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

Dear Mr. McCabe:

I write to offer comments on proposed Federal Rule of Appellate Procedure 32.1, which would forbid the Courts of Appeals from restricting the citation of opinions designated as non-precedential.

In my view this is a terrible idea. I recognize that it was proposed with the best of intentions, but I am concerned that if it is adopted the rule will have such bad unanticipated consequences that even its proponents will regret the change.

The problem is that our circuit judges have many more cases than they can handle. I learned from your most recent annual report that in 2002 there were 1,034 appeals filed per three-judge panel. Even if as many as half of those require no judicial action because they are discontinued by the parties or for some other reason, that's a crushing workload. At a mere (!) 500 appeals per panel, if there are 250 working days in a year, each judge is deciding on average two cases every day. At such a pace, there is simply no way that each opinion could be of high quality, even with a bench full of geniuses.

The current system, which allows the Courts of Appeals to restrict the citation of non-precedential opinions, is the best that can be done under the circumstances. It divides cases into two categories -- the important and the unimportant -- and it permits the judges to devote their limited time to the important cases, while using court staff to work on the unimportant ones. The result is that we get

high-quality opinions in the important cases, and, to be honest, a mixed lot in the unimportant cases. (I have seen this as a law clerk in the 1980s and as a practitioner in the 1990s.) It's not a perfect system, but at least the low-quality opinions don't come back to haunt us later on.

If opinions in the unimportant cases become citable, lawyers will cite them, whether or not they are formally precedential. As a result, judges will have to spend more time on them, again, whether or not they are formally precedential. If you know that there are sharp lawyers out there eager to quote your words back at you, you're going to be much more careful about what you say.

It is unrealistic to expect circuit judges suddenly to double their working hours, as most are working very hard already. It is equally unrealistic to expect the number of circuit judges to increase dramatically any time soon. There are only so many judge-hours to work with. All we can do is shift them around.

If all opinions become citable, therefore, one or more of the following things will have to happen.

1) The judges will shift some of their time from the important cases to the unimportant cases. The quality of the opinions in the important cases will decline.

2) The judges will cease writing opinions in the unimportant cases, and instead issue orders that simply say "Affirmed" or "Reversed."

3) The judges will decide fewer cases than they currently do. A backlog of filed cases will build up. With each passing year, there will be a longer time between filing and decision.

These consequences all seem very bad, so bad that they outweigh whatever benefits might be thought to flow from the proposed rule change.

Sincerely,

Stuart Banner