occasionally use" print materials
-11% "seldomly use" print materials
-2% "never use" print materials.

(3) About one-half of attorneys regularly use free online services for legal research:[151]

-52% "regularly use" free online services for legal research[152]
-31% "occasionally use" free online services
-13% "seldomly use" free online services
-4% "never use" free online services.

(4) In researching case law from their own state, attorneys "most often use" the following resources:[153]

-online fee-based (62%)
-free online (23%)
-print (7.5%)
-no use (5.5%)
-CD-ROM (2%).

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147. 5 LEGAL TECH. RESEARCH CTR., A.B.A., 2008 LEGAL TECHNOLOGY SURVEY REPORT: ONLINE RESEARCH 22 (2008). According to the survey, the most often used fee-based online legal research services were Westlaw (56.8%), Lexis/Nexis (33.7%), Other (2.9%), RIA Checkpoint (1.9%), BNA (1.8%), Loislaw (1.6%), Fastcase (0.6%), Casemaker (0.5%), and Versuslaw (0.2%). *Id.* at 47.

148. *Id.* at ix.

149. 5 LEGAL TECH. RESEARCH CTR., A.B.A., 2008 LEGAL TECHNOLOGY SURVEY REPORT: ONLINE RESEARCH 21 (2008).

150. *Id.* at x.

151. *Id.* at 22. According to the survey, the most often used free online legal research websites were the State Bar Website (35.9%), FindLaw (30.9%), Other (16.2%), Cornell's Legal Information Institute—LII (11.9%), and LexisOne (5.1%). *Id.* at 41.

152. *Id.* at x.

153. 5 LEGAL TECH. RESEARCH CTR., A.B.A., 2008 LEGAL TECHNOLOGY SURVEY REPORT: ONLINE RESEARCH 31 (2008).

(5) In using free online legal research resources, many attorneys were not satisfied (either "not very satisfied" or "not at all satisfied") with the specific features of those resources:

-40% were not satisfied with the advanced search options (e.g., Boolean queries, restrictors)[154]

-57% were not satisfied with the ability to search multiple databases simultaneously[155]

-28% were not satisfied with the user-friendliness of the services.[156]

(6) In using fee-based online legal research services, relatively few attorneys were not satisfied (either "not very satisfied" or "not at all satisfied") with the specific features of those services:

-only 6% were not satisfied with the advanced search options (e.g., Boolean queries, restrictors)[157]

-only 10% were not satisfied with the ability to search multiple databases simultaneously[158]

-only 14% were not satisfied with the user-friendliness of the services.[159]

These statistics reveal several important facts about the current status of legal research. The statistics show that an increasing percentage of attorneys regularly use fee-based online research services, with Westlaw being the most widely used. Sixty percent of attorneys "most often" use these fee-based legal research services to research their own state's case law, and few attorneys are dissatisfied with these fee-based services. Despite the increased use of fee-based online legal research services, other

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154. *Id.* at 38 (combining the percentages for attorneys who were either "not very satisfied" (36.6%) or "not at all satisfied" (3.8%) with the advanced search options).

155. *Id.* at 39 (combining the percentages for attorneys who were either "not very satisfied" (48%) or "not at all satisfied" (8.5%) with the ability to search multiple databases simultaneously).

156. *Id.* (combining the percentages for attorneys who were either "not very satisfied" (24.9%) or "not at all satisfied" (3.3%) with the user-friendliness of the free online legal research resources).

157. *Id.* at 45 (combining the percentages for attorneys who were either "not very satisfied" (4.7%) or "not at all satisfied" (1.0%) with the advanced search options).

158. 5 LEGAL TECH. RESEARCH CTR., A.B.A., 2008 LEGAL TECHNOLOGY SURVEY REPORT: ONLINE RESEARCH 46 (2008) (combining the percentages for attorneys who were either "not very satisfied" (9.2%) or "not at all satisfied" (1.1%) with the ability to search multiple databases simultaneously).

159. *Id.* (combining the percentages for attorneys who were either "not very satisfied" (11.2%) or "not at all satisfied" (2.3%) with the user-friendliness of the fee-based online legal research resources).

statistics show that a gap still exists between attorneys who regularly use these fee-based services and those attorneys who do not use these services. About one-half of all attorneys still regularly use print materials in conducting legal research. In addition, about one-half of all attorneys regularly use free online resources in conducting legal research. Perhaps most importantly, in researching their own state's case law, nearly thirty-one percent of attorneys do not use fee-based online research services (i.e., Westlaw, Lexis). Instead, in researching their own state's case law, 7.5% of attorneys "most often" use print materials and twenty-three percent of attorneys "most often" use free online resources. And, a large percentage (about forty percent) of attorneys are dissatisfied with the capabilities of the free online resources. These statistics are important because the manner in which attorneys conduct legal research relates directly to their ability to find cases that are only available electronically via Westlaw, Lexis, and court websites—namely, unpublished opinions in most jurisdictions and memorandum opinions in civil cases in Texas. Surprisingly, few articles have addressed the problems faced by attorneys who do not have access to Westlaw or Lexis.[160] Even more surprisingly, most scholars addressing the need to make unpublished opinions citable and even precedential have assumed that technological advances have made these opinions readily available and researchable for all attorneys. According to Professor Arthur D. Hellman, "the spread of computerized legal research has meant that 'unpublished' opinions generally are as readily available as those designated as 'published.'"[161] Justice

160. *See* Peter W. Martin, *Finding and Citing the "Unimportant" Decisions of the U.S. Courts of Appeals*, LEGAL INFO. INST., Apr. 25, 2008, at 1–2, http://topics.law.cornell.edu/wex/papers/lir2007-1 (noting that the problem of "effective access 'at little or no cost' . . . ha[s] escaped attention from the many legal academics who have weighed in on the issues surrounding treatment of unpublished or nonprecedential decisions").

161. *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary*, 107th Cong. 44 (2002) (statement of Professor Arthur D. Hellman), *available at* http://judiciary.house.gov/legacy/80454.PDF; *see also* Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 78 (2005) ("In almost all of the circuits, 'unpublished' opinions are as readily available as 'published' opinions. Barring citation to 'unpublished' opinions is no longer necessary to level the playing field."); J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419, 419 (2005) (explaining that unpublished opinions "are often readily available through online databases, such as judicial websites, private providers such as Westlaw and Lexis, and public alternatives such as Findlaw").

Samuel A. Alito has claimed that "[w]ith the advent of computer assisted legal research[,] . . . the overwhelming majority of [unpublished] opinions are now readily available to the public, often at minimal or no cost because they are posted on court websites."[162]

Despite these claims that the overwhelming majority of opinions are now readily available on court websites, opinions that are only electronically-available cannot yet be competently researched without access to Westlaw or Lexis. Westlaw and Lexis are sophisticated computerized legal research services;[163] however, they are also very expensive.[164] By contrast, court websites are free, but most of these websites are not yet sophisticated enough for competent legal research. As detailed in the ABA *Legal Technology Survey*, most free legal research websites have significant problems with respect to coverage, searchability, and user-friendliness.[165] Most court websites only allow a researcher to retrieve known opinions or conduct rudimentary word searching, rather than sophisticated Boolean language

162. *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary*, 107th Cong. 7 (2002) (statement of Judge Samuel A. Alito, Jr., U.S. Court of Appeals for the Third Circuit; Chair, Advisory Committee on the Federal Rules of Appellate Procedure), *available at* http://judiciary.house.gov/legacy/80454.PDF.

163. *See* Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 26 (2007) (noting the "sophisticated Boolean logic employed by Lexis and Westlaw").

164. As of January 2006, a law firm without a special Westlaw deal would pay $100/search in the Texas state and federal cases database (TX-CS-ALL) or the federal cases database (ALLFEDS). Alternatively, a law firm could choose "hourly" pricing and pay $16.63/minute in the Texas state and federal database or $13.86/minute in the federal cases database. These prices do not include printing costs, and searching in other databases can be even more expensive (e.g., $159/search in ALLCASES). Westlaw Plan 1 Pricing Guide, January 2006 (on file with the *St. Mary's Law Journal*). In fairness, most law firms sign contracts and pay a flat rate for unlimited Westlaw usage in certain databases, and these contracts greatly reduce these costs. It is also widely known that Lexis has similar pricing schemes. For example, as of January 2006, a law firm without a special Lexis deal would pay $118/search in the Texas state and federal cases database (MEGA, TXMEGA) or $116/search in the federal cases database (GENFED, COURTS). Alternatively, a law firm could choose "hourly" pricing and pay $15.57/minute in the Texas state and federal database or $12.93/minute in the federal cases database. LexisNexis Top Libraries/Files Customer Ready Pricing Overview, Per Search & Hourly Pricing, Current as of January 2006 (on file with author).

165. *See* 5 LEGAL TECH. RESEARCH CTR., A.B.A., 2008 LEGAL TECHNOLOGY SURVEY REPORT: ONLINE RESEARCH 38 (2008) (showing the dissatisfaction with free online websites).

searching.[166] For example, most of the websites for the Texas courts of appeals allow for the retrieval of cases by entering the case number or the date of the decision.[167] Alternatively, these websites allow a researcher to conduct rudimentary searching by entering search terms into a box entitled "opinion text." But the websites do not explain how the search engine processes those search terms. The websites also do not explain what cases and what years are covered (and not covered) in the websites' databases. They also give no indication as to whether the website covers regular, memorandum, and unpublished opinions. None of the websites contain a "help" feature that explains these search features and coverage. Finally, each of the websites contains the following disclaimer:

> This information is compiled and made available as a public service by the Court of Appeals. However, the Court of Appeals makes no warranty as to the accuracy, reliability, or completeness of the information and is not responsible for any errors or omissions or for results obtained from the use of the information. Distribution of the

166. *See* William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429, 442 (2003) ("Free Web sites that include collections of court opinions typically offer only a very limited and rudimentary set of retrieval mechanisms."); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1516 (2004) ("[A]vailability only becomes meaningful with the availability of searching tools that work, whether they are in the form of Boolean or natural language searching of computer or Internet databases . . . .").

167. Thirteen of the fourteen websites for the Texas courts of appeals have identical functionality. The exception is the Fifth Court of Appeals, which is addressed later. The initial discussion of the websites for the Texas courts of appeals focuses on the other thirteen courts that are available at the following web locations:

First Court of Appeals: http://www.1stcoa.courts.state.tx.us/opinions/opsrch.asp
Second Court of Appeals: http://www.2ndcoa.courts.state.tx.us/opinions/opsrch.asp
Third Court of Appeals: http://www.3rdcoa.courts.state.tx.us/opinions/opsrch.asp
Fourth Court of Appeals: http://www.4thcoa.courts.state.tx.us/opinions/opsrch.asp
Sixth Court of Appeals: http://www.6thcoa.courts.state.tx.us/opinions/opsrch.asp
Seventh Court of Appeals: http://www.7thcoa.courts.state.tx.us/opinions/opsrch.asp
Eighth Court of Appeals: http://www.8thcoa.courts.state.tx.us/opinions/opsrch.asp
Ninth Court of Appeals: http://www.9thcoa.courts.state.tx.us/opinions/opsrch.asp
Tenth Court of Appeals: http://www.10thcoa.courts.state.tx.us/opinions/opsrch.asp
Eleventh Court of Appeals: http://www.11thcoa.courts.state.tx.us/opinions/opsrch.asp
Twelfth Court of Appeals: http://www.12thcoa.courts.state.tx.us/opinions/opsrch.asp
Thirteenth Court of Appeals: http://www.13thcoa.courts.state.tx.us/opinions/opsrch.asp
Fourteenth Court of Appeals: http://www.14thcoa.courts.state.tx.us/opinions/opsrch.asp

By contrast, the Fifth Court of Appeals has a relatively sophisticated website and search engine.

> information does not constitute such a warranty. Use of the information is the sole responsibility of the user.[168]

These deficiencies make it impossible to conduct competent research on the websites of Texas courts of appeals.[169]

In contrast to these websites, the website for the Fifth Court of Appeals (Dallas) contains a fairly sophisticated search engine and help page.[170] The Fifth Court's website allows for Boolean searches, Wildcard searches, Phrase searches, Fuzzy searches, and Proximity searches. The website gives specific guidance on how to conduct each of these searches and explains the results that will be retrieved.[171] But even this fairly sophisticated website has problems because it does not indicate the years or comprehensiveness of its database. To further complicate matters, all of the websites of the Texas courts of appeals are independent of each other. As a result, to attempt to conduct competent and comprehensive research on Texas cases via these websites, a Texas attorney would need to research each website individually, and also the websites of the Texas Supreme Court or Texas Court of Criminal Appeals.

B. *The Problems with Giving Precedential Effect to Opinions That Are Only Available Electronically*

The prior sections have attempted to show the linkage between the availability and precedential value of cases that are exclusively available electronically (e.g., memorandum opinions in Texas civil cases since 2003). There remains little debate that technological advances have made electronically-available opinions more readily available. For attorneys with access to Westlaw or Lexis, electronically-available opinions are easily researchable. For these

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168. This disclaimer appears at the bottom of the opinion page on each of the court websites.

169. These problems do not even address the issues related to the organization and user-friendliness of the search results. The search results merely list case names without any description of those cases. The lack of a case abstract or case summary makes it impossible to differentiate the search results.

170. The opinion search page for the Fifth Court of Appeals (Dallas) appears at http://www.5thcoa.courts.state.tx.us/search_o.htm.

171. The Fifth Court's website has a special page devoted to helping users with advanced searching. The "search help" page explains each of the search features and provides specific examples. It is available at http://www.5thcoa.courts.state.tx.us/search1.htm.

attorneys, the 2008 amendment to TRAP 47 poses little problem. However, for the general public and those attorneys without access to Westlaw or Lexis, the amendment is quite problematic because it makes most of the recent law in civil cases precedential and that law is only available electronically and not easily researchable. For this reason, opinions that are only available electronically should not be made precedential until the availability and researchability problem is solved.[172]

The availability and researchability problem was one of the original justifications for making unpublished opinions non-precedential and prohibiting citation to those opinions. The main reason for the rules that made unpublished opinions non-precedential and non-citable was fairness. The concern over fairness was multi-dimensional. The primary problem was that a "[l]ack of access to unpublished opinions [would] compromise fairness in the litigation process."[173] The rules making some opinions non-precedential were thought to promote fairness and "dispel[] any suspicion that institutional litigants and others who might have ready access to collections of unpublished opinions had an advantage over other litigants without such access."[174] It was

172. This Article does not argue that opinions that are only available electronically (i.e., unpublished or memorandum opinions) should never be precedential. In fact, as a matter of stare decisis and fairness, unpublished and memorandum opinions should be precedential. Yet, this should occur only when the general public and attorneys have the ability to access and research those opinions, preferably on freely available court websites. Availability and researchability on Westlaw or Lexis is not a solution. Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 185 (2007) (warning that courts should only make electronically-available cases precedential when those opinions are "readily available and can be comprehensively researched").

173. J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419, 451 (2005).

174. *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary*, 107th Cong. 5, 7 (2002) (statement of Judge Samuel A. Alito, Jr., U.S. Court of Appeals for the Third Circuit; Chair, Advisory Committee on the Federal Rules of Appellate Procedure), *available at* http://judiciary.house.gov/legacy/80454.pdf; *see* Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 78 (2005) ("In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize 'unpublished' opinions would have an unfair advantage."); *see also* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 955–59 (1989) (showing how repeat litigants use unpublished opinions to their advantage by circulating them to attorneys within the offices, as well as using them when making decisions

widely believed that placing restrictions on opinions that were not readily available promoted "fairness between litigants, on the grounds that poorer litigants may not have the same level of access to unpublished opinions as do their wealthier counterparts."[175] Even after many of these opinions started to become available "on commercial databases or through court clerks' offices . . . [or] for free through court websites," courts continued to prohibit use of these precedents because "finding these precedents, even when they [we]re available for free, require[d] time, energy, and money, and place[d] those litigants with greater resources at an advantage over those with fewer (including pro se litigants, public defenders, and public-interest litigants)."[176]

In addition to continuing problems related to fairness, attorneys now face a possible ethical and legal malpractice problem when opinions are only electronically-available, but are deemed precedential.[177] This problem could occur because attorneys have an ethical and legal duty to conduct competent research, yet it is difficult for attorneys to satisfy this duty for electronically-available cases.[178] Several sources provide the basis for an attorney's duty to research and know the law.[179] First, the ABA Model Rules of Professional Conduct address competence in

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regarding settlement or whether to appeal).

175. Niketh Velamoor, Recent Development, *Proposed Federal Rule of Appellate Procedure 32.1 to Require That Circuits Allow Citation to Unpublished Opinions*, 41 HARV. J. ON LEGIS. 561, 562–63 n.8 (2004).

176. Daniel B. Levin, Case Note, *Fairness and Precedent*, 110 YALE L.J. 1295, 1301 (2001).

177. Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 185 (2007) (warning that attorneys could be sanctioned for failing to research binding case law that is only electronically-available).

178. *See* Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 609 (2000) ("The duty to research and know the law is discussed in the context of both ethical and malpractice standards that are applied to traditional and electronic research."); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 89–106 (2007) (explaining the ethical and legal duty to conduct competent research in the digital age).

179. *Cf.* Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 89 (2007) ("While no sources clearly and directly articulate a standard for competence in research, a number of ethical and legal standards contribute to a general understanding of the level of research it takes to avoid ethical or legal sanctions and public embarrassment.").

research.[180] For example, Model Rule 1.1 mandates that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[181] An attorney's failure to research and use binding memorandum opinions "would arguably constitute an ethical violation by depriving the client of competent representation."[182] In addition to requiring knowledge of the law for competent representation, the ethical rules also impose a duty of candor on attorneys.[183] This duty of candor requires attorneys to research and disclose controlling authority when that authority is directly adverse to their clients' positions.[184] This duty of candor would presumably apply to opinions that are only electronically-available, especially if those opinions are deemed precedential and binding by the court's rules (i.e., Texas memorandum opinions issued in civil cases since 2003). "In fact, in terms of the unpublished opinion, counsel's disclosure duty may be more significant precisely because opposing counsel does not have ready access to the unpublished opinion."[185] In addition to these ethical rules, both trial and appellate court rules address the adequacy of research in documents submitted to a court. These

180. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008) (discussing competence when researching).

181. *Id.*

182. J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419, 436 (2005).

183. MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2008).

184. Rule 3.3(a)(2) of the Model Rules of Professional Conduct provides that "[a] lawyer shall not knowingly ... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2008); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2008) (discussing confidentiality of information in the attorney-client relationship); Angela Gilmore, *Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority*, 43 CLEV. ST. L. REV. 303, 312–13 (1995) (noting that the lawyer's duty to the court trumps even the lawyer's duty of loyalty to the client because the lawyer may never prejudice the administration of justice).

185. J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in Trial Courts*, 47 ARIZ. L. REV. 419, 435 (2005); *see also* Rural Water Sys. No. 1 v. City of Sioux Ctr., Iowa, 967 F. Supp. 1483, 1498 n.2 (N.D. Iowa 1997) ("This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate 'hard ball.' At best, it constitutes failure to confront and distinguish or discredit contrary authority, and, at worst, constitutes an attempt to hide from the court and opposing counsel a decision that is adverse ... simply because it is adverse.").

rules also require research and knowledge of the law.[186]

Finally, courts express their displeasure with inadequate research through public chastisement of lawyers, and clients express their displeasure through malpractice actions.[187] At least one court has allowed a malpractice action for an attorney's failure to research unpublished opinions.[188] This decision, if adopted by other courts, has far ranging implications—it implies that an attorney has a legal duty to research opinions that are only available electronically and that a breach of that duty may subject the attorney to a legal malpractice action.

C. *Conclusion and Recommendations*

Similar to many jurisdictions, Texas has struggled with its rule relating to unpublished and memorandum opinions. This struggle has occurred because of the delicate interplay between the issuance, availability, citation, and precedential value of these opinions. The issuance of unpublished and memorandum opinions has helped the Texas judiciary cope with an exponentially increasing caseload. By initially limiting the precedential value and citation of these opinions, judges had been able to more quickly resolve disputes for the litigants without worrying about the future implications of these opinions. But, the very notion of a

186. *Cf.* FED. R. CIV. P. 11 (requiring that documents submitted to a court be supported by existing law or a good faith argument for the extension, modification or reversal of existing law); FED. R. APP. P. 28 (requiring that arguments in appellate briefs be supported by citations to relevant authority); TEX. R. APP. P. 45 (setting forth the standard for frivolous appeals in Texas); Keith v. Solls, 256 S.W.3d 912, 916 (Tex. App.—Dallas 2008, no pet.) (noting that an appeal is frivolous when it is brought without reasonable grounds to believe that the judgment would be reversed or when it is pursued in bad faith); Bradt v. West, 892 S.W.2d 56, 79 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (noting that under Rule 45 of the Texas Rules of Appellate Procedure, conscious indifference to settled rules of law, by turning a "blind eye" to established law, is one factor to consider in deciding whether to assign damages for bringing a frivolous appeal).

187. *See, e.g.*, Mortgage Elec. Registration Sys. v. Estrella, 390 F.3d 522, 524 (7th Cir. 2004) (scolding attorneys for failing to research federal appellate jurisdiction before filing their claim); Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (upholding a malpractice verdict where the attorney failed to perform adequate research); *In re* TCW/Camil Holding L.L.C., 330 B.R. 117, 117–18 (D. Del. 2005) (granting malpractice judgment for failure to conduct adequate research).

188. *See* Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, 691 N.W.2d 484, 494–95 (Minn. Ct. App. 2005) (finding that an attorney's failure to consider citable, but non-precedential, unpublished opinions could be used to prove that an attorney breached his standard of care in a legal malpractice action), *aff'd as modified*, 711 N.W.2d 811 (Minn. 2006).

non-precedential opinion contradicts one of the fundamental precepts of American law—stare decisis.[189] By labeling some opinions as non-precedential, courts undercut the notion that "like cases should be decided alike."[190] Seemingly for this reason, the 2008 amendment to TRAP 47 recently gave precedential effect to all civil opinions issued since 2003, including memorandum opinions. The rule, however, failed to take into account the availability of these memorandum opinions. These opinions are not published in the traditional sense (i.e., in book reporters) and are only available via Westlaw, Lexis, and the court websites. As a result and because of the deficiencies in the court websites, a large portion of the recent binding civil case law cannot be competently researched without access to Westlaw or Lexis.

Some will argue, of course, that the problem of granting precedential effect to memorandum opinions is much ado about nothing. In theory, memorandum opinions are reserved for easy cases—cases that merely apply settled rules of law to non-unique fact scenarios. So, an attorney's failure to find memorandum opinions should not matter because better published opinions (i.e., ones that establish and set forth the rule of law in greater detail) can be found and cited. But, Llewellyn has explained that rules *alone*, mere forms of words, are worthless.[191] These rules become meaningful and understandable only when concrete examples—cases—show and define the rule's meaning. Similarly, in discussing non-precedential opinions, Judge Arnold stated:

> I would take the position that all decisions have precedential significance. To be sure, there are many cases . . . that are almost identical. In each instance, however, it is possible to think of conceivable reasons why the previous case can be distinguished, and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law.[192]

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189. *See* THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasizing the importance of precedent and stare decisis). "To avoid an arbitrary discretion in the courts, it is indispensable that [the courts] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *Id.*

190. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571, 596 (1987) ("The previous treatment of occurrence *X* in manner *Y* constitutes, *solely because of its historical pedigree*, a reason for treating *X* in manner *Y* if and when *X* again occurs.").

191. K.N. LLEWELLYN, THE BRAMBLE BUSH 66–69 (1930).

192. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222–23 (1999).

In addition to these intuitive notions about the value of all cases in a system of precedent, recent studies have shown that unpublished opinions are not just reserved for routine cases. According to one study, "[t]he evidence is overwhelming that unpublished opinions are indeed a valuable source of insight and information."[193] Another study concluded that unpublished opinions can be particularly helpful to trial court judges "who so often must exercise discretion in applying relatively settled law to an infinite variety of facts."[194] And, yet another study showed that "[u]npublished decisions do not reflect routine applications of existing law with which all judges would agree."[195] Instead, the unpublished opinions showed a "noticeable number of reversals, dissents, [and] concurrences."[196] All of these studies prove that unpublished opinions are more important than originally believed.

Although similar studies have not been done for Texas unpublished and memorandum opinions, such studies would likely yield similar findings because the percentage of unpublished opinions in the federal courts of appeals mirrors the percentage of memorandum opinions in the Texas courts of appeals. Even without the specific studies, it simply belies believability that seventy-five percent of all Texas court of appeals decisions—the current percentage of memorandum opinions—are routine applications of settled law to settled facts.

In a perfect world, all opinions would be precedential and readily researchable by all attorneys via court websites. The E-

193. Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 43 (2005) (citing a 2003 study regarding the impact of unpublished opinions).

194. *Id.* at 45 (citing a 2004 study regarding the impact of unpublished opinions and noting that only four of the 1,000-plus district judges in the United States submitted comments opposing FRAP 32.1).

195. 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).

196. *Id.* at 119–20.

> [T]hese findings suggest that panels authoring unpublished opinions reach some results with which other reasonable judges would disagree. Such divergent views are likely to reflect both differences as to the meaning of legal principles and disagreement over the proper application of seemingly settled law. Under those circumstances, failing to give unpublished opinions precedential effect raises the very specter described by the Eighth Circuit: that like cases will be decided in unlike ways . . . .

Id. at 119.

Government Act attempted to ensure that all attorneys could research all federal appellate opinions via a free, text-searchable database. To date, however, the websites of the federal courts are not readily researchable.[197] Similarly, the websites of the Texas courts of appeals have made great strides in making the law more readily available. But, a Texas attorney cannot yet competently conduct research on those websites because problems still exist with respect to the sophistication of the search engines, the comprehensiveness of the databases, and the ability of the user to fully comprehend the search results. The best solution would be to make all opinions readily available on a sophisticated, comprehensive, and unified website for the Texas courts of appeals. Such a website would need to unify the currently independent websites of the fourteen courts of appeals and also rectify problems related to the sophistication of the search engine, years of coverage, and overall user-friendliness. This would make all opinions, including the newly precedential memorandum opinions in civil cases since 2003, readily researchable. Alternatively, or until such a sophisticated website becomes a reality, the Texas courts of appeals should request that the West Publishing Company publish memorandum opinions, issued in civil cases since 2003, in either the *South Western Reporter* or a specialty reporter for memorandum opinions. By doing so, attorneys without access to Westlaw or Lexis will have access to all of the binding law, which now includes memorandum opinions issued in civil cases since 2003. If neither of these solutions is possible, memorandum opinions should be returned to non-precedential status. This would not, of course, make memorandum opinions more readily available or researchable. It would, however, ensure that opinions that are not readily researchable are not binding. Any of these three solutions would be fairer than the current system, which has now made most of the recent binding Texas civil case law readily researchable only by those attorneys using Westlaw or Lexis.

197. *See* Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 26 (2007) ("Despite federal legislation apparently mandating posting of all unpublished circuit court opinions in 'text-searchable' form on court websites, only some circuits make even comparatively crude key-word searching available, rather than the more sophisticated Boolean logic employed by Lexis and Westlaw.").

Appendix A—TRAP 47—1997 Version

RULE 47. OPINIONS, PUBLICATION, AND CITATION

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. Where the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it.

47.2 Signing of Opinions. 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. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

47.3 Publication of Opinions.

(a) *The initial decision.* A majority of the justices who participate in considering a case must determine—before the opinion is handed down—whether the opinion meets the criteria stated in 47.4 for publication. If those criteria are not met, the opinion will be distributed only to the persons specified in Rule 48, but a copy may be furnished to any person on request by that person.

(b) *Notation on Opinions.* A notation stating "publish" or "do not publish" must be made on each opinion.

(c) *Reconsideration of Decision on Whether to Publish.* Any party may move the appellate court to reconsider its decision regarding publication of an opinion but the court of appeals must not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for review, petition for discretionary review, or other request for relief.

(d) *High-Court Order.* The Supreme Court or the Court of Criminal Appeals may, at any time, order a court of appeals' opinion published.

47.4 Standards for Publication. An opinion should be published only if 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 a legal issue of continuing public interest;
(c) criticizes existing law; or
(d) resolves an apparent conflict of authority.

47.5 Concurring and Dissenting Opinions. 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. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in 47.4. If a concurrence or dissent is to be published, the majority opinion must be published as well.

47.6 Action of En Banc Court. Sitting en banc, the court may modify or overrule a panel's decision regarding the signing or publication of the panel's opinion or opinions.

47.7 Unpublished Opinions. Opinions not designated for publication by the court of appeals have no precedential value and must not be cited as authority by counsel or by a court.

Appendix B—TRAP 47—2003 Version

RULE 47. OPINIONS, DISTRIBUTION, AND CITATION

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.

(a) *Civil and Criminal Cases.* 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 will be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

(b) *Criminal Cases.* In addition, each opinion in a criminal case must bear the notation "publish" or "do not publish," as determined—before the opinion is handed down—by a majority of the justices who participate in considering the case. Any party may move the appellate court to change the notation, but the court of appeals must not change a notation after the Court of Criminal Appeals has acted on any party's petition for discretionary review or other request for relief. The Court of Criminal Appeals may, at any time, order that a "do not publish" notation be changed to "publish."

47.3. Distribution of Opinions. All opinions of the courts of appeals are open to the public and must be made available to public reporting services, print or electronic.

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

47.5. Concurring and Dissenting Opinions. 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.

47.7. Citation of Unpublished Opinions. Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, "(not designated for publication)."

Notes and Comments

Comment to 2002 change: The rule is substantively changed to discontinue the use of the "do not publish" designation in civil cases, to require that all opinions of the court of appeals be made available to public reporting services, and to remove prospectively any prohibition against the citation of opinions as authority in civil cases. The rule favors the use of "memorandum opinions" designated as such except in certain types of cases but does not change other requirements, such as those in *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635–636 (Tex. 1986). An opinion previously designated "do not publish" has no precedential value but may be cited. The citation must include the notation, "(not designated for publication)."

Appendix C—TRAP 47—2008 Version

RULE 47. OPINIONS, PUBLICATION, AND CITATION

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. Designation and Signing of Opinions; Participating Justices

(a) *Civil and Criminal Cases.* 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 will be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

(b) *Criminal Cases.* In addition, each opinion and memorandum opinion in a criminal case must bear the notation "publish" or "do not publish," as determined—before the opinion is handed down—by a majority of the justices who participate in considering the case. Any party may move the appellate court to change the notation, but the court of appeals must not change a notation after the Court of Criminal Appeals has acted on any party's petition for discretionary review or other request for relief. The Court of Criminal Appeals may, at any time, order that a "do not publish" notation be changed to "publish."

(c) *Civil Cases.* Opinions and memorandum opinions in civil cases issued on or after January 1, 2003 shall not be designated "do not publish."

47.3. Distribution of Opinions. All opinions of the courts of appeals are open to the public and must be made available to public reporting services, print or electronic.

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

47.5. Concurring and Dissenting Opinions. 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.

47.7. Citation of Unpublished Opinions.
(a) *Criminal Cases.* Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, "(not designated for publication)."
(b) *Civil Cases.* Opinions and memorandum opinions designated "do not publish" under these rules by the courts of appeals prior to January 1, 2003 have no precedential value but may be cited with the notation, "(not designated for publication)." If an opinion or memorandum opinion issued on or after that date is erroneously designated "do not publish," the erroneous designation will not affect the precedential value of the decision.

Notes and Comments

Comment to 1997 change: This is former Rule 90. Subdivision 47.1 makes clear that a memorandum opinion should not be any longer than necessary. Subdivision 47.5 is amended to make clear that only justices who participated in the decision may file an opinion in the case. Judges who are not on a panel may file an opinion only in respect to a hearing or rehearing en banc. Former Rule 90(h), regarding publication of opinions after the Supreme Court grants review, is repealed.

Comment to 2002 change: The rule is substantively changed to discontinue the use of the "do not publish" designation in civil

cases, to require that all opinions of the court of appeals be made available to public reporting services, and to remove prospectively any prohibition against the citation of opinions as authority in civil cases. The rule favors the use of "memorandum opinions" designated as such except in certain types of cases but does not change other requirements, such as those in *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635–636 (Tex. 1986). An opinion previously designated "do not publish" has no precedential value but may be cited. The citation must include the notation, "(not designated for publication)." Of course, whenever an opinion not readily available is cited, copies should be furnished to the court and opposing counsel.

Comment to 2008 change: Effective January 1, 2003, Rule 47 was amended to prospectively discontinue designating opinions in civil cases as either "published" or "unpublished." Subdivision 47.7 is revised to clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated "do not publish" should be considered "unpublished" cases lacking precedential value. All opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged. Subdivisions 47.2 and 47.7 are amended to clarify that memorandum opinions are subject to those rules.