

**After the Flood:
Legal Research Implications of the TRAP Amendments**

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**In Memory
Sam H. Bass
(1927-2003)**

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**After the Flood:
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I. Acknowledgments

I want to thank Professor Tracy McGaugh of South Texas College of Law for agreeing to present this paper despite being approximately thirteen months pregnant. I believe that Professor McGaugh also would want me to point out that the opinions expressed in this paper are mine alone.

If a short, but hugely pregnant woman isn't presenting this paper, then Professor McGaugh wants to thank Professor Maxine Goodman of South Texas College of Law for filling in at the last moment.

II. The Zen of New Rule 47.7

New rule 47 is, at least in a jurisprudential sense, completely screwed up. One of the problems with the old rule was that it said unpublished opinions had "no precedential value" and prohibited citing unpublished cases as "authority." This was, at least, internally consistent: if the opinion had no precedential value, there wasn't any need to cite it. Resourceful lawyers and courts skirted the rule by citing unpublished cases as something less than authority. When the Texas Supreme Court Advisory Committee was discussing rule 47, one appellate lawyer confessed: "I regularly don't follow 47.7 anyway. I mean, it says you can't cite it as authority. I'll cite it, and I'll say, you know. This isn't precedent, but it's persuasive to me anyway, and Court, here's an opinion that came down." Meeting of the Supreme Court Advisory Committee, at 2578 (Oct. 20, 2000), *available at* <www.jw.com/scac>, Select: Publications, Select: Transcripts, Select: October 20, 2000 P.M. Courts also circumvented the rule. For example, when the Waco Court of Appeals cited an unpublished case it said it wasn't citing the cases as "precedential authority," the court was just noting the factual similarities between the cases. *Ince v. Ince*, 58 S.W.3d 187, 191 n. 3 (Tex. App. – Waco 2001, no pet.).

New rule 47.7 doesn't stop the madness; although unpublished opinions may be cited, they still "have no precedential value." Query: if these cases have **no** precedential value, then why the hell does anyone care about citing them?

I haven't finished tracing the "legislative history" of new rule 47. When the rule change was being discussed by the Supreme Court Advisory Committee on October 20, 2000, there apparently already was a Combined Committee proposal that said unpublished opinions "have no precedential value but may be cited as persuasive authority." Professor Dorsaneo suggested that "the announcement that they have no precedential value" be left

out. Meeting of the Supreme Court Advisory Committee, at 2534. Unfortunately, the language about “no precedential value” was left in, and the language about persuasive authority was left out.

For now, I believe that new rule 47.7 can best be understood as a Zen koan. A koan is a riddle used by Zen masters to confuse and disorient their students as a means of awakening. (An example: “Wakun complained when he saw a picture of the bearded Bodhidharma: ‘Why hasn't that fellow a beard?’” Other examples can be found whenever the supreme court explains how the evidence that supported the jury’s verdict was really no evidence.) Here, the riddle is this: lawyers and judges cite prior opinions that apply rules of law to a similar sets of facts because those opinions are considered precedential. But when a lawyer or judge cites an unpublished opinion because it applies a rule of law to a similar set of facts that opinion has “no precedential value.” The act of citing an opinion signifies it’s precedential while an unpublished opinion that’s cited has no precedential value.

Courts of appeals already are struggling with this riddle. One court, when faced with an unpublished opinion cited by the appellants, concluded the opinion was not on point and dismissively added that “it also was not designated for publication and so has no precedential value.” *Ortega v. City Nat’l Bank*, 97 S.W.3d 765, 773 n.7 (Tex. App.—Corpus Christi 2003, no pet.).

Another court resolved the riddle by deciding the unpublished opinion, while having no precedential value, nonetheless was useful as an “illustration.” *Kolenic v. Travelers Lloyds of Tex. Ins. Co.*, No. 03-02-00366-CV, 2003 WL 247117, at *1 (Tex. App.—Austin Feb. 6, 2003, no pet.)(mem. op.). The court was looking at the meaning of “plumbing system” in an insurance policy. To support the statement that courts have looked to the Texas plumbing license law for its definition, the court cited a published opinion introduced by the signal “see” and an unpublished opinion after a “see also.” The court then dropped a footnote to explain that the unpublished case “is not cited as precedent; it is cited as an illustration of the use of the definition of ‘plumbing’ from the Texas Plumbing License Law.” *Id.*

The Amarillo Court of Appeals has offered the fullest explanation for how a cited opinion can have no precedential value when the very act of citing the opinion indicates it’s precedential. *Carillo v. State*, 98 S.W.3d 789, 793 (Tex. App.—Amarillo 2003, pet. filed). The appellant in that case had cited an unpublished opinion from the Amarillo court, claiming that it was “factually undistinguishable.” When a party starts talking about an opinion being “factually indistinguishable,” that sounds a lot like precedent. The court treated the impact of new rule 47.7 as a matter of first impression. It noted that the difference between the old version and the new version is that “the citation of unpublished opinions is no longer forbidden.” It then turned to the “no precedential value” part of the rule. It looked at the definitions of precedent in Black’s Law Dictionary, which defines

precedent as either binding or persuasive.¹ The court then attempted to solve the riddle:

By stating that unpublished opinions may be cited but have no precedential value, we perceive the intent of the rule to be that a court has no obligation to follow such opinions. The effect of the rule is to afford parties more flexibility in pointing out such opinions and the reasoning employed in them rather than simply arguing, without reference, that same reasoning. However, the court to whom an unpublished opinion is cited has no obligation to follow the opinion or to specifically distinguish such opinion. They may be cited merely as an aid in developing reasoning that may be employed by the reviewing court be it similar or different. Even so, we do not view Rule 47.7, or the former rule, as justifying unreasoned inconsistency on the part of an appellate court.

Id. at 794. The court was able to distinguish the facts presented in the unpublished case from the facts presented in the case on appeal, much like what a court would do when it would distinguish a case that had precedential value. The Texarkana Court of Appeals has agreed with this approach to rule 47.7; citing *Carillo*, the court noted that a reviewing court can take “guidance” from unpublished opinions. *Montanez v. State*, No. 06-01-00225-CR, 2003 WL 1856529, at *4 n.2 (Tex. App. – Texarkana April 11, 2003, no pet. h.).

III. An Early Snapshot of the Use of the New Rule

It’s going to be important to figure out how the courts approach these non-precedential unpublished cases. If these unpublished opinions aren’t “guiding” the courts, then it won’t be worth the candle looking for them. To get an early impression of the courts of appeals’ reaction, I looked at cases citing unpublished opinions that were issued after January 1, 2003 (the effective date of the new rule). In Westlaw, there were 3,552 cases from the courts of appeals issued since January 1 (I looked on May 12, 2003); only 100 cases cited opinions “not designated for publication.” More than half of these were criminal cases and a good number of the civil cases cited an unpublished opinion for that particular appeal’s procedural history. As for the rest of the cases, I did notice some early citation patterns by the courts.

A caveat: the cases that came out between January and May 12 had been briefed under the old rule that prohibited lawyers from citing unpublished cases as authority. That

¹Black’s Law Dictionary defines “binding precedent” as precedent that a court must follow and it defines “persuasive precedent” as precedent a court “may either follow or reject but that is entitled to respect and careful consideration.

didn't stop everyone from citing unpublished cases. It's obvious that in some cases the lawyers had alerted the court about the unpublished opinion long before the rule change; they must have cited the case not as "authority," but as an interesting story with an instructive lesson or just as a good read. Some lawyers though probably didn't cite unpublished cases because of old rule 47.7.

Several cases can be grouped under the heading "the unbearable lightness of unpublished opinions." Some courts seem reluctant to put too much weight on an unpublished opinion, which is probably fitting for precedent that isn't precedential. These courts put the published cases in citation sentences first, and then cited the unpublished opinions with signals like "see also," "cf.," or "accord." See, e.g., *Ahmed v. Shimi Ventures, L.P.*, 99 S.W.3d 682, 689 n.10 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *In re Sheshtawny*, No. 14-03-00444-CV, 2003 WL 1922869, at *1 (Tex. App.—Houston [14th Dist.] April 22, 2003, orig. proceeding)(mem. op.); *Texas Tech Univ. Health Sciences Center v. Mendoza*, No. 08-01-00061-CV, 2003 WL 1359549 at *3 (Tex. App.—El Paso March 20, 2003, no pet h.)(mem. op.). The Bluebook rule on the order of authorities in a string citation says that authority that is more authoritative should precede other authorities. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.4 (17th ed. 2000). It makes sense that unpublished opinions would be separated from published opinions both by placement and by an introductory signal that indicates their lack of weight.

In one appeal, the court of appeals cited two Federal Supplement decisions in the body of the opinion to support a proposition of law about the effect of a separation of insureds clause on a particular exclusion; in a footnote, the court then cited, with a "see also" signal, an unpublished opinion that also supported that rule of law. *Bituminous Cas. Corp. v. Maxey*, No. 01-01-01111-CV, 2003 WL 1563858, at *9 n.3 (Tex. App.—Houston [1st Dist.] March 27, 2003, no. pet. h.). You can infer by that citation that published decisions from federal district courts have more weight than an unpublished Texas court of appeals opinion. Another court of appeals cited its own unpublished opinion with a "see also" signal. *City of San Antonio v. Johnson*, No. 04-02-00909-CV, 2003 WL 1090624, at *2 (Tex. App.—San Antonio March 12, 2003, pet. filed).

Since January 2003, courts haven't consistently cited unpublished opinions in string citations. Courts typically didn't use signals to differentiate unpublished opinions from published opinions when they cited them as evidence of how the various courts have lined up on a particular issue. See, e.g., *Curtis v. Anderson*, No. 03-02-00302-CV, 2003 WL 1832257, at *5 n.5 (Tex. App.—Austin, April 10, 2003, no pet. h.); *Cardinal Health Staffing Network, Inc.*, No. 01-02-00769-CV, 2003 WL 1742180, at *7 (Tex. App.—Houston [1st Dist.] April 3, 2003, no pet. h.); *Sultan v. Mathew*, No. 14-02-01254-CV, 2003 WL 1738864, at *2 (Tex. App.—Houston [14th Dist.] March 6, 2003, no pet h.)(mem. op.). When the Fourteenth Court of Appeals traced a line of cases that had reached similar results, it noted that two courts had followed the same line of reasoning in "recent unpublished cases." *Almanara*

World Class Restaurant, Inc. v. Caspian Enter., Inc., No. 14-02-00347-CV, 2003 WL 748180, at *4 (Tex. App. – Houston [14th Dist.] March 6, 2003, no pet. h.).

Although most citations to unpublished opinions are part of citation sentences that also include real precedent, some courts have been bold enough to support a proposition of law with only an unpublished opinion. Thus, the Tyler court cited only an unpublished opinion to support the notion that “an issue has not been actually litigated if its resolution was expressly made subject to future modifications.” *In re Calderon*, 96 S.W.3d 711, 712 (Tex. App. – Tyler 2003, orig. proceeding). That court also used a lone unpublished opinion to support the proposition that a lease that terminates upon the death of a lessee is a tenancy at will rather than a tenancy for life. *Kajo Church Square, Inc. v. Walker*, No. 12-02-00131-CV, 2003 WL 1848555, at *5 (Tex. App. – Tyler April 9, 2003, no pet h.)(mem. op.). The Texarkana Court of Appeals used an unpublished opinion to support the notion that the lack of a notary seal is a defect in form. *Bray v. Fuselier*, No. 06-02-00070-CV, 2003 WL 21078041, at *3 (Tex. App. – Texarkana May 14, 2003, no pet h.). The Fourteenth Court of Appeals said a circumstantial instruction “has been recognized” as properly informing the jury that negligence could be inferred from circumstantial evidence; the prior court has “recognized” this in an unpublished opinion. *Lee v. Huntsville Livestock Servs., Inc.*, No. 14-02-00182-CV, 2003 WL 1738418, at *2 (Tex. App. – Houston [14th Dist.] April 3, 2003, no pet.). An unpublished opinion also was used by the Fourteenth Court of Appeals to define an “envelope draft.” *Flanagan v. Redland Ins. Co.*, No. 14-02-00152-CV, 2003 WL 193080, at *1 (Tex. App. – Houston [14th Dist.] Jan. 30, 2003, no pet.). The Corpus Christi Court of Appeals used only an unpublished opinion to support the rule that forfeiture will not be read into a contract where the alleged forfeiting party is not on fair notice of its application. *Leonard v. Coastal States Crude Gathering Co.*, No. 04-02-00238-CV, 2003 WL 21067090, at *7 (Tex. App. – Corpus Christi May 14, 2003, no pet. h.). That court also used a single unpublished opinion to support the particular application of an appellate rule. *In re Lawson*, No. 03-02-716-CV, 2003 WL 1562550, at *1 (Tex. App. – Corpus Christi March 27, 2003, orig. proceeding)(mem. op. on reh’g).

IV. Pay to Play: Finding Unpublished Opinions

The probable impact of new rule 47.7 is that researching will become more expensive, more time-consuming, and more complicated. Finding unpublished opinions isn’t easy. And you’re going to have to pay to play.

The number of cases that may warrant a look when researching a case has expanded dramatically. The courts of appeals in the nine preceding fiscal years issued 18,000 opinions that ended up in South Western Reporter and 81,000 that didn’t. Just for those nine years the number of potential cases has increased over 400%. When the Supreme Court Advisory Committee discussed changing rule 47, committee member Paula Sweeney

pointed out that the “do not publish” designation was useful when you found 600 cases and 500 weren’t published. If those cases also could be cited, then she couldn’t tell her malpractice carrier she “blew off the last 500 cases because they were ‘do not publish.’ I have to tell them why I didn’t read them all. And I can’t do it We are creating a crushing workload for every lawyer in the state.” In that morass of unpublished opinions, there may be a nugget worth finding, and you’ll have to assume your “opponent who’s got 18 little weenie law clerks will have found a nugget.” Meeting of the Supreme Court Advisory Committee, at 2615-2616 (Oct. 20, 2000), *available at* <www.jw.com/scac>, Select: Publications, Select: Transcripts, Select: October 20, 2000 P.M.

Researching will become more complicated. What’s available varies considerably from court to court. *See* Table 1. This isn’t news. Two years ago, Justice Hankinson pointed out that the assumption that “unpublished opinions from all the courts of appeals are equally available” wasn’t true; the 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). Unpublished opinions currently aren’t available at all for two courts of appeals, Beaumont and Fort Worth. Not on Westlaw. Not on Lexis. Not on the courts’ websites. Unpublished opinions aren’t available on either Westlaw or Lexis for four courts: Fort Worth, El Paso, Waco, and Eastland. Westlaw also doesn’t have any unpublished opinions from two other courts: Tyler and Corpus Christi. For those two courts, Lexis provides only the last year of unpublished opinions (2002) for Tyler, but a decade worth of opinions from Corpus Christi. Some Supreme Court Advisory Committee members believed that this problem would magically resolve itself. *See, e.g.*, Meeting of the Supreme Court Advisory Committee, at 2576. It hasn’t happened yet.

It’s not clear how many of those 500 unpublished opinions you will need to read to meet your duty to research diligently. After all, none of the unpublished cases have to be followed by a court. But it’s doubtful you can safely ignore them. The bare minimum requirement in researching unpublished opinions may be looking at the unpublished opinions from the court of appeals you are before. Although all unpublished opinions are created equal, some unpublished cases are more equal than others. It’s better to cite an unpublished opinion with no precedential value that’s from your reviewing court than it is to cite an unpublished opinion with no precedential value from some other court of appeals. In the trial courts, those opinions are predictive. In the appellate courts, most courts like to be consistent. As the Amarillo court said, rule 47.7 doesn’t justify “unreasoned inconsistency” by appellate courts. *Carillo v. State*, 98 S.W.3d at 794. But you can’t actually say that the court is *bound* by that unpublished opinion. That would be wrong; unpublished opinions are for guidance only. Try suggesting to the court that it could be *really, really* guided by its own prior unpublished opinion.

Your best bet in finding the most unpublished opinions from a particular appellate court varies. *See* Table 2. Use the court’s website (as best as you can) for Austin, Dallas,

El Paso, Eastland, and Tyler. Use Westlaw for the First Court of Appeals, San Antonio, Beaumont, and the Fourteenth Court of Appeals. Use Lexis for Texarkana, Amarillo, and Corpus Christ. For Fort Worth, call David Keltner.

A. Court Websites

The Office of Court Administration has developed a basic website template for the courts of appeals. This template includes a searchable database of opinions. Unfortunately, each court individually has determined how far it would (or will) go back and the archives for most courts are extremely limited. *See* Table 1. The search syntax is also very rudimentary and will be extremely frustrating to anyone used to using Westlaw or Lexis. None of the websites detail what kind of search syntax can be used; only one court states how extensive its coverage is. This is essential information that should be posted. In Table 1 I have listed approximate dates of coverage based on the results from searches I ran. It's possible that these dates will change if courts add more cases to their databases.

But there are going to be unpublished opinions that are available at court websites that aren't available on Westlaw or Lexis. *See* Tables 1, 2. At the present time, five courts have more unpublished cases available at their websites than at the fee-based databases. Both the Austin and Dallas courts of appeals have significantly more opinions available at their websites than are currently available on either Westlaw or Lexis. The Dallas Court of Appeals website has opinions dating back to at least December 1986. But Lexis only goes back to 1995 and Westlaw goes back to June 1991. If you use Westlaw, you'll miss five years of Dallas opinions. If you use Lexis, then you'll miss almost nine years of opinions. The Austin court has put opinions from 1991 on its website; the coverage of unpublished opinions on both Westlaw and Lexis begins in 1996. You'll miss five years of opinions by not checking the court's website. Two court websites (Eastland and El Paso) win by default because neither Westlaw nor Lexis have any of their unpublished opinions. And you'll get only sixteen months of unpublished opinions from Eastland's website and fifteen months from El Paso's. The Tyler court's website has a little over seventeen months of unpublished opinions, which still beats Westlaw (none) and Lexis (since 2002).

There are problems with using the court websites. When I used Netscape to access the websites, my computer crashed most of time; this didn't happen when I used Internet Explorer. Searching is a huge headache because you can't refine your searches: you can do simple text searches only. You apparently can't do one search for all courts of appeals; you would have to do fourteen individual searches. (It would be nice if the Office of Court Administration had a database that combined all the available opinions from the fourteen courts of appeals.) The availability of unpublished cases varies from court to court. But it's free!

B. Electronic Databases

Unpublished opinions aren't available at all on the less expensive databases like Loislaw or Versuslaw or the free database found at MyTexasBar. The new rule privileges Westlaw and Lexis. The coverage on Lexis and Westlaw varies. Westlaw is the better bet for the First, San Antonio, Beaumont and the Fourteenth; Lexis is the better bet for Texarkana, Amarillo, and Corpus Christi. Westlaw presently has no unpublished opinions from six courts of appeals: Fort Worth, El Paso, Waco, Eastland, Tyler, and Corpus Christi. Lexis has bupkus from four courts: Fort Worth, El Paso, Waco, and Eastland.

Westlaw and Lexis obviously don't have the same number of cases available; the actual difference is striking and, for research purposes, unsettling. For the twenty-five years that preceded the new rule, Lexis has 6794 court of appeals opinions that Westlaw doesn't have and Westlaw, in turn, has 3549 opinions that Lexis doesn't have. See Table 3. This is a big problem.

Don't overlook LexisOne (www.lexisone.com), which provides free access to a rolling five-year database. This year you can access cases issued since 1998; next year you'll be able to access cases since 1999. In five years, Lexisone will be useless for researching unpublished cases.

V. Memorandum Opinions

The comments to rule 47 announce that the rule "favors the use" of memorandum opinions. This means, as a matter of policy, that efficiency is more important than justice in the courts of appeals. Getting it right is no longer as important as getting it out.

Under the previous rule 47, judges decided whether an opinion would be published in South Western Reporter. Under the new rule, this decision has been given to West. And West has decided that memorandum opinions aren't going to be published in South Western Reporter.

Memorandum opinions also present problems with precedent, and, consequently, with researching cases. Rule 47 says that an opinion must be designated a memorandum opinion unless it fits certain criteria, which are eerily similar to those previously used for determining whether an opinion should be published. I'm assuming that a memorandum opinion will be fully precedential to the extent anyone can figure out what happened in the case. And that's going to be the problem with memorandum opinions: they may be so opaque that they will have very little precedential value. Justice Hecht has said that he had expected the courts of appeals to have already evolved to writing memorandum opinions that were "virtually unintelligible to somebody who didn't know the background of the case." Meeting of the Supreme Court Advisory Committee, at 2508.

For citation purposes, a memorandum opinion probably should be noted with a

parenthetical “mem. op.”

VI. Other Implications of TRAP 47

A. Is there an ethical duty to cite unpublished opinions?

Probably. The rule that compels lawyers to cite adverse authority is technically triggered when the authority is “controlling.” TEX. DISCIPLINARY R. PROF’L CONDUCT 3.03, *reprinted in* TEX. GOV’T CODE ANN. tit. 2, subtit. G, App. A (Vernon 1998)(TEX. STATE BAR R. art. X, §9). Because unpublished opinions are not precedential, they can’t be controlling. But, I believe, the courts look at the duty to disclose more broadly and expect lawyers to cite authority when it would be misleading not to do so. Ethicist Geoffrey Hazard got it right when he suggested the real test was the more unhappy you are after reading the case, the clearer the duty to disclose it. GEOFFREY C. HAZARD, *THE LAW OF LAWYERING* 593 (2d ed.1998). If you have an appeal and it’s a case of first impression in that court of appeals but you’ve found unpublished opinions from other courts, it would be misleading not to disclose those unpublished opinions.

B. Does the new rule mean that unpublished opinions can be the basis of conflict jurisdiction?

Probably not. The supreme court has held that conflicts jurisdiction couldn’t be established by citing to unpublished opinions because those opinions, under then rule 47.7, had no precedential value. *Collins v. Ison-Newsome*, 73 S.W.3d 178, 183 (Tex. 2001). Those unpublished opinions still don’t have any precedential value so conflicts jurisdiction still wouldn’t exist under the new rule. But four judges in *Ison-Newsome* would have allowed their use to establish conflicts jurisdiction and two judges in the majority are no longer on the court.

VII. Citing Unpublished Opinions

A. Introduction

If you find an unpublished opinion that you want to use in a brief, then you’ll need to know how to cite to it. This raises problems because the handy South Western Reporter cite is missing. And since one of the purposes of citation is to enable the reader to find the case easily, this gets a little tricky.

The rule requires that the cited unpublished opinion contain the notation “not designated for publication.” The court suggests in the comments to the new rule that

“whenever an opinion not readily available is cited, copies should be furnished to the court and opposing counsel.” Neither the rule nor the comments define what’s “readily available.”

Even when an unpublished case is “readily available” you could make things easier on the court by providing a copy of the unpublished opinion. In many instances that might be overkill. If the unpublished case is a lengthy opinion on a matter of first impression that makes the original decision not to publish inexplicable (this is technically known as a “case from Dallas”), then you should include the case in an appendix even if it’s readily available.

One thing to consider about whether something is “readily available” is that some courts have access to Westlaw and some have access to Lexis. I had planned to include a table on what electronic databases are available at the different courts; however, I abandoned that project after the second phone call.² I think that the First and Fourteenth use Westlaw and the other courts use Lexis; but I may be wrong. The courts might consider sharing that information on their websites.

B. Citing an Unpublished Case Found on Westlaw or Lexis

Some courts have given parallel citations to Westlaw and Lexis when citing to unpublished opinions. In *Collins v. Ison-Newsome*, Justice Hecht cited unpublished opinions from the Dallas Court of Appeals and gave parallel cites that included three databases: Westlaw, Lexis, and the court website. 73 S.W.3d 178, 186 n.2, 3 (Tex. 2001)(dissenting op.) A recent case from the Tyler Court of Appeals also gave parallel cites to Westlaw and Lexis when it cited an unpublished opinion. *In re Calderon*, 96 S.W.3d 711, 721 (Tex. App. – Tyler 2003, orig. proceeding)(mem. op.). I hope that these judges were only trying to be helpful to readers and weren’t suggesting that lawyers also include parallel citations to both fee-based databases when citing unpublished opinions. The parallel cite to two fee-based databases is a luxury that most litigants can’t afford.

Citations to unreported cases found on Westlaw and Lexis are covered under rule 6.1.2 of the Greenbook. You should ignore rule 20.3 of the Greenbook because it contradicts rule 6.1.2 on the placement of the Westlaw or Lexis cite. (I used the ninth edition when I prepared this paper; a new edition should be out soon.) The general citation form found in the ninth edition is:

²At the second court I called, the person who answered the phone said she thought the court had access to both, but sounded unsure. I asked if I could speak to a staff attorney to confirm this and was told that I couldn’t speak to a staff attorney because I wasn’t calling about a particular case.

Style of case, cause number, database identifier, (court exact date, petition history)(not designated for publication).

For Westlaw, it goes a little something like this:

Harrison v. U.S.A.A. Ins. Co., No. 03-00-00362-CV, 2001 WL 391539 (Tex. App. – Dallas April 19, 2001, no pet.)(not designated for publication).

A pin-point cite to the Westlaw version looks like this:

Harrison v. U.S.A.A. Ins. Co., No. 03-00-00362-CV, 2001 WL 391539, at *5 (Tex. App. – Dallas April 19, 2001, no pet.)(not designated for publication).

For Lexis:

Harrison v. U.S.A.A. Ins. Co., No. 03-00-00362-CV, 2001 Tex. App. LEXIS 2516 (Dallas April 19, 2001, no pet.)(not designated for publication)

Note that the “Tex. App” isn’t needed in the parenthetical because the Lexis identifier already has that information. And the pin-point cite for Lexis:

Harrison v. U.S.A.A. Ins. Co., No. 03-00-00362-CV, 2001 Tex. App. LEXIS 2516, at *5 (Dallas April 19, 2001, no pet.)(not designated for publication)

C. Citing Cases from Court Websites

Since at the present time, five databases at court websites have more unpublished opinions available than their fee-based counterparts, you need to learn how to do internet citations. The most recent editions of the Bluebook and the ALWD Citation Manual address citation problems raised by Internet citations. The Bluebook rules for citing material on the Internet are similar to traditional Bluebook rules: they are overly complicated and nonsensical. Thus, the Bluebook gives three slight variations to citing Internet materials. If you are using a printed source but want to show that you are hip to that source’s availability on the Internet, then introduce the web address “in the form of a parallel citation to the Internet using ‘available at.’” If you are using the Internet version of a source that has a print version, then “provide the traditional and Internet citations using no explanatory phrase.” But if the material is found exclusively on the Internet, then “use the explanatory phrase ‘at.’” BLUEBOOK at 134. The Bluebook also says to include some date; it prefers the date of the material itself, then the date the webpage was

modified, and then the date the site was visited. *Id.* at 136. An example given in the Bluebook looks like this: Randall R. Smith, *Jones on the Internet: Confusion and Confabulation*, Citation Debate Forum, at <http://www.citations.org> (last visited Jan. 20, 2000).

The ALWD Manual uses this basic format: "Author•Title•Pinpoint reference [if available]•, URL•(access or update information•Exact date)." ALWD CITATION MANUAL rule 40.1 (2d ed. 2003). So a Internet cite, according to the ALWD Manual, would look like this: Federal Jud. Ctr., *History of the Federal Judiciary*, http://www.fjc.gov/newweb/jnetweb.nsf/fjc_history?OpenFrameSet (accessed June 10, 2002). *Id.* It puts the date at the end, which is consistent with other citations, and uses "accessed" instead of "visited," which it claims is more professional sounding.

It isn't clear why both citation manuals believe that the "http://" is still necessary for a proper Internet citation. Typing www.stcl.edu after selecting File, Open (or CTRL-O) in either Internet Explorer or Netscape will retrieve the South Texas webpage; you don't have to type the "http://" first (the abbreviation for hyper text transfer protocol) for your browser to find a webpage.

Neither ALWD nor the Bluebook is very helpful for citing cases. Court websites typically retrieve opinions from a database in a database-to-web interface. The challenge here becomes citing material that is dynamically generated, or in other words, material that is created on the fly from a database on the server that is being accessed. This material does not have a true web address; it exists on the Internet in response to your query. The address of the response to your query may or may not subsequently work, although the "address" for the courts of appeals opinions all appear to work. The "cgi-bin" or "asp" in the address is a tip-off to dynamically created pages. CGI stands for "common gateway interface," which is a standard for how a web server should access an external program, "so that this data is returned to the user in the form of an automatically generated Web page." WEBSTER'S NEW WORLD POCKET INTERNET DIRECTORY AND DICTIONARY 292 (1997).³ ASP stands for Active Server Pages. A common use for dynamically created pages is to enable database searches. Because these pages are dynamically generated, they actually don't exist as an actual page written in HTML at the website you are visiting; they are written as a response to your query. A CGI or ASP page exists on your computer, not the website's.

CGI or ASP scripts may be re-usable by a subsequent researcher; the court of appeals websites all appear to employ re-usable scripts. That means they can be used again to give the essential information of a citation, which is where can the reader find the cited material. But the CGI citation will present another problem: it usually is ridiculously long (an ASP

³Webster's Dictionary further explains that "CGI programs, called scripts, come into play when a Web user fills out an on-screen form; the form generates output that is handled by the script, which brings other programs into play as necessary." *Id.*

address may be shorter). This is the CGI “address” for House Committee Report 107-5 on low-speed electric bicycles located at the Thomas website:

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http://thomas.loc.gov/cgi-bin/cpquery/1?cp107:./temp/~cp107q1Wr::&
sid=rW1q01pcudelctsrusus&&report=hr005.107&&dbname=cp107&&prev
ious_query=&&hold_doc_count=2&&variant=yes&&item_number=1&&s
el=DOC&&level=2&&xform_type=100&&bool=n&
```

Assuming that this address would work, the intrepid researcher would still have to successfully copy over 200 keystrokes to duplicate it.

The problem of accurately reproducing CGI addresses surfaced in a dissenting opinion in the Texas Supreme Court. Justice Owen cited two unpublished Dallas Court of Appeals cases and, after noting the web address of the Dallas Court of Appeals, gave the “specific” addresses of these opinions. *Yzaguirre v. KCS Resources Inc.*, 66 S.W.3d 212, 213 (Tex. 2000)(op. dissenting to denial of pet. for rev.) In Westlaw, Justice Owen’s footnote appears as:

```
The specific URL for Yzaguirre is http://courtstuff.com/cgi-bin/as web.exe?c
05 00.ask+D+15047424. The specific URLs for De Los Santos are
http://courtstuff.com/cgi-bin/as web.exe?c05 99.ask+D+8920349 (initial
opinion), and http://courtstuff.com/cgi-bin/as web.exe?c 05
99.ask+D+15146020 (opinion on rehearing).
```

Id. These addresses don’t work because Westlaw did not accurately reproduce the addresses that Justice Owen actually gave in her dissent. Justice Owen gave the addresses as <http://courtstuff.com/cgi-bin/as_web.exe?c05_00.ask+D+15047424>; <http://courtstuff.com/cgi-bin/as_web.exe?c05_99.ask+D+8920349>; and, <http://courtstuff.com/cgi-bin/as_web.exe?c05_99.ask+D+15146020>. See *Yzaguirre v. KCS Resources Inc.*, 00-0829, slip op. at 2 (Tex. Oct. 26, 2000). Westlaw replaced the underscoring in the slip opinion with blank spaces; this editing mishap made the addresses inoperable.

The latest edition of the Bluebook says not to include the complete subdirectory path to the document cited if the URL provides sufficient information to locate the document being cited; it gives examples of omitting long CGI-generated addresses, but doesn’t address why. BLUEBOOK at 135. It doesn’t specifically address the problems created by CGI. Moreover, just saying that a document is somewhere on a website may not be giving the reader enough help to actually find it, which defeats one of the main purposes in giving the citation. A historian at the University of Memphis, Maurice Crouse, offered this solution for a dynamically created document: give the web address and then such descriptive terms as “Select,” “Search,” “Message,” or “Subject” to identify keystrokes that

must be entered once the address has been reached. Maurice Crouse, *Citing Electronic Information in History Papers*, <www.people.memphis.edu/~mcrouse/elcite.html>. The ALWD Manual also addresses this situation and also suggests the use of identifying keystrokes. See ALWD CITATION MANUAL rule 40.1 (d). Using Crouse's solution, the committee report citation would appear as H. Rep. No. 107-5 (2001), available at <thomas.loc.gov/> Select: Committee Report, Search: Committee Report Number, Enter:107-5.

Except for the Dallas Court of Appeals, which uses CGI, the courts of appeals that have searchable databases use ASP. Here is an example of an "address" for a case from a court website. This is what appears in the address window in the browser for *Hart Properties, Inc. v. Graves*, a 1992 Austin Court of Appeals case that can be found at the court's website: www.3rdcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=6009. The citation for the case then would look like this:

Hart Properties, Inc. v. Graves, No. 3-92-150-CV, available at <www.3rdcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=6009> (Tex. App.—Austin Oct. 14, 1992, no writ)(not designated for publication).

An alternative citation would be:

Hart Properties, Inc. v. Graves, No. 3-92-150-CV, available at <www.3rdcoa.courts.state.tx.us>, Select: Opinion Search, Enter Case Number.: 92-150-CV (Tex. App.—Austin Oct. 14, 1992, no writ)(not designated for publication).

VIII. Conclusion

Good luck. You're going to need it.

Cool-Looking Tables

Table 1
The Uneven Coverage of Unpublished Opinions⁴

| Unpublished Opinions | Coverage on Westlaw | Coverage on Lexis | Court Websites |
|----------------------|---------------------|-------------------|----------------|
| First | July 1986- | 1987- | 2-1-2001- |
| Fort Worth | Not available | Not available | Not available |
| Austin | February 1996- | 1996- | 3-13-1991- |
| San Antonio | September 1995- | 1996- | 7-8-1998- |
| Dallas | June 1991- | 1995- | 12-12-1986- |
| Texarkana | April 1999- | 1996- | ? |
| Amarillo | July 1996- | 1996- | 9-28-1998- |
| El Paso | Not available | Not available | 10-14-2001- |
| Beaumont | September 1993- | 1996- | 7-26-2001- |
| Waco | Not available | Not available | Not available |
| Eastland | Not available | Not available | 9-6-2001- |
| Tyler | Not available | 2002- | 7-25-2001- |
| Corpus Christi | Not available | 1992- | 5-6-1999- |
| Fourteenth | July 1986- | 1990- | 5-2-2002- |

⁴The numbers in these tables were, for the most part, derived from the Annual Reports from the Office of Court Administration. Monica Ortale, reference librarian at South Texas College of Law, helped me with Table 3.

Table 2
Best Shot at Finding Unpublished Opinions

| | |
|-----------------------------|---------------------|
| First Court of Appeals | Westlaw |
| Fort Worth | Divine intervention |
| Austin | Court website |
| San Antonio | Westlaw |
| Dallas | Court website |
| Texarkana | Lexis |
| Amarillo | Lexis |
| El Paso | Court website |
| Beaumont | Westlaw |
| Waco | Divine intervention |
| Eastland | Court website |
| Tyler | Court website |
| Corpus Christi | Lexis |
| Fourteenth Court of Appeals | Westlaw |

Table 3
Estimated Availability of COA Opinions on Westlaw and Lexis

| Year | Total COA Opinions | Opinions on Westlaw | Opinions on Lexis | Westlaw v. Lexis |
|--------|--------------------|---------------------|-------------------|------------------|
| 1979 | 2080 | 1447 (69.57%) | 1535 (73.79%) | Lexis +88 |
| 1980 | 2170 | 1378 (63.5%) | 1445 (66.58%) | Lexis +67 |
| 1981 | 3016 | 1552 (51.45%) | 1575 (52.22%) | Lexis +38 |
| 1982 | 6509 | 1876 (28.82%) | 1888 (29%) | Lexis +12 |
| 1983 | 7613 | 1882 (24.72%) | 1927 (25.31%) | Lexis +45 |
| FY1984 | 7841 | 1931 (24.62%) | 2207 (39.55%) | Lexis +276 |
| FY1985 | 7522 | 1821 (24.2%) | 2975 (41.20%) | Lexis +1154 |
| FY1986 | 7741 | 2116 (27.33%) | 3190 (41.20%) | Lexis +1074 |
| FY1987 | 7392 | 2808 (37.98%) | 3089 (41.78%) | Lexis +281 |
| FY1988 | 7593 | 2909 (38.31%) | 3275 (43.13%) | Lexis +366 |
| FY1989 | 7993 | 2883 (36.06%) | 3340 (41.78%) | Lexis +457 |
| FY1990 | 7511 | 2628 (34.9%) | 3050 (40.6%) | Lexis +422 |
| FY1991 | 7545 | 2789 (36.96%) | 3001 (39.77%) | Lexis +212 |
| FY1992 | 8875 | 4451 (50.15%) | 3150 (35.49%) | Westlaw +1301 |
| FY1993 | 9379 | 4467 (47.62%) | 3277 (34.93%) | Westlaw +1190 |
| FY1994 | 9301 | 4373 (47%) | 3687 (39.64%) | Westlaw +686 |
| FY1995 | 9172 | 4426 (48.23%) | 4054 (44.19%) | Westlaw +372 |
| FY1996 | 9950 | 5422 (54.49) | 5095 (51.2%) | Westlaw +327 |
| FY1997 | 10,480 | 6271 (59.83%) | 6610 (63.07%) | Lexis +339 |
| FY1998 | 11,457 | 6399 (55.85%) | 7234 (63.14%) | Lexis +835 |
| FY1999 | 12,787 | 7945 (62.13%) | 8673 (67.82%) | Lexis +728 |
| FY2000 | 12,798 | 8467 (66.15%) | 8867 (69.28%) | Lexis +400 |
| FY2001 | 12,691 | 8667 (68.29%) | 8571 (67.53%) | Westlaw +96 |
| FY2002 | 11,959 | 8427 (70.46%) | 8065 (67.44%) | Westlaw +362 |

Table 4
The Expanding Research Universe, 1994-2002

| Year | Published Opinions | Unpublished Opinions | % Increase if DNP Opinions Added |
|-------------|---------------------------|-----------------------------|---|
| 1994 | 2,031 | 7,270 | 359% |
| 1995 | 2,308 | 6,864 | 297% |
| 1996 | 1,912 | 8,038 | 420% |
| 1997 | 1,490 | 8,490 | 570% |
| 1998 | 1,986 | 9,471 | 477% |
| 1999 | 2,092 | 10,695 | 511% |
| 2000 | 1,935 | 10,863 | 496% |
| 2001 | 2,187 | 10,504 | 480% |
| 2002 | 2,977 | 8,982 | 302% |
| Totals | 18, 918 | 81,177 | 433% |

Table 5
Percentage of Opinions Designated Unpublished, 1994-2002

| | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|----------------|------|------|------|------|------|------|------|------|------|
| First | 66 | 45 | 78 | 79 | 78 | 83 | 82 | 82 | 89 |
| Fort Worth | 83 | 81 | 78 | 82 | 84 | 86 | 82 | 87 | 83 |
| Austin | 85 | 84 | 85 | 67 | 83 | 81 | 84 | 85 | 84 |
| San Antonio | 84 | 77 | 78 | 94 | 65 | 71 | 78 | 74 | 76 |
| Dallas | 89 | 91 | 91 | 94 | 95 | 96 | 95 | 96 | 95 |
| Texarkana | 80 | 73 | 71 | 73 | 78 | 76 | 69 | 68 | 65 |
| Amarillo | 86 | 80 | 84 | 82 | 86 | 88 | 91 | 88 | 86 |
| El Paso | 63 | 63 | 73 | 76 | 85 | 85 | 90 | 81 | 88 |
| Beaumont | 61 | 67 | 71 | 81 | 81 | 75 | 70 | 95 | 83 |
| Waco | 77 | 83 | 78 | 76 | 78 | 72 | 57 | 53 | 64 |
| Eastland | 85 | 85 | 84 | 90 | 90 | 87 | 88 | 90 | 87 |
| Tyler | 83 | 80 | 83 | 83 | 85 | 89 | 85 | 91 | 84 |
| Corpus Christi | 68 | 76 | 72 | 73 | 79 | 77 | 76 | 80 | 77 |
| Fourteenth | 72 | 64 | 85 | 81 | 83 | 82 | 82 | 84 | 87 |
| Totals | 78 | 75 | 81 | 81 | 82 | 83 | 83 | 83 | 84 |

Table 6
Searchable Databases at Court Websites

| Court | Web Address for Searchable Database |
|------------------------|--|
| First Court of Appeals | www.1stcoa.courts.state.tx.us/opinions/opsrch.asp |
| Fort Worth | www.2ndcoa.courts.state.tx.us/opinions/opsrch.asp |
| Austin | www.3rdcoa.courts.state.tx.us/opinions/opsrch.asp |
| San Antonio | www.4thcoa.courts.state.tx.us/opinions/opsrch.asp |
| Dallas | www.courtstuff.com/5th/search.htm |
| Texarkana | www.6thcoa.courts.state.tx.us/opinions/opsrch.asp |
| Amarillo | www.7thcoa.courts.state.tx.us/opinions/opsrch.asp |
| El Paso | www.8thcoa.courts.state.tx.us/opinions/opsrch.asp |
| Beaumont | www.9thcoa.courts.state.tx.us/opinions/opsrch.asp |
| Waco | None |
| Eastland | www.11thcoa.courts.state.tx.us/opinions/opsrch.asp |
| Tyler | www.12thcoa.courts.state.tx.us/opinions/opsrch.asp |
| Corpus Christi | www.13thcoa.courts.state.tx.us/opinions/opsrch.asp |
| Fourteenth Court | www.14thcoa.courts.state.tx.us/opinions/opsrch.asp |