The Use and Abuse of Authority In Texas Courts

Mark E. Steiner
South Texas College of Law

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K
MARK E. STEINER
1303 San Jacinto
Houston, Texas 77002
713. 646.2904
713.646.1766 (fax)
Email: msteiner@stcl.edu

Employment:
Assistant Professor, South Texas College of Law, Houston, Texas
Courses taught: Legal Research & Writing I & II, Internet Legal Research,
                   Texas Trial & Appellate Procedure

Education:
University of Houston (Ph.D. in History 1993)
University of Houston (J.D. 1982)
University of Texas (B.A. with Special Honors in History 1978)

Publications:
Not Fade Away: The Continuing Relevance of "Writ Refused" Opinions, Appellate Advocate
               (Feb. 1999)
Grit Your Teeth and Cite It: The Duty to Disclose Adverse Authority, Appellate Lawyer
               (Winter 1998-99)
The Secret History of Proprietary Legal Education: The Case of the Houston Law School, 47
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I. INTRODUCTION

Lawyers have the duty to disclose controlling authority that is directly adverse to their position. This duty is broader than the text of the applicable rule suggests. Texas lawyers also must pay close attention to the writ of error notations. Finally, there is some persuasive authority that actually is persuasive.

Portions of this paper appeared in slightly different form in Not Fade Away: The Continuing Relevance of "Writ Refused" Opinions, Appellate Advocate (Feb. 1999) and Grit Your Teeth and Cite It: The Duty to Disclose Adverse Authority, Appellate Lawyer (Winter 1998-99).

Petition histories and Westlaw searches were current as of the week of August 17, 1999.

II. THE DUTY TO CITE ADVERSE AUTHORITY

Judge Roger J. Miner of the Second Circuit recently observed that in his thirteen years on the bench he has witnessed a deterioration in the quality of appellate advocacy, which Judge Miner attributed in large part to a decline in the attention paid to the ethical rules governing appeals. Hon. Roger J. Miner, Professional Responsibility in Appellate Practice: A View From the Bench, 19 Pace L. Rev. 323, 323 (1999). This sense of "growing appellate unprofessionalism" may also explain the drafting of Standards for Appellate Conduct by the Appellate Practice Section of the State Bar of Texas. See Kevin Dubose, Standards of Appellate Conduct, 62 Tex. B.J. 558 (June 1999). In February 1999, these standards were adopted by the Texas Supreme Court and Court of Criminal Appeals. Order of the Supreme Court of Texas and the Court of Criminal Appeals, 62 Tex. B.J. 399 (April 1999). One of the most important ethical rules affecting appellate practice is the duty to cite adverse authority.

A. Rule 3.03 of the Texas Rules of Disciplinary Conduct

Candor is one of the most important traits of an effective appellate lawyer. Jimmy Carroll, former chief justice of the Austin Court of Appeals, recently explained,

You cannot fool the court, and you hurt yourself when you try to do it. You have to be prepared, you have to know your case, you have to know the law, and you have to be candid about your strengths and weaknesses. And when you are willing to do that, it builds your credibility with the court. If the court believes that you will try to -like Jerry Jeff Walker said- "slide one by you once more," they won't believe you when you're right.
Rule 3.03 of the Texas Rules of Disciplinary Conduct addresses "candor toward the tribunal." For an appeal, the most pertinent parts of rule 3.03 state:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

* * *

(4) fail to disclose to the tribunal 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.

The disclosure of adverse authority is compelled by the lawyer's "duty as an officer of the court to assist in the efficient and fair administration of justice." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 84-1505 (1984). Appellate lawyers also violate the duty of candor when they misrepresent or misquote the record, misquote cases, or elide statements from cases that undercut their position. See J. Michael Medina, Ethical Concerns in Civil Appellate Advocacy, 43 Sw. L. J. 677, 697-703 (1989).

B. The Parameters of Rule 3.03

The parameters of rule 3.03 are not entirely clear. Very different perspectives appear in ethics opinions, law review articles, and reported cases. Ethics opinions on model rule 3.3 and its predecessor take an expansive view on what authority must be disclosed. In 1949, an ABA ethics opinion suggested that lawyers had to disclose decisions "directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case." ABA Comm. on Professional Ethics and Grievances, Formal Op. 280
The opinion also suggested that the tests should be (1) is the decision that opposing counsel has overlooked one that the court should clearly consider in deciding the case, (2) would a reasonable judge believe that a lawyer who advanced a proposition of law contrary to the undisclosed authority was lacking in candor and fairness, and (3) might the judge feel misled by an implied representation that the lawyer knew of no adverse authority. Id.; see also ABA Comm. on Professional Ethics and Professional Responsibility, Informal Op. 84-1505 (1984). Legal ethicist Geoffrey Hazard has offered another test: "the more unhappy the lawyer is that he found an adverse precedent, the clearer it is that he must reveal it." Geoffrey C. Hazard, The Law of Lawyering 593 (2d ed.1998).

Some commentators have taken a more circumspect view of what authority must be disclosed. Professor Monroe Freedman believes that the ethical duty to disclose authority is so narrow as to be wholly ineffectual. Monroe H. Freedman, Arguing the Law in an Adversary System, 16 Ga. L. Rev. 833, 835 (1982). Professor H. Richard Uviller asserts that "the affirmative obligation of disclosure is cast in the narrowest terms." He explains that, under DR 7-106(B)(1),

Not only is it restricted to authority in the jurisdiction of the argument, but apparently it applies only to decisions of a superior tribunal which are "controlling" on the court to which the argument is addressed. However recent or persuasive, cases in a forum of coequal rank may be ignored entirely. In addition, a lawyer may omit with ethical impunity harmful decisions of a "controlling" court if they are not "directly" adverse.

H. Richard Uviller, Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law, 6 Hofstra L. Rev. 729, 734 (1978).

Appellate lawyers would be wise to avoid such hypertechnical readings of rule 3.03. Courts take a broad view of the responsibility to cite adverse authority. Appellate courts are particularly sensitive about the failure to cite adverse authority because they rely heavily upon the litigants to research the law.

A recent Florida case shows the impact on appeal of failing to disclose in the trial court. The defendant successfully had moved for summary judgment, asserting that it was immune from liability because of a Florida statute. Dilallo v. Riding Safely, Inc., 687 So.2d 353, 355 (Fla. App. 1997). On appeal, the plaintiffs pointed out that the statute was not yet in effect at the time of the accident. The defendant then asserted that this argument could not be raised for the first time on appeal. The defendant's counsel conceded to the appellate court that he had not checked the effective date of the statute before he moved for summary judgment. The court noted both the duty to disclose and the duty of competence, which "require an attorney to provide full information to the trial court such that the court has all necessary information to determine the issue presented to it." Id. The appellate court rejected defendant's argument that the plaintiff could not raise the issue of retroactivity on appeal: "[defendant's] counsel, having failed to disclose to the court below the fact that his argument was predicated upon a statute not yet in effect on the date of the accident, cannot now benefit from his own improper conduct by virtue of this 'gotcha' argument." Id.

C. Recent Texas Cases on Rule 3.03
Nationally, reported cases involving the duty to disclose fall in two basic categories: (1) appeals where one party's counsel discloses adverse authority, loses the appeal, but gains the court's respect and trust, and (2) appeals where one party's counsel fails to disclose adverse authority, loses the appeal, and gains the court's enmity and scorn. Recent Texas cases fall in that basic pattern, except that in both reported cases the losing party who had been criticized by the court of appeals for not disclosing authority eventually won in the Texas Supreme Court.

Some courts have commended lawyers for doing the right thing. The Corpus Christi Court of Appeals recently applauded a trio of appellate lawyers for their candor in disclosing adverse authority. Fonseca v. Barth, 972 S.W.2d 814, 815 (Tex. App.-Corpus Christi 1998, no pet.). At oral argument, counsel for appellees (John D. Ellis, Jr. of Houston, Fred E. Davis of Austin, and Errol John Dietze of Cuero) informed the court that they had discovered two Texas Supreme Court cases, not cited by the appellant, that established the merits of one of the appellant's points of error and conceded that the case should be reversed and remanded. Id. The court ended its short opinion by noting, "In this era of 'Rambo' litigation, the Court finds counsel's conduct in pointing out adverse, but controlling authority, commendable." Id. A Florida appellate court similarly commended a lawyer for citing in her appellant's reply brief contrary authority that was decided after the appellee's brief was filed. The court noted, "Normally we do not compliment counsel for being ethical; however, compliance with this canon, in our experience, has been the exception rather than the rule." Lassiter Constr. Co. v. American States Ins. Co., 699 So.2d 768, 770 n.2 (Fla. App. 1997).

A recent mandamus that made a disastrous stop in the court of appeals on its way to a victory in Austin provides some dramatic lessons about the duty to disclose authority. The lessons to be learned from the proceeding in the court of appeals are (1) courts are very serious about a perceived failure to cite adverse authority and (2) you can't distinguish a case that you don't cite. What happened in these mandamus proceedings is not entirely clear from the reported opinions, but in the court of appeals, the relators not only were denied relief, they were ordered to show cause about their failure to cite a Texas Supreme Court case. In re Colonial Pipeline Co., 960 S.W.2d 272, 273 (Tex. App.-Corpus Christi 1997, orig. proceeding). In the Texas Supreme Court, the relators won, the show-cause in the court of appeals is not mentioned, and the case that the court of appeals thought was controlling was dismissed with a parenthetical. In re Colonial Pipeline Co., 968 S.W.2d 938, 942 (Tex. 1998) (orig. proceeding).

In the Corpus Christi Court of Appeals, the relators challenged a docket control order in a complex litigation that involves over seventeen thousand plaintiffs in lawsuits filed in three different counties. The trial judge had entered a docket control order that allowed ten representative plaintiffs to go to trial first and abated discovery for the remaining plaintiffs. In re Colonial Pipeline Co., 960 S.W.2d at 272. The court of appeals found that a case from the Texas Supreme Court, Polaris Investment Mgt. Corp. v. Abascal, 892 S.W.2d 860 (Tex. 1995), controlled because the case had held that "these types of docket control orders are incidental rulings of the court and are not reviewable by mandamus." Id. The court explained, Polaris is essentially indistinguishable from the case before us and is determinative.

Relators completely ignored Polaris in their filings in this Court, although filing a thirty-seven-page brief containing three pages of authorities in the index. Relators did not attempt to explain or distinguish this controlling authority, nor mention Polaris might be considered to be contrary to their position. In their response to Relators' petition for mandamus, the Real Parties in Interest cite Polaris and state the case was extensively argued before the trial judge . . .
Id. The court concluded that "such failure to disclose pertinent adverse authority might be a
failure of Relators to deal in good faith with this Court and a breach of professional ethics." Id.
The court ordered relators to show cause why relators should not be sanctioned for "not acting in
good faith with this court by failing to cite the Polaris case as authority." Id. at 274.

The court of appeals' reaction to the perceived failure to disclose authority shows the
wisdom of legal ethicist Charles W. Wolfram's observation that a court's belief that a party failed
to disclose authority is likely to "produce the impression that the awakened precedent, because
suppressed, should be regarded as particularly vicious." Charles W. Wolfram, Modern Legal
Ethics 682 (2d ed. 1986). The Polaris opinion was seen as "vicious" to the relators because to the
court believed that the relators were hiding the ball.

The court of appeals - in an unpublished opinion - later found that the relators' petition for
mandamus was not groundless or sanctionable. In re Colonial Pipeline Co., No. 13-97-808-CV,
response to the show-cause order was to agree that they should have cited and distinguished
Polaris in their petition for mandamus, but argued that the case was not controlling. The issue -
whether the trial court should have denied discovery - was not governed by Polaris, but by
another supreme court case. The relators nonetheless apologized for any inconvenience caused
by their failure to cite, discuss, and distinguish Polaris. The court noted "the far better practice
would have been for relators to put the two opinions in juxtaposition one to another and contrast
them, distinguishing the one not supporting their claim for relief, rather than ignoring unfavorable
authority." Id.

The Polaris opinion didn't hurt the relators in the supreme court. The lesson to be learned
from the mandamus proceeding in the supreme court is that few cases really are directly adverse.
The court of appeals had chided relators for not citing Polaris, a case that the court believed was
"controlling authority" and "determinative." In the supreme court, relators easily distinguished
Polaris. The court agreed with relator's argument that the docket control order abating discovery
denied relators "discovery that went to the heart of the litigation." In re Colonial Pipeline, 968
S.W.2d at 942. Because relators successfully argued that the abated discovery went to the heart
of the litigation, the supreme court dismissed Polaris with a "compare" signal and a parenthetical
that stated "case involving securities fraud wherein the Court held that, based on the record before
it, the trial court's abatement of discovery did not go to the heart of the defendant's case." Id.

The same pattern appeared in an earlier appeal. In the Dallas Court of Appeals, the court
criticized the (losing) appellant's failure to cite a case that had addressed the same issue. In the
supreme court, the party that was criticized for not citing the case won. HL Farm Corp. v. Self,
1994). The issue before both courts was the constitutionality of a Tax Code provision that
excluded land owned by corporations controlled by nonresident aliens from appraisal as
open-space agricultural land. Four years earlier, the Eastland Court of Appeals had found that the
classification of nonresident aliens was not an inherently suspect classification and did not require
strict scrutiny. It rejected the appellant Alexander Ranch's argument that the provision in the Tax
S. W.2d 303, 306 (Tex. App.-Eastland 1987, writ ref'd n.r.e.). Four years later, appellant HL
Farm Corporation presented the same argument about the unconstitutionality of the Tax Code
provision that had lost in Alexander Ranch. The appellant did not cite the case in its brief. At
oral argument, the appellant's counsel admitted that he knew about the Alexander Ranch case, but stated that he did not cite the case in his brief "because he thought the case was wrong." HL Farm Corp. v. Self, 820 S.W.2d at 375 n.2. Although the appellees cited the case, the court noted it did not condone "knowingly ignoring contrary authority that is directly on point." Id.

Apparently, the appellant's attorney had a pretty good point about the Alexander Ranch case being wrongly decided: when the Texas Supreme Court reversed the court of appeals, it expressly disapproved the Alexander Ranch opinion. HL Farm Corp. v. Self, 877 S.W.2d 288, 292 (Tex. 1994). It certainly looks as though the appeal would have gone more smoothly if the court of appeals had not been distracted by the appellant's failure to cite a case directly on point. The appellant lost a valuable opportunity to argue in its opening brief why the Eastland case was "wrong."

D. Implications of Rule 3.03

Judge Richard Posner observed that "the ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless." Hill v. Norfolk & Western Ry., 814 F.2d 1192, 1198 (7th Cir. 1987). Since both rule 3.03 and common sense dictate that you can't pretend adverse authority doesn't exist, a party faced with bad binding precedent can either distinguish it or ask the court to overrule it. Hazard, The Law of Lawyering at 593.

An argument that requires overruling must be directed to the right audience. One panel of a court of appeals should not be able to overrule another panel. The court of appeals should have to sit en banc to overrule one of its own opinions. See e.g. Davis v. Covert, 983 S.W.2d 301, 304 (Tex. App.-Houston [1st Dist.] 1998, pet. dism'd. w.o.j.)(en banc).

Nor should a court of appeals be able to overrule a Texas Supreme Court opinion. In re Smith Barney, Inc., 975 S.W.2d 593, 596 (Tex. 1998); W.W. Rodgers & Sons Produce Co. v. Johnson, 673 S.W. 2d 291, 295 (Tex. App.-Dallas 1984, orig. proceeding). The supreme court has quoted with approval from the United States Supreme Court: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the lower court should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." In re Smith Barney, 975 S.W.2d 593, 596 (Tex. 1998)(quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

Some courts of appeals apparently believe that they have the authority to overrule supreme court precedent if it's really old. See, e.g., Fain v. Great Springs Water of America, Inc., 973 S.W. 2d 327, 329-30 (Tex. App.-Tyler 1998), aff'd, 42 Tex. Sup. Ct. J. 629 (May 6, 1999). When asked to overrule a 1904 supreme court decision, the Tyler court noted that "the doctrine of stare decisis does not stand as an insurmountable bar to overruling precedent," apparently forgetting that a lower court can't overrule a higher one. Id. The court nonetheless reached the right result, although for the wrong reason; it concluded that it was "more appropriate" for the legislature or supreme court to fashion a new rule. Id.

III. THE NOTATION SYSTEM IN THE TEXAS SUPREME COURT

A. No Place But Texas

The notation practice of the Texas Supreme Court is unlike any other high court. See
Ted Z. Robertson & James W. Paulsen, Rethinking the Texas Writ of Error System, 17 Tex. Tech L. Rev. 1, 2-3 (1986). The hallmark of a high court in a three-tiered system is that the high court's decision not to review adds nothing to the precedential authority of the intermediate court's opinion. The leading text on United States Supreme Court practice states: "A simple order denying a petition for writ of certiorari is not designed to reflect the Court's views either as to the merits of the case or as to its jurisdiction to hear the matter. A denial order simply expresses the Court's discretionary refusal to give any kind of appellate review to the decision below." Robert L. Stern et al., Supreme Court Practice 239 (7th ed. 1993). The denial of a petition for a writ of certiorari is not a ruling on the merits. Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 119 S. Ct. 365, 365 (1998) (Stevens, J., respecting denial of certiorari). Justice Stevens has pointed out that "sometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue.” Id.

A "petition refused" notation from the Texas Court of Criminal Appeals is similar to "cert. denied." The Court of Criminal Appeals has explained that "the summary refusal of a petition for discretionary review by this Court is of no precedential value." The court stated, "The Bench and Bar of the State should not assume that the summary refusal of a petition for discretionary review lends any additional authority to the opinion of the Court of Appeals." Sheffield v. State, 650 S.W.2d 813, 814 (Tex. Crim. App. 1983)(per curiam). In actual practice, the meaning of PDR refusals has become more complicated. Jim Paulsen & James Hambleton, Of PDRs and Precedent, 55 Tex. B. J. 1074 (Nov. 1992).

B. Refused

Over 4000 Texas Supreme Court opinions are cleverly disguised as court of appeals opinions. These are the 4,157 opinions that were "writ refused" by the supreme court. These cases have the same precedential effect as supreme court opinions. For the past twenty years, the Texas Supreme Court has rarely "refused" an application of writ of error (or now petition for review). Because of the small number of recent refusals, lawyers sometimes overlook the continued significance of the "refused" notation. The Texas Supreme Court's "refused" notation is unlike a "cert. denied" from the United States Supreme Court or a "pet. ref'd" from the Court of Criminal Appeals. When the supreme court "refuses" review, the court adopts the court of appeals' opinion and judgment as its own. In re Smith Barney, Inc. 975 S.W.2d 593, 596 (Tex. 1998). The supreme court has stated that a refusal of a writ of error gives full approval to the court of appeals opinion and makes the opinion as authoritative as one of its own opinions. Biggers v. Continental Bus Sys., 157 Tex. 351, 303 S.W.2d 359, 364 (1957).

From 1892 until June 14, 1927, the supreme court also used a "refused" notation, but the meaning was quite different. Until June 14, 1927, a "writ refused" did not mean that the supreme court approved the reasoning of the court of civil appeals' opinion; it meant only that the supreme court approved of the result in the case. Texas State Bd. of Med. Examiners v. Koepsel, 159 Tex. 479, 322 S.W.2d 609, 614 (1959); Fleming v. Texas Loan Agency, 87 Tex. 238, 27 S.W. 126, 127 (1894); Rowley v. Lake Area Nat'l Bank, 976 S.W.2d 715, 723 n.7 (Tex. App.-Houston [1st Dist.] 1998, pet. denied). The opinion in an early "refused" case might have been "wholly right or wholly wrong or even somewhat of both." Gordon Simpson, Notations on Applications for Writs of Error, 12 Tex. B. J. 547, 571 (Dec. 1949). One commission of appeals justice explained that "the truth is that in no instance does a refusal by the Supreme Court of a writ of error necessarily
or conclusively carry an approval by that court of the opinion of the Court of Civil Appeals."
Terrell v. Middleton, 108 Tex. 14, 191 S.W.2d 1138, 1139 (1917) (Hawkins, J., concurring in refusal of writ of error); see also Latham v. Security Ins. Co., 491 S.W.2d 100, 102 (Tex. 1972); City of San Angelo v. Deutsch, 126 Tex. 332, 91 S.W.2d 308, 312 (1936). The first version of "writ refused" has caused some confusion with the latter one. One court of appeals recently had to reject an appellant's erroneous suggestion that a 1895 "writ refused" opinion had the weight of a supreme court opinion. Rogers v. Ricane Enter., Inc., 930 S.W.2d 157, 166 n.4 (Tex. App.-Amarillo 1996, writ denied).

In 1927, the meaning of a "writ refused" notation was changed by the Texas Legislature. The legislature pronounced that the supreme court would "refuse" the application for writ of error where "the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined." Act of March 25, 1927, 40th Leg., R.S., ch.144, 1927 Tex. Gen. Laws 215. This change was intended "to give more authenticity to sound opinions of Courts of Civil Appeals and to afford the Bench and Bar the benefit and advantage of a more numerous body of authoritative pronouncements." Simpson, Notations on Applications for Writs of Error, 12 Tex. B. J. at 571. Because this change went into effect in the middle of 1927, the exact date a case was refused that year is essential for determining its precedential value. It wasn't until October 1927 that cases were given the new "refused" stamp. One court of appeals mistakenly stated that the "approval and imprimitur [sic] of the Supreme Court" attached to a 1927 "writ refused" opinion when it was refused on May 25, before the change went into effect. Lampson v. South Park Indep. Sch. Dist., 698 S.W.2d 407, 424 (Tex. App.- Beaumont 1985), judgment set aside by 742 S.W.2d 275 (Tex. 1987)(citing Parrish v. Wright, 293 S.W. 659 (Tex. Civ. App.- Amarillo 1927, writ ref'd)).

The definition of "refused" has gone essentially unchanged since 1927. For example, rule 133 of the former rules of appellate procedure stated that "where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.'" Tex. R. App. P. 133(a) (repealed).

When the Texas Supreme Court officially changed to a petition for review system, it not only kept the "refused" notation, it clarified its meaning. The new appellate rule keeps the "judgment correct and legal principles announced in the opinion are correct" language, but adds, "the court of appeal's opinion in the case has the same precedential value as an opinion of the Supreme Court." Tex. R. App. P. 56.1(c).

The number of "refused" cases has steadily declined over the years. I counted 4,157 "refused" opinions. There were approximately 3000 "refused" cases in the first twenty years, another 871 in the next twenty, and only 182 in the last thirty years. "Refused" cases first appear in volume 293 of South Western Reporter; there are 120 "refused" opinions in the last eight volumes of South Western Reporter, First Series. There are 1855 "refused" cases in the first one hundred volumes of South Western Reporter, Second Series; 1129 in the volumes 100-199; 614 in volumes 200-299; 257 in volumes 300-399; 87 in volumes 400-499; 43 in volumes 500-599. According to Texas Judicial Council statistics, 41 cases were refused from 1981 to 1990. Since 1991, the supreme court has "refused" only nine cases.

A "refused" case requires six votes from the justices. The recent cases that are refused "tend to involve short single-issue decisions." Robertson & Paulsen, Rethinking the Texas Writ of Error System, 17 Tex. Tech L. Rev. at 33. The most recent "refused" cases fit that profile.
They include: Comdisco, Inc. v. Tarrant County Appraisal Dist., 927 S.W.2d 325 (Tex. App.-Fort Worth 1996, writ ref'd)(Tax Code permits appraisal review board to correct the appraisal roll for an owner's clerical errors); Jones v. Nightingale, 900 S.W. 2d 87 (Tex. App.-San Antonio 1995, writ ref'd)(res judicata applies to voluntarily withdrawn claims when withdrawn with prejudice); Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. App.- San Antonio 1994, writ ref'd)(assignment of legal malpractice claim invalid); Conaway v. Lopez, 880 S.W. 2d 448 (Tex App.- Austin 1994, writ ref'd)(when a defendant's Monday appearance day is a legal holiday, Tex. R. Civ. P. 4 extends the deadline to the end of the next day that is not a Saturday, Sunday, or legal holiday); Milam v. Miller, 891 S.W. 2d 1 (Tex. App.-Amarillo 1994, writ ref'd)(answer timely filed under mail box rule); Danesh v. Houston Health Clubs, 859 S.W. 2d 535 (Tex. App.- Houston [1st Dist.] 1993, writ ref'd) (petition timely filed under mail box rule); Soto v. First Gibralter Bank, 868 S.W. 2d 400 (Tex. App.- San Antonio 1993, writ ref'd)(bank can offset funds in a revocable, nontestamentary trust account against a debt the settlor-trustee owes bank); Bergenson v. Hartford Ins. Co., 845 S.W. 2d 374 (Tex. App.- Houston [1st Dist.] 1992, writ ref'd)(insured could not "stack" underinsured motorist and liability provisions of policy); Styers v. Harris County, 838 S.W.2d 955 (Tex. App.- Houston [14th Dist.] 1992, writ ref'd)(statute of repose does not extend the two-year statute of limitations).

Because a "writ refused" opinion is as authoritative as a supreme court opinion, it takes the supreme court to overrule it. The Austin Court of Appeals has noted that any reexamination of an issue in a "refused" opinion lies solely within the province of the Texas Supreme Court. San Diego I. S. D. v. Central Educ. Agency, 704 S.W.2d 912, 915 (Tex. App.- Austin 1986, writ ref'd n. r. e.).

A 1993 decision by the San Antonio Court of Appeals provides a powerful example of the precedential effect of a "writ refused" case. '21' Int'l Holdings, Inc. v. Westinghouse Elec. Corp., 856 S.W.2d 479, 484 (Tex. App.- San Antonio 1993, no writ). The issue on appeal was whether the doctrine of forum non conveniens applies where a foreign corporation had a permit to conduct business in Texas. Id. at 480. The court of appeals was constrained by a 1941 "writ ref'd" case that had held that foreign corporations having a permit to do business in Texas had a statutory right to sue another foreign corporation having a permit to do business in Texas. H. Rouw Co. v. Railway Exp. Agency, 154 S.W.2d 143 (Tex. Civ. App.- El Paso 1941, writ ref'd). The court had no choice but to follow Rouw; it noted that the power to abrogate that decision was within the power of the supreme court or the legislature. 21' Int'l Holdings, Inc. v. Westinghouse Elec. Corp., 856 S.W.2d at 484.

Justice Peeples, in a concurring opinion, stated that "this panel has reluctantly followed a poorly reasoned but binding precedent." Id. at 485. He explained,

"I agree that Rouw cannot be honestly distinguished and it has the status of a 1941 opinion by the supreme court itself . . . Because this panel takes seriously its duty to follow binding precedent and is unwilling to engage in a unabashed sophistry to avoid Rouw, we must reverse the forum non conveniens dismissal." Id. at 485. Justice Peeples concluded, "This intermediate court is obligated to follow supreme court precedents, but the Texas Supreme Court is not so restricted. I urge the court to reexamine Rouw and disapprove it. The legislature did not compel the result in Rouw, and if it remains the law in Texas, we will not be only the courthouse for the world but the laughing stock of the legal world as well." Id. at 486. The Texas Supreme Court has since overruled Rouw. In re Smith Barney, 975 S.W.2d at 598.
Somewhat paradoxically, the Texas Supreme Court has shown a greater awareness of the meaning of the "ref'd" notation as it has progressively moved to discretionary jurisdiction. After the San Antonio Court of Appeals held that "an assignment of a legal malpractice action arising from litigation is invalid," the Texas Supreme Court refused the writ of error. Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. App.- San Antonio 1994, writ ref'd). The supreme court recently discussed the Zuniga opinion as if it was a supreme court opinion; its lengthy discussion of the case was punctuated by such phrases as "we considered," "we observed," "we acknowledged," "we concluded," and "we held." State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 707-708 (Tex. 1996).

At other times, the Texas Supreme Court and the courts of appeals have not shown such a keen awareness of the meaning of a "refused" notation. For example, the supreme court once dismissed a petitioner's argument because it was merely supported by "a series of court of appeals opinions." Keetch v. Kroger, 845 S.W.2d 262, 265 (Tex. 1992). The ten "court of appeals opinions" included Sherwood v. Medical & Surgical Group, Inc., 334 S.W.2d 520 (Tex. Civ. App.- Waco 1960, writ ref'd). That case was not just another court of appeals opinion.

The Dallas Court of Appeals did not follow a "writ refused" opinion because it thought the case was wrongly decided, and apparently didn't notice that it was a "refused" case. OKC Corp. v. UPG, Inc., 798 S.W.2d 300, 308 (Tex. App.-Dallas 1990, writ denied). UPG had argued in a cross-point that it was entitled to prejudgment interest compounded on a daily basis and cited City of Houston v. Wolfe, 712 S.W.2d 228 (Tex. App.-Houston [14th Dist.] 1986, writ ref'd) for that proposition. The court of appeals stated, "UPG's reliance upon Wolfe is almost as misguided as is the Wolfe court's interpretation of Cavnar." Id. According to the Dallas court, the Wolfe court had contravened the language of Cavnar and had contravened the applicable statutes. Id. The Dallas court wouldn't have anything to do with this misguided decision.

Three years later, the Dallas Court of Appeals noticed its mistake in OKC and overruled it. Spangler v. Jones, 861 S.W.2d 392, 399 n. 3 (Tex. App.- Dallas 1993, writ denied)(en banc). It noted: "By designating the petition for writ of error "Refused," the supreme court adopted the court of appeals opinion as its own . . . . Thus, although we were free to criticize or distinguish Wolfe, we were not free to reject it any more than we could reject any opinion issued by the supreme court." Id. (citations omitted).

The Zuniga case itself provides vivid examples of the courts of appeals not fully appreciating the significance of a "refused" notation. For example, the Dallas Court of Appeals, one year after Zuniga was writ refused, stated, "Because we agree with . . . the reasoning set forth in Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. App.- San Antonio 1994, writ ref'd), we hold that legal malpractice claims are not assignable." City of Garland v. Booth, 895 S.W.2d 766, 769 (Tex. App.- Dallas 1995, writ denied). The Dallas court overlooked the obvious: it didn't matter whether or not it agreed with Zuniga's reasoning, because it was bound to follow Zuniga. The Fort Worth Court of Appeals similarly erred. In discussing the survivability of a legal malpractice claim, the court stated, "We agree with Zuniga in that a legal malpractice claim is not assignable; however, although a cause of action must survive to be assignable, not every action that survives is assignable." Traver v. State Farm Mutual Automobile Ins. Co., 930 S.W.2d 862, 871 (Tex. App.- Fort Worth 1996), rev'd on other grounds, 980 S.W.2d 625 (Tex. 1998). Two cases from the Fourteenth Court of Appeals that explicitly noted Zuniga's "refused" status also stated their "agreement" with its reasoning. Izen v. Nichols, 944 S.W.2d 683, 684 (Tex. App.- Houston [14th Dist.] 1997, no pet.); McLaughlin v. Martin, 940
S.W.2d 261, 262 (Tex. App.- Houston [14th Dist.] 1997, no pet.). In Izen, the Fourteenth Court of Appeals said it had "adopted" the Zuniga holding in McLaughlin. Izen v. Nichols, 944 S.W.2d at 684. The Fourteenth Court of Appeals did not "adopt" the holding in Zuniga; it was an opinion that the Fourteenth Court of Appeals was duty-bound to follow. In all these cases, the courts followed Zuniga, but it isn't immediately obvious that they realized they had to.

The key to using "refused" cases is finding them. There are several ways to get a case's writ or petition history. The easiest method is to use West's Subsequent History Tables. In 1984 an article appeared in the Texas Bar Journal that questioned whether West wrote the right writs. Jim Paulsen et al., Does West Write the Right Writs?, 47 Tex. B. J. 1260 (Nov. 1984). The answer in 1984 was that the Writ of Error Table contained too many errors. West's Subsequent History Table now appears to get the right writs.

Every year tens of thousands of cases are cited by Texas appellate courts. Because of inevitable mistakes, you cannot depend on courts getting the correct writ or petition history for every case cited in their opinions. While researching this article I discovered a number of mistakes in writ histories in both published and unpublished opinions. I ran one Westlaw search that found 47 "writ ref'd" notations in opinions issued in 1998; twelve of the notations were wrong. Fortunately, the most common error is relatively harmless: courts giving "writ ref'd" notations to criminal "pet. ref'd" cases. Other errors could cause real problems for any lawyer or judge who didn't double-check the notations. For example, I also have found courts downgrading the status of cases from "refused" to "denied." See, e.g., Burton v. State Farm Mutual Automobile Ins. Co., 869 F. Supp. 480, 487 (S.D. Tex. 1994); (Bergensen v. Hartford Ins. Co., 845 S.W.2d 374 (Tex. App.- Houston [1st Dist.] 1992, writ ref'd) cited as "writ denied").

In other instances, "no writ" cases were elevated to "ref'd" status. In Holstein v. Federal Debt Management, Inc., 902 S.W.2d 31, 36 n.1 (Tex. App.- Houston [1st Dist.] 1994, no writ), two "no writ" cases were cited as "refused." While these notations were not correct, they were close. The two cited cases -Newman v. Broadus, 847 S.W.2d 249 (Tex. App.- Corpus Christi 1992, no writ) and Bado Equip. Co. v. Bethlehem Steel Corp., 814 S.W.2d 464 (Tex. App.- Houston [14th Dist.] 1991, no writ)- apparently were given the notation in the Subsequent History Table that was closest to where these "no writ" cases would have appeared if they had a writ notation. Thus, the "ref'd" notation for 847 S.W.2d 251 was given to 847 S.W.2d 249 and the "ref'd" notation for 814 S.W.2d 462 was given to 814 S.W.2d 464.

I have found other instances of the "neighborhood" system of writ notations. See, e.g., Bless Your Heart, Inc. v. Jyrah, No. C14-92- 01239-CV, 1993 WL 393799, at *2 (Tex. App.- Houston [14th Dist.] Oct. 7, 1993, writ denied) (the "no writ" case at 784 S.W.2d 708 given the nearby "ref'd" notation from 784 S.W.2d 711); Lyle v. Hart, No. 05-93-00447-CV, 1993 WL 319415, at *6 (Tex. App.- Dallas Aug. 16, 1993, writ dism'd by agr.) (the "no writ" case at 750 S.W.2d 5 given the "ref'd" notation from 750 S.W.2d 6). In another opinion, a "writ denied per curiam" was replaced by a "ref'd" notation, and the supreme court opinion denying the writ was missed. Prudential Ins. Co. v. Jefferson Assoc., 839 S.W.2d 866, 872 (Tex. App.- Austin 1992 ), rev'd, 896 S.W.2d 156 (Tex. 1995) (incorrectly citing Autohaus, Inc. v. Aguiler, 794 S.W.2d 459 (Tex. App.- Dallas 1990), writ denied per curiam, 800 S.W.2d 853 (Tex. 1991)).

Lawyers need to keep the meaning of writ notations in mind when researching Texas cases. If you cite to a court of appeals an opinion that was "refused" by the supreme court, you probably need to drop a footnote that explains what a "ref'd" notation means. You could quote the language from rule 56.1 that explains that "the court of appeal's opinion in the case has the
same precedential value as an opinion of the Supreme Court." Tex. R. App. P. 56.1(c). A court overlooking the significance of a "refused" case is the fault of the party who cites the case.

C. Refused N. R. E.

"N.r.e." stands for "no reversible error." "N.r.e." is not an abbreviation for "never read the evidence" or "no reasonable excuse." The "writ ref'd n.r.e." notation is the subject of an excellent law review article by former supreme court justice Ted. Z. Robertson and Jim Paulsen, Rethinking the Texas Writ of Error System, 17 Tex. Tech. L. Rev. 1(1986). Like the post-1927 "refused," the notation "refused n.r.e." also is a statement on the merits of the appeal and lends precedential weight to the court of appeals' opinion. Id. at 3. The supreme court was to deny the writ of error application "Refused, No Reversible Error" in all cases "where the Supreme Court is not satisfied that the opinion of the Court of Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal." Tex. R. Civ. P. 483 (repealed). Unfortunately, the significance of a "n.r.e." is seldom clear. Ted Z. Robertson & James W. Paulsen, The Meaning (If Any) of an "N.R.E.," 48 Tex. Bar J. 1307, 1308 (Dec. 1985).

Courts have recognized that 'an 'n.r.e.' stamp is in every sense a decision on the merits of the appeal, and it can have great influence upon whether a court of appeals decision is later cited as authority and followed." Wylie I.S.D. v. TMC Found., Inc., 770 S.W.2d 19, 22 (Tex. App. - Dallas 1989, writ dism'd).

At the very least, the supreme court found that no error was presented in the application for writ of error. Robertson & Paulsen, The Meaning (If Any) of an "N.R.E.," 48 Tex. Bar J. at 1308. If the "n.r.e." notation means that no error was presented in the application, then the key to a case's precedential significance lies in the application. Some courts have studied the writ of error application to decide whether a particular holding had been approved by the supreme court with its "n.r.e." stamp. See, e.g., Wylie I.S.D. v. TMC Found., 770 S.W.2d at 22.

Several other notations are roughly similar to the "no reversible error" notation. The original "writ refused" meant that the supreme court approved the result, but not necessarily the reasoning of the court of civil appeals. The "writ refused, want of merit" case is not controlling authority. Texas & Pac. Ry. v. Wood, 211 S.W.2d 321, 322 (Tex. Civ. App. - El Paso 1948, writ ref'd n.r.e.). A "w.o.m." notation meant the supreme court was not satisfied that the opinion of the court of civil appeals in all respects correctly declared the law, but the judgment of the court of civil appeals was correct. Id. at 322-23.

D. Denied

In 1988, the notation "denied" replaced "refused n.r.e." The new notation accommodated the supreme court's "newly acquired discretionary review powers." Elaine A. Carlson & Roland Garcia, Jr., The New Discretionary Review Powers of the Texas Supreme Court, 50 Tex. Bar J. 1201, 1201 (Dec. 1987). New language about the "importance to the jurisprudence of the state" was added to rule 133; this language signaled the addition of discretionary jurisdiction in the supreme court. Tex. R. App. P. 133(a)(repealed).

Two commentators predicted that "writ denied" would be analogous to a "cert. denied" case in the United States Supreme Court. Carlson & Garcia, The New Discretionary Review Powers of the Texas Supreme Court, 50 Tex. Bar J. at 1202. The Texas Supreme Court has not indicated whether that is true. In one case, the court noted that a denial of writ "is no indication
that this court approved the opinion of the court of appeals." Matthews Constr. Co. v. Rosen, 796 S.W.2d 692, 694 n.2 (Tex. 1990). The San Antonio Court of Appeals recently noted that "the court's denial of an application for a writ of error does not necessarily reflect the court's approval or even its consideration of the merits of the case." Alamo Community College Dist. v. Obayashi Corp., 980 S.W.2d 745, 749 (Tex. App.-San Antonio 1998, pet. denied). That court also has noted that the "writ denied" notation should not be give a res judicata effect on any dicta in that "writ denied" opinion. In re Estate of Chavana, 993 S.W. 2d 311, 316 (Tex. App. - San Antonio 1999, no pet. h.).

E. Per Curiam Opinions on Applications and Petitions

Although the point of the Texas system of writ notations was to eliminate the need for the supreme court to write opinions about cases that were not granted review, the court nonetheless has written opinions even when it did not grant review. Counsel should pay special attention to these per curiam opinions that may affect the precedential value of the court of appeals opinions. The supreme court has written three kinds of per curiam opinions on the application or petition: (1) opinions expressing disapproval of a specific holding in the court of appeals opinion; (2) opinions expressing approval of a particular portion of the opinion; and, (3) opinions expressly reserving issues. On rare occasions, the supreme court has expressly approved the holding of a court of appeals opinion without a "writ refused" notation. In City of Dallas v. Holcomb, 383 S.W.2d 585, 586 (Tex. 1964), the court in a per curiam opinion "n.r.e.'d" the writ of error, but expressly approved the holding of the court of civil appeals that the trial court erred in refusing full cross-examination. More frequently, the court has expressly disapproved either language or a specific holding in the court of appeals opinion while rejecting the application. For example, in Louder v. DeLeon, 754 S.W.2d 148, 149 (Tex. 1988) (per curiam), the court disapproved the court of appeals' pronouncements about Tex. R. Evid. 704, but denied the application because the court of appeals' judgment could be sustained under another point.

While per curiam opinions that expressly approve or disapprove court of appeals opinions affect precedential weight, opinions that merely reserve questions do not. The Austin Court of Appeals rejected the argument that its earlier holding was not controlling because the supreme court expressly had reserved the question when it noted "no reversible error." El Paso Elec. Co. v. Public Util. Comm'n, 727 S.W.2d 283, 287 (Tex. App. - Austin 1987, no writ). The "n.r.e." notation still meant that the supreme court neither approved nor disapproved of the holding; the reservation "only points to the part of our opinion which remained open to question in the Supreme Court's view." Id. In a footnote, the court of appeals said, "'Reserving' the question only causes the parties to argue the effect of that reservation and to waste time speculating about what the Supreme Court might hold were it forced to write an opinion on the issue. The effect of the notation on the writ is unchanged by such a practice." Id. at 287 n. 6.

IV. PUBLICATION AND VACATUR

A. Publication

Only published cases are precedential in Texas state courts; opinions not designated for publication "have no precedential value." Tex. R. App. P. 47.7. This sensible rule differs from the odd Fifth Circuit local rule that provides that unpublished opinions issued before January 1, 1996 are "precedent," and unpublished opinions issued after that date may be persuasive but are not

Rule 47.7 establishes standards for publication. It says that an opinion should be published only if it:

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.

Tex. R. App. P. 47.7.

The courts of appeals publish relatively few opinions. In fiscal year 1998, the courts published only 1,986 out of 11,457 opinions (17.3%). Texas Judicial System Annual Report Fiscal Year 1998, at 91-92 (1999). In fiscal year 1997, the courts also published less than twenty percent of their opinions. Texas Judicial Council, Texas Judicial System Annual Report Fiscal Year 1997, at 123 (1997). The publication rates of the individual courts of appeals vary: in the last two fiscal years, the San Antonio Court of Appeals has published about one-third of its opinions, while the Dallas Court of Appeals has published less than six percent of its opinions.

The supreme court clarified the rule on citing unpublished cases in the 1997 appellate rules. The former rule said that "unpublished opinions shall not be cited as authority by counsel or a court." Tex. R. App. P. 90(i)(repealed). This language raised some questions about the status of cases that had been ordered published but had not yet been reported. 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. Rev. 115, 130-132 (1992). The First Court of Appeals sensibly held that former rule 90(i) only prohibited citation to opinions not designated for publication. The court reasoned that the rule did not prohibit citation to opinions designated for publication until actual publication because private publishers would then have the power to decide what the common law of Texas is. Bloch v. Dowell Schlumberger, Inc., 925 S.W.2d 301, 303-304 (Tex. App.- Houston [1st Dist.] 1996, no writ). New Rule 47.7 says, "Opinions not designated for publication have no precedential value and must not be cited as authority by counsel or by a court." Tex. R. App. P. 47.7 (emphasis added). A withdrawn opinion has no precedential value. Frizzell v. Cook, 790 S.W.2d 41, 43 (Tex. App.-San Antonio 1990, writ denied).


Some lawyers believe that because the rule only prohibits citing an unpublished case as
"authority," an unpublished case can be used when it isn't cited as "authority." This type of argument is the kind of thing that gives disingenuousness a bad name. Moreover, the Austin Court of Appeals has noted that if unpublished cases are cited as something other than "authority," then "they constitute facts outside the record." Carlisle v. Philip Morris, Inc., 805 S.W.2d at 501.

Although the rule prohibits the citing of unpublished opinion by either court or counsel, it is not clear what remedy a party has against a court that considers unpublished authority. The Beaumont Court of Appeals recently cited an unpublished portion of one of its opinions as "authority" for the proposition that a court of appeals cannot conduct an evidentiary review for an individual item of damages where the jury question asked for a total amount for all elements of damages. See Wal-Mart Stores, Inc. v. Ard, 991 S.W.2d 518, 520-21 (Tex. App.- Beaumont 1999, no pet. h.). A complaint based on the trial court's consideration of unpublished authority will likely go nowhere. If a court of appeals can presume that a trial judge doesn't consider inadmissible evidence in a bench trial, it should be able to presume that a trial judge would not consider unpublished cases. See Merrill Lynch, Pierce, Fenner & Smith, Inc., v. McCollum, 666 S.W.2d 604, 609 (Tex. App. - Houston [14th Dist.] 1984, writ ref'd n.r.e.) (no evidence that trial judge considered unpublished cases).

There are some twists to the rule. An unpublished prior opinion can be used as the "law of the case" in a subsequent appeal, which the court of appeals can judicially notice. Sledge v. Mullin, 927 S.W.2d 89, 93 (Tex. App.- Fort Worth 1996, no writ).

B. Vacatur


Courts have responded to the problem of buying precedent by limiting the use of vacatur. The Texas Supreme Court in 1993 refused to vacate a court of appeals' opinion and judgment as part of a settlement. Houston Cable TV, Inc. v. Inwood West Civic Ass'n, 860 S.W.2d 72, 73 (Tex. 1993). The court held that "a settlement does not automatically require the vacating of a court of appeals' opinion." Id. The court reasoned, "Our courts are endowed with a public purpose- they do not sit merely as private tribunals to resolve private disputes. While settlement is to be encouraged, a private agreement between litigants should not operate to vacate a court's writing on matters of public importance." Id. If a case settles while pending in the supreme court, the petition for review will be granted and the case will be remanded to the trial court for entry of a judgment. Id. The precedential authority of the (unvacated) court of appeals opinion is equivalent to a "writ dismissed" case. Id.; see also Employers Cas. Co. v. Texas Attorney General, 878 S.W.2d 285, 288 n.2 (Tex. App. -Corpus Christi 1997, no writ).

The supreme court codified Inwood in the new appellate rules. Rule 56.3 says, "In any event, the Supreme Court's order does not vacate the court of appeals' opinion unless the order specifically provides otherwise. An agreement or motion cannot be conditioned on vacating the

V. PRECEDENTIAL AUTHORITY OF LOWER TEXAS COURTS

A. Texas Commission of Appeals

The Texas Commission of Appeals existed from 1918 until 1945. The Texas Supreme Court could (1) adopt the commission's opinion, (2) approve the holding, or (3) approve the judgment. The precedential authority of a commission of appeals opinion depends upon which action the supreme court took. Graves v. Diehl, 958 S.W.2d 468, 471 (Tex. App. - Houston [14th Dist.] 1997, no pet.). Commission opinions adopted by the Texas Supreme Court are given the same force, weight, and effect as supreme court opinions. Cadle Co. v. Butler, 951 S.W.2d 901, 911 (Tex. App.- Corpus Christi 1997, no pet.). If the supreme court approved the holding or adopted the judgment, the precedential value is limited. Graves v. Diehl, 958 S.W.2d at 471. The Texas Supreme Court explained:

There are, however, a great many opinions of the commission which appear in the Southwestern Reporter that were not adopted or approved by the Supreme Court. These opinions are not binding on the court in the same sense that the approved and adopted opinions are, but they are given great weight by us, and the courts of civil appeals and all lower courts should feel constrained to follow them, until they are overruled by the Supreme Court. Of course, where an unapproved opinion of the commission is in conflict with an opinion of the Supreme Court, or with an approved or adopted opinion of the commission, the unapproved opinion of the commission should yield to the opinion of the court, or to the approved or adopted opinion of the commission, as the case may be.


B. Panel Decisions

One of the easiest principles to find in federal circuit court opinions is that subsequent panels are bound by an earlier panel decision unless that earlier panel decision is overturned en banc. Literally hundreds of federal cases can be found in the West Digests under key number 90 of the topic "Courts" expressing this notion of intra-circuit stare decisis. The West editors, however, have yet to find any Texas courts of appeals expressing the same principle; there are no court of appeals cases under that key number in the Texas Digest. The courts of appeals apparently believe that one panel is bound by a prior panel's opinion because they do go en banc to reverse panel decisions. See, e.g., Davis v. Covert, 983 S.W.2d 301(Tex. App. - Houston [1st Dist.] 1998, pet. dism'd. w.o.j.) (en banc); Spangler v. Jones, 861 S.W. 2d 392, 399 n. 3 (Tex. App. - Dallas 1993, writ denied)(en banc). The supreme court has stated, "Unless a court of appeals chooses to hear a case en banc, the decision of a panel constitutes the decision of the

C. Decisions of Coordinate Courts


D. Problems with Transferred Appeals


The question of which cases were binding in a transferred case was first addressed by the San Antonio Court of Appeals. American Nat'l Ins. Co. v. International Bus. Mach. Corp., 933 S.W. 2d 685 (Tex. App. - San Antonio 1996, writ denied). After summary judgment was granted in the Galveston County district court, the case was appealed to the First Court of Appeals. It was subsequently transferred to the San Antonio Court of Appeals. If the case had remained in the First Court of Appeals, the summary judgment would have been affirmed under First Court precedent. The San Antonio court affirmed in part and reversed in part. Justice Sarah Duncan argued in a concurring and dissenting opinion that the San Antonio court should have affirmed the summary judgment based on the law of the transferring court. Id. at 689. Justice Duncan presented the appeal as "a conflict of laws issue between the law of the two coordinate courts." Id. The majority did not accept that approach, holding that it was not bound by the precedent of the transferring court of appeals. The court reasoned that "the State of Texas has but one law on any given subject." Id. at 688. If "differences of opinion" exist between the courts of appeals, the supreme court could resolve those conflicts. Id. Three other courts of appeals have adopted the approach taken by the San Antonio court. See Wesley v. State, No. 10-98-182-CR, 1999 WL 564093 (Tex. App.-Waco, Aug. 4, 1999, no pet. h.); McLendon v. Texas Dep't. of Public Safety, 985 S.W.2d 571, 576 n.6 (Tex. App.- Waco 1998, pet. filed); Smith v. State, No. 13-97-512-CR, 1999 WL 499789 (Tex. App.- Corpus Christi, July 15, 1999, no pet. h.); Perez v. Murff, 972 S.W. 2d 78, 85 (Tex. App.- Texarkana 1998, no pet. h.)(op. on reh'g). In the Texarkana case, after the court of appeals reversed a directed verdict, the appellants complained that the court had not followed a Fort Worth Court of Appeals opinion. Perez v. Murff, 972 S.W. 2d at 85. The appellants asserted that the Texarkana court should have followed the holdings of the Fort Worth court because the case had been transferred from the Fort Worth Court of Appeals. The Texarkana court rejected this argument, concluding "if a conflict exists between our decision and the stare decisis of the Fort Worth court, it is for the Texas Supreme Court to resolve." Id. at 86.

The approach taken by these courts rests upon a idealized notion that "the State of Texas
has but one law on any given subject." This notion is not supported in the real world, where conflicts between courts of appeals abound. See Cynthia K. Timms, Different Takes at State Courts of Appeals, Texas Lawyer (July 28, 1997). It also assumes that the supreme court takes seriously its role in resolving conflicts between the courts of appeals.

VI. FEDERAL AUTHORITY IN STATE COURTS

The only opinions from a federal court that are binding precedent to a state court are United States Supreme Court opinions. J. M. Huber Corp. v. Santa Fe Energy Resources, Inc., 871 S.W.2d 842, 846 (Tex. App.-Houston [14th Dist.] 1988, no writ); Barstow v. State, 742 S.W.2d 495, 501 n.2 (Tex. App.- Austin 1987, writ denied). As the Barstow court noted, "On questions of federal law such as the proper interpretation of a federal statute all courts in every state owe obedience to the Supreme Court of the United States." Id. The Texas Supreme Court has noted that when it decides issues of federal law, it has "the unique role - as a court of last resort on all other issues within our jurisdiction -of an intermediate appellate court, anticipating the manner in which the United States Supreme Court would decide the issue presented." City of Lancaster v. Chambers, 883 S.W.2d 650, 658 (Tex. 1994).

The decisions from federal courts of appeals and district courts are not binding on state courts. State courts are not bound by lower federal courts even when a federal question is involved. Mitchell v. Amarillo Hosp. Dist., 855 S.W.2d 857, 864 (Tex. App.-Amarillo 1993, writ denied). The Austin Court of Appeals explained,

[I]n creating the various United States Courts of Appeals, Congress limited their jurisdiction to appeals taken from the final decisions of federal district courts. . . . Consequently, the decisions of one federal Court of Appeals on a question of law do not bind any other federal Court of Appeals under the doctrine of stare decisis. Nor do they bind any Texas court, even on federal questions, although they are of course received with respectful consideration. While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, since the state court owes obedience to only one federal court, namely, the Supreme Court. Barstow v. State, 742 S.W.2d at 501 n.2.

Fifth Circuit precedent is not binding on state courts merely because Texas is within the geographical limits of the Fifth Circuit. Id. at 501. Texas courts, however, generally pay "particular attention" to Fifth Circuit precedent. Newth v. Adjutant General's Dept', 883 S.W.2d 356, 359 (Tex. App.-Austin 1994, writ denied). This attention does not guarantee that the Texas court will follow the Fifth Circuit's lead. The Texas Supreme Court recently reversed the Beaumont Court of Appeals because it had "looked only to the sole Fifth Circuit precedent on the precise issue" of whether punitive damages are available in an unseaworthiness action brought under general maritime law. Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993). The supreme court faulted the court of appeals for overlooking the implications of a United States Supreme Court case and the "weight of intervening federal court decisions from other jurisdictions." Id. The supreme court explained:

We disagree with both the court of appeals' result and what appears to be the methodology that led it to that result. The court of appeals' discussion of Merry Shipping [650 F.2d 622 (5th Cir.
and its cursory dismissal of contrary federal precedent from other jurisdictions suggests that the court felt bound by the pronouncements of the Fifth Circuit on federal law issues. This is not the case. While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are obligated to follow only higher Texas courts and the United States Supreme Court. Id.

Texas courts do pay close attention to federal decisions when the Texas statute or rule is based upon a federal one. As the Dallas Court of Appeals noted, "When the legislature adopts a state or federal statute from another jurisdiction, it is presumed the legislature intended to adopt the construction of that statute given by the courts of that jurisdiction." City of Garland v. Dallas Morning News, 969 S.W.2d 548, 556-57 (Tex. App.- Dallas 1998, pet. granted). For example, Texas courts consider Federal decisions construing the Freedom of Information Act to be instructive in interpreting our Open Records Act. Id.


Federal cases are also used to interpret Texas rules based on federal ones. Federal cases interpreting the Federal Rules of Evidence generally are persuasive in the interpretation of the state rules. Beavers v. Northrop Worldwide Aircraft Serv., Inc., 821 S.W.2d 669, 674 (Tex. App.-Amarillo 1991, writ denied). Texas courts have relied on federal case law when interpreting the Texas rule governing class actions. The Fort Worth Court of Appeals has noted that Tex. R. Civ. P. 42 "is patterned after the federal class action rule and, therefore, reference to federal case law is appropriate." Adams v. Reagan, 791 S.W.2d 284, 287 (Tex. App.-Fort Worth 1990, no writ); see also RSR Corp. v. Hayes, 673 S.W.2d 928, 931-32 (Tex. App.-Dallas 1984, writ dism'd w.o.j.).

Texas courts already have begun to rely on federal case law to interpret the new no-evidence summary judgment rule. See Moore v. K Mart Corp., 981 S.W.2d 266, 269 (Tex. App.-San Antonio 1998, pet. denied). The extent to which federal cases are instructive is arguable; Timothy Patton believes that the new no-evidence summary judgment rule "does not represent a wholesale adoption of federal Rule 56 and cases construing the federal rule." Timothy Patton, Summary Judgments in Texas 19-27 (2d ed. 1998 Supp.).

VII. PERSUASIVE AUTHORITY

A. Texas Pattern Jury Charges

The Texas Pattern Jury Charges are used as both a sword and a shield on appeal. Appellants sometimes will argue that the trial court committed charge error by not using PJC questions or instructions, and appellees will argue, in other cases, that the charge was proper because it was based on the PJC. See, e.g., Green Tree Financial Corp. v. Garcia, S.W.2d 776, 784 (Tex. App.-San Antonio 1999, no pet. h.)

The Texas Pattern Jury charges are not law, although, as the San Antonio Court of
Appeals has noted, they are "heavily relied upon by both bench and bar." H.E. Butt Grocery Store v. Bilotto, 928 S.W.2d 197 (Tex. App.- San Antonio 1996), aff'd, 985 S.W.2d 22 (Tex. 1998). The Dallas Court of Appeals has noted that "the Texas Pattern Jury Charges are nothing more than a guide to assist the trial courts in drafting their charges; they are not binding on the courts." Keetch v. Kroger Co., 845 S.W.2d 276, 281 (Tex. App.- Dallas 1990), aff'd, 845 S.W.2d 262 (Tex. 1992). Many of the pattern jury charges have been expressly adopted by the Texas Supreme Court. See, e.g., Texas Dept. of Human Resources v. E.B., 802 S.W.2d 647, 648 (Tex. 1990); Placencio v. Allied Indus. Int'l, Inc. 724 S.W.2d 20, 22 (Tex. 1987); Nicholes v. T.E.I.A., 692 S.W.2d 57, 58 (Tex. 1985)(per curiam); Acord v. General Motors Corp., 669 SW.2d 111, 115 (Tex. 1984); Select. Ins. Co. v. Boucher, 561 S.W.2d 474, 478 (Tex. 1978). In other cases, the supreme court has been more cryptic. In a footnote to a per curiam opinion, the court noted that it did not necessarily approve of the pattern jury charge on borrowed servant, but stated the charge was not "affirmatively incorrect." Exxon Corp. v. Perez, 842 S.W.2d 629, 630 n.1 (Tex. 1992) (per curiam). Courts of appeals also have expressly approved some of the pattern jury charges. Stoner v. Hudgins, 568 S.W.2d 898, 902 (Tex. Civ. App. - Fort Worth 1978, writ ref'd n.r.e.).

The use of the PJC does not necessarily make the charge bullet-proof. In rare cases, the Texas Supreme Court has disapproved of PJC instructions. In State v. Williams, the court disapproved of the use of the PJC instruction for premises liability where the plaintiff is a licensee. 940 S.W.2d 583, 584 (Tex. 1996). In Keetch v. Kroger Co., the court recommended different instructions to define negligence and ordinary care in a premises liability case. Keetch v. Kroger, 845 S.W.2d 262, 266-67 (Tex. 1992).

Nor is the trial court's failure to use PJC forms necessarily error. T.E.I.A. v. Critz, 604 S.W.2d 479, 482 (Tex. 1980). The Fort Worth Court of Appeals rejected the "unnecessarily rigid and impractical" argument that no additions to the Pattern Jury Charges are permitted. T.E.I.A. v. Duree, 798 S.W.2d 406, 413 (Tex. App.- Fort Worth 1990, writ denied). The Pattern Jury Charges are not an "exhaustive list of issues and instructions" appropriate for all cases. Id. If trial courts were limited to the Pattern Jury Charges, then "they would remain silent" in cases where there is no appropriate pattern charge and would thus fail to carry out the mandate of Tex. R. Civ. P. 277. Id. The Fort Worth Court of Appeals rejected the argument that the trial court's refusal to submit a requested instruction copied from the pattern jury charges was error. Ishin Speed Sport, Inc. v. Rutherford, 933 S.W.2d 343, 349 (Tex. App.- Fort Worth 1996, no writ). The court noted that for some causes of action, the supreme court expressly has approved of the Pattern Jury Charge and has disapproved of adding any other instructions in those actions, no matter how correctly they may state the law. Id. In all other cases, however, the forms in the Texas Pattern Jury Charges are "only a guide to assist a trial court in drafting its charge, and those forms do not bind the court." Id. In DeLeon v. Pickens, the Corpus Christi Court of Appeals rejected a similar argument that the trial court's instruction was erroneous because it deviated from the PJC form. 933 S.W.2d 286, 292 (Tex. App.- Corpus Christi 1996, writ denied). The court noted that PJC 3.02 had not been specifically adopted by either the Texas Supreme Court or the Corpus Christi court. Id. While recognizing that "the pattern jury charge is a useful tool to aid practitioners and judges," the court did not presume that any variation from the PJC form "necessarily constitutes error." The standard of review for charge error remains whether "the submitted instruction was a misstatement of the law as applied to the facts." Id.
B. Dictionaries

Appellate courts love dictionaries. One commentator has noted that "more and more disputes about the meaning of statutes are greeted with citations to dictionaries." A. Raymond Randolph, Dictionaries, Plain Meaning, and Context in Statutory Interpretation, 17 Harv. J. L. & Pub. Pol'y 71, 71 (1994). Studies have shown that use of dictionaries in United States Supreme Court opinions has increased. Samuel A. Thumma & Jeffrey L. Kirchmeier, The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries, 47 Buff. L. Rev. 227, 231 (1999); Note, Looking it Up: Dictionaries and Statutory Interpretation, 107 Harv. L. Rev. 1437, 1438-39 (1994). Texas appellate courts also appear to have increased their reliance on dictionaries in their opinions. There were 25 citations to dictionaries in 1968 and 143 citations in 1998. This increased reliance on dictionaries is tied to a shift toward textualism in statutory interpretation. Ellen P. Aprill, The Law of the Word: Dictionary Shopping in the Supreme Court, 30 Ariz. St. L. J. 275, 278-80 (1998).


One commentator has noted that "one of the most significant flaws of dictionaries as interpretive tools is the imperfect relationship of dictionaries to statutory context." Note, Looking it Up, 107 Harv. L. Rev. at 1449. As my colleague Jim Paulsen has explained, a dictionary by its very nature must remove words from context, but the meaning of words sometimes cannot be understood except in the context in which the words were used. James W. Paulsen, Family Law: Parent and Child, 51 SMU L. Rev. 1087, 1104 (1998). A dictionary cannot capture the "particular historical and textual framework of a statutory term." Note, Looking it Up, 107 Harv. L. Rev. at 1449.

There is also a danger of "dueling dictionaries." The courts' use of any particular dictionary appears to be haphazard. A recent court of appeals case interpreting whether a change in the Family Code was substantive or not depended on which dictionary was used to define the word "preceding." Paulsen, Family Law: Parent and Child, 51 SMU L. Rev. at 1104. Courts, however, do not explain why they picked a particular dictionary or a particular definition:

There are a wide variety of dictionaries from which to choose, and all of them usually provide several entries for each word. The selection of a particular dictionary and a particular definition is not obvious and must be defended on some other grounds of suitability. This fact is particularly troubling for those who seek to use dictionaries to determine ordinary meaning. If multiple definitions are available, which one best fits the way an ordinary person would interpret the term?. . . Individual judges must make subjective decisions about which dictionary and which definition to use.

Note, Looking it Up, 107 Harv. L. Rev. at 1449.

The problematic nature of using dictionaries to settle questions of statutory interpretation...
has generally gone unnoticed by Texas courts. Texas courts routinely use Webster's Third New International Dictionary (over 350 citations) and Black's Law Dictionary (over 1200 citations) for statutory and contractual interpretation. For example, the Austin Court of Appeals relied on dictionaries to interpret the phrase "relating to litigation" in the litigation exception of the Open Records Act. University of Tex. Law School v. Texas Legal Found., 958 S.W.2d 479, 483 (Tex. App.-Austin 1997, no pet.). The Beaumont Court of Appeals relied on Webster's to decide whether a pollution exclusion applied to run-off of water contaminated by fire-fighting efforts. E & L Chipping Co. v. Hanover Ins. Co., 962 S.W.2d 272, 276 (Tex. App.-Beaumont 1998, no pet.).

The Austin Court of Appeals recently held that the existence of differing dictionary definitions did not prove that a term in an insurance policy was ambiguous. Gulf Metals Indus., Inc. v. Chicago Ins. Co., 993 S.W.2d 800, 805-806 (Tex. App.-Austin 1999, no pet. h.). The court's comments about the problems with using dictionaries is well worth quoting:

While dictionaries may be helpful to the extent they set forth the ordinary, usual meaning of words, they provide an inadequate test for ambiguity. To allow the existence of more than one dictionary definition to be the sine qua non of ambiguity would eliminate contextual analysis of contractual terms; any time a definition appeared in a dictionary of whatever credibility or usage, that definition could be said to be "reasonable" and thus render many, if not most, words ambiguous. Dictionaries define words in the abstract, while courts must determine the meaning of terms in a particular context, here a specific insurance policy. Dictionary definitions alone can therefore be accorded little weight in determining ambiguity. The fact that different people reading different dictionary definitions of the same word might reach different interpretations of that word does not make each reading and interpretation reasonable. We agree with those courts holding that such definitions provide no significant help in determining whether a term has two reasonable meanings.

Id.

C. Texas Supreme Court Advisory Committee Minutes

Courts are receptive to citations to the transcripts of Texas Supreme Court Advisory Committee meetings when appeals involve the interpretation of rules. The function of the committee is to consider complaints, suggestions, and proposed changes to rules; draft proposed amendments; and, forward its recommendations to the supreme court. Sarah B. Duncan, Rules Changes, in State Bar of Texas, Appellate Practice for Lawyers and Legal Assistants V-3 (1995). Transcripts of the meetings begin with the May 31, 1985 meeting. Lydia M. V. Brandt, Texas Legal Research 494 (1995). The transcripts are available at the State Law Library in Austin and are indexed by rule number. Id.

Courts have relied on the "legislative history" of the rules in at least twenty appeals. The San Antonio Court of Appeals recently used the minutes of the supreme court advisory committee to aid its decision that motions for rehearing under Tex. R. App. P. 19.1(b) included motions for reconsideration en banc. Yzaguirre v. Gonzalez, 989 S.W.2d 111, 112 (Tex. App.-San Antonio 1999, pet. denied). The Fourteenth Court of Appeals found that objections on factual insufficiency grounds to the submission of jury questions violated Tex. R. Civ. P. 279, relying on the discussion of the amended rule by the supreme court advisory committee. The court concluded, "Despite the clear language of the new rule, its legislative history demonstrates
unambiguously that no change was intended." Smith v. Christley, 755 S.W.2d 525, 528-29 (Tex. App.-Houston [14th Dist.] 1988, writ denied). The San Antonio Court of Appeals found that Tex. R. Civ. P. 200 required that party must give notice that its expert will attend the deposition of the opposing party's expert witness. Burrhus v. M & S Supply, Inc., 933 S.W.2d 635, 640 (Tex. App.- San Antonio 1996, writ denied). The court relied on both the plain language of the rule and the advisory committee transcripts. Id.

D. Texas Attorney General Opinions

The Attorney General of Texas has a constitutional duty to "give advice in writing to the Governor and other executive officers, when requested by them." Tex. Const. Art. 4, §22. Attorney General opinions are available on the Internet in a searchable database. See http://www.oag.state.tx.us.

Attorney General opinions are not binding on Texas courts. Commissioners Court of Titus County v. Agan, 940 S.W.2d 77, 82 (Tex. 1997); Holmes v. Morales, 924 S.W.2d 920, 924 (Tex. 1994). Courts will give "due consideration to attorney general opinions where appropriate." Southwest Texas State Univ. v. Enriquez, 971 S.W.2d 684, 687 (Tex. App.- Austin 1998, pet. denied).

E. Treatises, Law Review Articles, and CLE Papers

Texas courts often consider such treatises as Prosser and Keeton on Torts or Corbin on Contracts for statements on what the law is or what it should be. Texas courts have cited Corbin on Contracts at least 300 times. This treatise is given great deference. See, e.g., Truly v. Austin, 744 S.W.2d 934, 938 (Tex. 1988)("Professor Corbin's writing is instructive on this question."); Cantu v. Central Educ. Agency, 884 S.W.2d 565, 567 (Tex. App.- Austin 1994, no writ). Prosser and Keeton on Torts has been cited at least 50 times by Texas courts. While it is respected, it does not have the exalted status that Corbin on Contracts has. See e.g. Southwestern Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 494 (Tex. 1991); Salinas v. General Motors Corp., 857 S.W.2d 944, 948 (Tex. App.- Houston [1st Dist.] 1993, no writ).

The most-cited Texas legal treatise is McDonald's Texas Civil Practice, which has been cited over 2400 times by Texas courts. The number of citations to McDonald's has steadily declined in recent years. In 1973, Texas courts cited McDonald's 105 times; in 1978, 114 times. In 1983, McDonald's was cited 65 times; in 1988, 41 times. In 1993, McDonald's was cited only 24 times; last year, Texas courts cited McDonald's 30 times. Timothy Patton's work on Texas summary judgments has been cited at least 45 times in the last five years. See e.g. Thomas v. Bracey, 940 S.W.2d 340, 342 (Tex. App.- San Antonio 1997, no writ).

authors identified the ten articles published in each of three recent years that garnered the most judicial citations. These articles then were compared to the most cited articles in law reviews. The results were not surprising: courts and law professors do not appear to cite the same articles. What was somewhat surprising to the authors was the "Texas phenomenon": four of the 30 most-cited articles discussed principles of Texas law. The authors concluded "either that Texas courts cite law review articles more often than do courts in other states, or that they at least cite particular articles repeatedly." Id. at 886. The "heavy representation" of Texas articles was not merely a function of the number of reported Texas opinions; courts of other populous states such as New York or California did not generate articles for the most-cited lists. Id.

According to the Chicago-Kent article, the most cited Texas articles published in 1989-1991 were Judge David Hittner & Lynne Liberato, Summary Judgments in Texas, 20 St. Mary's L.J. 243 (1989); W. Wendell Hall, Standards of Appellate Review in Civil Appeals, 21 St. Mary's L.J. 865 (1990); Harold H. Bluff, Separation of Powers Under the Texas Constitution, 68 Tex. L. Rev. 1337 (1990); and, William Powers, Jr. & Jack Ratliff, Another Look at 'No Evidence' and 'Insufficient Evidence,' 69 Tex. L. Rev. 515 (1991). Both the Hall article on standards of review and the Hittner and Liberato article on summary judgment have been updated. W. Wendell Hall, Standards of Review in Texas, 29 St. Mary's L.J. 351 (1998); W. Wendell Hall, Revisiting Standards of Review in Civil Appeals, 24 St. Mary's L.J. 1045 (1993); Judge David Hittner & Lynne Liberato, Summary Judgments in Texas, 34 Hous L. Rev. 1303 (1998); Judge David Hittner & Lynne Liberato, Summary Judgments in Texas, 35 S. Tex. L. Rev. 9 (1994). The Powers and Ratliff article has been cited nearly 130 times by Texas courts. Hall's three articles on standards of review have been cited over 100 times, and Hittner and Liberato's three articles on summary judgments have been cited over 30 times.

Citations alone do not tell the story. Law review citations often appear to be ornamental. Some law review articles, however, do appear to have helped guide the court's reasoning. The most recent version of the Hittner and Liberato article will undoubtedly be used by courts to help sort out the no-evidence summary judgment rule; it already has been cited eight times. See, e.g., Jackson v. Fiesta Mart, Inc., 979 S.W.2d 68, 70 (Tex. App.-Austin 1998, no pet. h.) (motion under the no-evidence summary judgment rule is essentially one for a pretrial directed verdict).

The most-cited article is, of course, Robert W. Calvert's article on insufficient evidence and no-evidence points, which has been cited over 1000 times by Texas courts. Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 Tex. L. Rev. 361 (Tex. 1960). The influence of this seminal article appears to be waning, in part, because of the more recent Ratliff and Powers article. See William Powers, Jr. & Jack Ratliff, Another Look at 'No Evidence' and 'Insufficient Evidence,' 69 Tex. L. Rev. 515 (1991). The Calvert article was cited over 400 times by Texas courts in the 1980s, but has only been cited 256 times in the 1990s.

CLE papers should not be overlooked as sources for persuasive authority. (Recent papers are available for downloading at the State Bar Professional Development site; the site also has a searchable database. See http://www.texasbarcle.com.) As appellate courts have been facing the no-evidence summary judgment rule, a paper presented by Judge Hittner and Lynne Liberato at the 1997 Advanced Civil Trial Course has been cited nine times. See e.g. Milam v. National Ins. Crime Bureau, 989 S.W.2d 126, 130 (Tex. App.- San Antonio 1999, no pet. h.); Moritz v. Bueche, 980 S.W.2d 849, 853 (Tex. App. - San Antonio 1998, no pet.); Moore v. K Mart Corp., 981 S.W.2d 266, 269 (Tex. App. - San Antonio 1998, pet. denied).
F. Obiter Dictum


Obiter dictum should not be confused with judicial dictum. Judicial dictum is defined as "an opinion of the court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision." Id. One court defined judicial dictum as a statement "deliberately made for the guidance of the bench and bar upon a point of statutory construction not theretofore considered by the Supreme Court." Thomas v. Meyer, 168 S.W.2d 681, 685 (Tex. Civ. App.- San Antonio 1943, no writ). Courts consider judicial dictum binding. See Ex Parte Harrison, 741 S.W.2d 607, 609 (Tex. App.- Austin 1993, no writ).

Whether a particular statement is obiter dictum does not end the inquiry. A court still could be guided by dictum. The Beaumont Court of Appeals once noted that "if this holding is mere dicta or obiter dicta (as appellee's counsel maintains), it is pretty good plain, straight, clear dicta." Westchester Fire Ins. v. Lowe, 888 S.W.2d 243, 248 (Tex. App.- Beaumont 1994, no writ)(op. on reh'g). Recent decisions on whether comparative negligence applies in a non-subscriber case provide different judicial reactions to dictum. The Texas Supreme Court earlier had noted that "an injured employee pursuing the common law remedy must still prove that the employer was negligent and that he or she was not more than 50 percent negligent." Texas Worker's Compensation Comm'n v. Garcia, 893 S.W.2d 504, 521 (Tex. 1995). The Amarillo Court of Appeals rejected an injured employee's argument that this statement was dictum. The court reasoned that "the challenged proposition is a clear and carefully considered statement by the Supreme Court." Byrd v. Central Freight Lines, 976 S.W.2d 257, 260 (Tex. App.- Amarillo 1998), pet. denied per curiam, 992 S.W.2d 447 (Tex. 1999). Assuming that the statement from Garcia was dictum, the court would not "ignore, disregard or refuse to follow it." Id. Even if the statement was not a binding rule of law, it was "entitled to respect as a serious, carefully considered and carefully made comment "about an element of the worker's non-subscribed cause of action. Id.

When faced with the same sentence from Garcia, the Tyler Court of Appeals rejected it as "clearly dicta and noncontrolling." Kroger Co. v. Keng, 976 S.W.2d 882, 893 (Tex. App.-Tyler 1998, pet. filed); see also Brookshire Bros., Inc. v. Wagnon, 979 S.W.2d 343 (Tex. App.-Tyler 1998, pet. filed). The Tyler Court analyzed the supreme court's statement in Garcia and concluded that the court was "merely entertaining a fiction" by considering common-law remedies available to the injured worker without regard to the worker's compensation act. If its analysis was incorrect, then the statement in Garcia "was not essential to the outcome of the case, nor did comparative negligence constitute even a minor issue in that case." Id.

G. Restatements of the Law

Texas appellate courts have cited to the Restatements of the Law over 3900 times. Cited most often have been the Restatement of the Law of Torts (1900+ citations) and the Restatement of the Law of Contracts (650+ citations). See American Law Institute, Published Cases to the Restatements of the Law, http://www.ali.org/ali/AR99 cit1.htm. Citations to the various
Restatements appear to be increasing. Citations to the Restatements more than doubled (in absolute terms) from 1968 to 1998. Texas courts cited to the Restatements 52 times in 1968; 64 times in 1978; 67 times in 1988; and, 127 times in 1998.

Texas courts, on occasion, have expressly adopted a Restatement rule. See McKisson v. Sales Affiliates, Inc., S.W.2d 787, 788-89 (Tex. 1967). On other occasions, the courts have used the Restatement for a convenient summary of the common-law rule. See Hurlbut v. Gulf Atlantic Life Ins. Co., 749 S.W.2d 762, 766 (Tex. 1987). A citation to the Restatement doesn't mean that the court accepted the Restatement's position. The Texas Supreme Court recently refused to adopt Comment j of Restatement (Second) of Torts section 402A. Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328 (1998); see also Prather v. Brandt, 981 S.W.2d 801 (Tex. App.-Houston [1st Dist.] 1998, pet. denied)(Restatement rule on abnormally dangerous activities not adopted); Rodriguez v. Spencer, 902 S.W.2d 37, 42-43 (Tex. App.- Houston 1995, no writ)(Restatement rule on parental liability not adopted); DeLuna v. Guynes Printing Co., 884 S.W.2d 206, 209 (Tex. App.- Fort Worth 1994, writ denied)(Restatement rule on employer liability did not apply).

H. Legislative History

The Texas Legislature has directed state courts to consider legislative history. The Texas Government Code provides, "In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . .(3) legislative history. Tex. Gov't Code § 311.023 (Vernon 1988). Texas courts nonetheless favor a "plain meaning" approach, believing that "when the statutory language is clear and unambiguous, such extrinsic aids and rules of statutory construction are unnecessary and the statute should be given its plain meaning." Employers Cas. Ins. v. Dyess, 957 S.W.2d 884, 889 (Tex. App.- Amarillo 1997, pet. denied).

Despite this predilection toward the plain meaning approach, courts routinely cite legislative history. That's unfortunate because researching most Texas legislative history is a painstaking process. The Texas Legislative Reference Library has information on compiling legislative intent at its website. See http://www.lrl.state.tx.us/. The Court of Criminal Appeals also provided a guide to doing legislative history in an appendix to an opinion. See Dillehey v. State, 815 S.W.2d 623, 627 (Tex. Crim. App. 1991).


The bill analyses are the most-cited Texas legislative history materials. House committee reports include a bill analysis that provides background information and a statement of the bill's purpose. Brandt, Texas Legal Research at 338-39. Courts have relied on these bill analyses over 200 times. A recent example is the supreme court's opinion in Jones v. Fowler, 969 S. W.2d 429, 431-32 (Tex. 1998)(per curiam). The court reversed the court of appeals' holding that a change to the Family Code was substantive, finding "the flaw in the court of appeals' reasoning is revealed in the history and purpose of the two House Bills at issue." Id. The supreme court relied heavily on the bill analyses. The supreme court already has cited bill analyses in at least four 1999 opinions.