OP-ED ARTICLE – CORPUS

The Texas Supreme Court and the Texas Court of Criminal Appeals are currently considering a proposal to eliminate a rule which allows the Court of Appeals to designate their judicial opinions (decisions) in cases as DNP, Do Not Publish. Under this rule a DNP designation means the case may not be used or cited as precedent by lawyers in other cases or indeed by the courts themselves.

Recent statistics show that 85% of all Courts of Appeals decisions in Texas received the DNP designation. One court did not publish 97% of its decisions. This phenomenon, which has been criticized by legal scholars and some judges, can lead to curious results.

In a recent case, the Dallas Area Rapid Transit (DART) Board received a favorable ruling from an appellate court on a particular point of law. The judicial opinion was designated DNP. Two years later DART was back in court facing the same legal issue. Its lawyers, however, could not cite the prior opinion because of the DNP rule.

This time different judges from the same court decided the case the other way and ordered the opinion published. So the same defendant lost the exact same legal issue in the same court despite having won two years earlier.

This is but one example of the mischief the DNP rule can generate. Critics of the rule also point out:

In recognition of these problems the Texas Supreme Court asked its Advisory Committee, which I chair, to study ways to fix the problem. After extensive review and public

discussion, the Committee recommended that the DNP designation be abolished and that decisions formerly designated as DNP be eligible for citation as persuasive although not binding authority.

The proposed rule has the support of the Advisory Committee and, Justice Nathan Hecht reports, is acceptable to the appellate judges. It also has the overwhelming support of the civil and criminal lawyers who practice before these courts and who, under the old rule, are precluded from citing persuasive authority to the court merely because it carries the label DNP.

Indeed a lawyer in California who cited an opinion which had been designated DNP under a federal rule similar to the Texas procedure was hauled up on ethics charges for violating a court rule. The lawyer escaped punishment but with an admonition and warning not to do it again.

Texas has the opportunity to avoid such situations and can be a model for courts across the country who are struggling with the DNP designation. The Supreme Court and Texas Court of Appeals are expected to act soon.

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Court opinions should become public

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It would probably surprise the average Texan to learn that most state appellate court opinions cannot be used as precedent in future cases, and in fact, aren't even published.

But that's the way it's done under current state rules.

The DNP, or Do Not Publish opinion, has become increasingly popular among Texas appellate judges.

Chip Babcock, chairman of the Texas Supreme Court Advisory Committee, recently noted in an article published by Houston Lawyer that only 15 percent of the 12,798 courts of appeals opinions written in fiscal year 2000 were published.

The panel headed by Babcock has recommended that all appellate opinions be published in the future, and that those which are not groundbreaking in some fashion be disposed of in brief memorandums of opinion.

The proposed change is important to all Texans.

Judges who are interpreting the law that we live by should put their work on the record. Opinions should be published and accessible to all who are interested.

The state's high court is expected make a decision on the recommendation early next year.

Supporters of the rule that allows unpublished opinions say the appellate courts already are awash in paper, and forcing them publish all opinions will fill law books with so much unnecessary verbiage that they will become useless.

Unpublished opinions also relieve busy appellate judges from the burden of polishing each opinion when a rougher version will dispose of a routine case.

Babcock said, "The official rationale is that with heavy caseloads the only way to get through the docket is to dash out opinions on the easy ones and not have to worry about it being cited as precedent."

Some of the state's 14 appellate courts put unpublished opinions on their web sites, but others don't, making the opinions difficult to obtain.

Even unpublished opinions that are accessible are frustrating for lawyers because they can't be cited as precedent even when breaking new ground. The situation retards the evolution of the law as it is interpreted by appellate courts.

The same legal dispute can be fought again and again without being resolved because a standard has not been established.

Some appellate judges like unpublished opinions, because they reduce the chance of being reversed.

Appeals of unpublished opinions are less likely to be accepted by the Supreme Court.

Fourth Court of Appeals Chief Justice Phil Hardberger, a member of the Supreme Court Advisory Committee, favors publishing all opinions, saying that unpublished opinions reduce accountability.

"One way of evaluating judges is for the public to know what they are saying and why they are saying it," Hardberger said. "I don't want to be below the radar scope."

Supreme Court Chief Justice Tom Phillips said he is undecided on the proposed rule change and will not make up his mind until the court debates the issue next year.

"There's advantages both ways," Phillips said.

He added, "It's not a clear-cut issue to me. There's not a clearly right opinion."

If the court approves the committee's recommendation, the Texas legal community is likely to be pleased about winning permission to cite all appellate opinions.

But lawyers may become frustrated later when cases they have worked hard to present are disposed of with one-paragraph memorandum opinions.

Most importantly, it is unfair to Texans who must pick their judges in the voting booth to not have a full record of judicial performance.

Justice should not be meted out in secret even when rulings are considered mundane by practitioners of the legal profession.

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One would think that, any time a Texas appeals **court** issues a ruling, anyone could find it in the law books and rely on it to make an argument in one's own case.

One would be wrong.

A peculiar and oft-criticized rule lets Texas appellate judges designate some of their opinions "Do Not Publish" - or DNP. That means they can't be relied on in future cases, even those raising the exact same issues.

Lawyers cannot cite DNP rulings as precedent, meaning that other **courts** are not bound to follow them and can't look to them for guidance. And, because a DNP designation basically shouts "I'm Not Important," those rulings are far less likely to get reviewed by the Texas **Supreme Court** or **Court** of Criminal Appeals.

Originally, marking an opinion DNP meant it wouldn't make it into printed law volumes, the theory being that it made little sense to spend time and book space on routine rulings with little relevance to other cases. However, DNP rulings now show up in online legal research services, so they're in circulation even if the rule says they don't carry much value. And, in practice, one case's trivia could prove to be a future case's treasure.

The most troubling by-product of the rule has been that some **courts** - either by accident or by design - end up shielding large numbers of their rulings from getting a second look from the state's highest **courts.**

One study showed that the 5th District **Court** of Appeals in Dallas published 3.6 percent of its rulings in 2000, while the 9th District **Court** of Appeals in Beaumont published 49.3 percent. The 2nd **Court** of Appeals in Fort Worth published 12.7 percent.

Are Beaumont's rulings really so abundantly compelling and Dallas' really so overwhelmingly picayune?

The Texas **Supreme Court**'s **Advisory Committee** has recommended abolishing this troublesome distinction and allowing all appellate rulings to stand as precedents except for a fraction that meet specific guidelines as being really of narrow importance.

Both the **Supreme Court** and the **Court** of Criminal Appeals should adopt this revision to add consistency to Texas law and improve the **courts'** public accountability.

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PUBLISH OR PERISH

Unpublished appellate court opinions corrode Texas law

Opinions rendered by Texas appellate courts that are designated "do not publish" are among the sort of legal peculiarities of which the nonlawyering public generally is unaware. And yet, the large number of these so-called DNP opinions has a corrosive effect on the practice of law in this state, which results in Texans having little, or even conflicting, guidance on those very important legal issues that the courts of appeals are charged with sorting out. What's more, citizens are less able to know what their elected justices are up to when so many of the decisions they make are not made public.

To remedy this, the Texas Supreme Court Advisory Committee is recommending that the rules governing how the appellate courts handle their business be changed to eliminate the overly broad use of the DNP designation on rendered opinions.

Among the reasons to take this sensible step is the fact that DNP opinions apply only to the lawsuit and parties involved in any given case. Such opinions cannot be cited as precedent in subsequent, similarly situated cases. Without a published opinion to bind them, appeals court rulings — even out of the same court — can come down all over the map, even in deciding cases with identical fact situations.

Nor can the public count on getting well-researched, well-written opinions if its elected justices know they are writing what will be an unpublished opinion. Furthermore, the Supreme Court is less likely to review unpublished opinions, which is unfair to litigants in court cases and Texans in general.

But one of the most worrisome aspects of DNP opinions is that the decisions that come out under a given judge's name are about the only means the public has of evaluating a judge's performance on the bench. Unpublished opinions are released to electronic services that record legal decisions only at the discretion of the individual appellate courts. Of 12,798 opinions released by Texas' 14 courts of appeals in a 12-month period ending in August this year, only 1,935 were published.

Generally speaking, under the proposed rule change, justices would have to publish any opinion that: establishes or alters a point of law or that applies to a novel fact situation that is likely to recur; involves a constitutional issue; criticizes existing law; or resolves an apparent conflict of authority.

Those proposed changes make sense and will make a better, more coherent, brand of criminal and civil justice in Texas.

Court opinions need more review

The Chronicle's Dec. 9 editorial, "Publish or Perish; Unpublished appellate court opinions corrode Texas law," was a typical piece of propaganda telling the public about the wonderful Supreme Court Advisory Committee that is looking after our interests and praising the proposed rule changes that would require the publishing of appellate court opinions involving constitutional issues.

I have studied appellate court decisions for 15 years and I believe these proposed "new" rules have always been in place, even thought they haven't been followed. And they won't be followed in the future because there is no system of oversight or enforcement.

The unpublished appellate court decisions are no problem; it is the published opinions that are the problem. Appellate courts annually publish 13,000 opinions and only five out of 100 are reviewed by the state Supreme Court.

This allows the appellate courts to issue opinions that do not follow the Legislature's intent or previous Supreme Court decisions. When these faulty opinions

are not reviewed, they become precedent-setting for other appellate courts to use in rendering another faulty decision, and so on.

Laws enacted by the Texas Legislature are similarly being disregarded, mutated and, worst of all, repealed by judicial decree.

Judicial activism is rampant at the trial-court and appeal-court levels. The legal community knows what's going on and will not discipline itself.

The editorial's statement that a better, more coherent brand of justice is in the offing for Texas has no basis whatsoever.

Ray E. Dittmar, Houston

Court blackout

Too many opinions are kept under wraps

12/31/2001

You have been wronged by a company and have filed a lawsuit in a Texas court. In preparing for trial, your attorney found a case identical to yours in which an appeals court ruled in the plaintiff's favor, citing the same legal points you want to make.

But your luck runs out when your attorney learns the appellate decision bears the initials D.N.P. This means "do not publish" and it eliminates the chance of using the court opinion as a precedent to win the lawsuit.

This scenario is all too common in Texas' appeals courts. From the year ending Aug. 31, 2000, only 1,935 of the 12,798 opinions issued by the 14 district courts of appeal in Texas were published - just 15 percent.

The Texas Supreme Court Advisory Committee has recommended the state's appellate procedure rules be amended to eliminate the increasing frequency of unpublished opinions. The Supreme Court should follow that advice and end the tendency of appeals courts to hide behind the "do not publish" decree.

Not only is the policy detrimental to lawyers looking for court decisions that support their arguments, it permits judges to become sloppy in their rulings. Without fear that the decision will set precedents, appeals judges sometimes can hastily reach conclusions.

The reasons for not publishing court opinions vary. Some judges say they do not have time to write complete opinions that could be used later as legal precedents. But the practice of not publishing appeals court rulings has become problematic for the legal system. Too often, lawyers find court rulings that might be persuasive in their cases, but they are compelled to remain silent about them.

In May, the 9th U.S. Circuit Court of Appeals considered imposing sanctions against a lawyer because she cited an unpublished opinion in a brief, in defiance of court rules. Eventually, the court decided not to sanction the lawyer, but warned this was an unusual case, that it might not be as lenient next time.

The Supreme Court Advisory Committee has found a fair and equitable way to do away with unpublished opinions. The committee proposed that appeals court judges be permitted to designate some rulings "memorandum opinions," meaning they have little precedential value. That should counter complaints from the judges that there would be too much work if all rulings had to be fully written out. The Texas Supreme Court should adopt these recommendations as soon as possible.