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03-AP-511

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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
1 Columbus Circle, NE
Washington, DC 20544

Re: Proposed Change to FRAP 32.1

Dear Mr. McCabe:

I am writing to express my opposition to the proposal to amend the Federal Rules of Appellate Procedure to permit citation to unpublished decisions of the appellate courts. I oppose the proposal for several reasons.

My first observation is that the courts generally chose to publish a decision for a reason - if the case presents new twists on the law, application of the law to new sets of facts, developments in the law, or is a case of public importance. By contrast, most cases that are not published tend to present nothing new or of precedential value. I do not believe that permitting citation to unpublished decisions would enhance the quality of our judicial system because they tend to have little value.

During my career, I have seen the number of appellate decisions in total, and the number of reported decisions, grow dramatically. My observation is that, while there is a much larger pool of cases to draw on for research today, the larger number of cases does not enhance the development of the law or the ability of lawyers or judges to do their jobs in a fair and effective manner. I do not believe that increasing the pool of cases that would be necessary to research or that would be available for citation would make the situation any better. To the contrary, my perception is that increasing the number of such cases would actually diminish the quality of lawyering and judging because of the added time that would be required to wade through the murk of cases of little value.

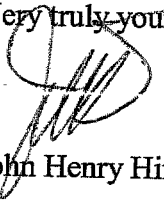
My third concern involves the trade-offs that inevitably occur in busy courts. I have practiced in systems in which all cases receive at least some written decision, albeit unpublished, and systems in which the appellate courts simply affirm judgments without opinion. My observation is that the systems in which opinions are written, however short and unpublished, do a better job for the attorneys and the litigants. There is value to the lawyers in seeing what the appellate court has ruled

upon. On occasion, there are mistakes and the rehearing process can be used to correct them. There is also a value to the clients in being able to see why they have won or, perhaps more importantly, lost, and believe that they have had a fair day in court. I have a concern that permitting citation to unpublished opinions may drive some of the circuits to forego writing at all. I believe that would be a detriment to our system.

A fourth concern involves the different resources available to wealthy and nonwealthy and government and nongovernmental litigants. In addition to the cost in time that will follow the need to research more cases, there are likely to be costs in dollars and accessability differentials to electronic databases. The Department of Justice, in particular, is likely to be placed at a significant advantage over private litigants because of the strong and very low cost electronic research capabilities that it has.

In sum, I believe that this is a situation in which less is more and that adoption of the proposed rule would have a negative impact on the appellate process. Thank you for your consideration of these views.

Very truly yours,



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