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Comments:

Concerning proposed new Rule 32.1 citing unpublished opinions.

My concerns are on widespread availability, document integrity, longevity and security. Adequate safeguards for a mixed storage and retrieval system can provide redundant safeguards.

Currently, published opinions are available in paper, microform and electronic formats. This makes them durable and well suited to long-term storage and retrieval, in a worldwide manner.

Unpublished opinions are by contrast, locally known, held in typescript in remote storage at the court of jurisdiction, and wholly dependent upon electronic storage and internet distribution.

Electronic storage and Internet distribution is by no means a stable, long-term solution in states and counties with wildly variable yearly budgets. A court case reporter volume, once purchased, sits completely stable on a library shelf. So long as there is no fire, and the roof does not leak, and the doors are secured from vandals, the court case can be found and read by any citizen. A computer based court case opinion is dependent on a library paying the yearly internet access fees, and upon maintaining a computer; in a lean budget year, both costs weigh on smaller libraries. This might be excused as a local failure. If the internet is disrupted, or the Courts internet server loses court case files, the system fails for the whole nation.

A computer information system, based only on the appearance of stability is unacceptable. It may well be handy, and easier to deploy in the conventional course of daily office practice, but it does not measure up to the standards of archival science. A mixed system, with electronic search and retrieval backed by paper copy for long term stable storage, with microfilm as a compact

storage option provides mutually reinforcing redundancy.

The current Appellate and Supreme Court case reporter system meets that redundant secure standard.

Other

agencies in Federal service are also struggling with the issues of computer based information. The Government Printing Office, the Library of Congress and the National Archives are all searching for the correct mix of practical access and long-term stability.

If this rule is adopted, the entire Federal Courts system must commit to long-term solutions for electronic document storage, document integrity, availability and ready retrieval. Elevating unpublished opinions to the level of citable cases carries with it the inevitable duty to store and make accessible those opinions. Anything less degrades the quality of citable case law, making surprise and intellectual ambush a stronger gaming option in court proceedings. In a free society, we cannot play games with court cases.

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