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February 4, 2004

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

I learned that you are proposing a change to the federal rules of appellate procedure that would require the courts of appeal to allow citation to unpublished decisions.

The proposed rule would reduce both the quality and utility of briefs and oral argument For this reason, I oppose the change.

When I founded my firm here in Chicago ten years ago, I had a vision for changing the way that lawyers practice law.

The old way was the big, pyramid-shaped firm. At the bottom of the pyramid are large numbers of inexperienced associates. At the top are a few partners. The partners' income depended on keeping the associates busy, billing the clients by the hour.

The large-firm pyramid model puts a premium on the quantity of legal work done, not the quality.

It rewards inefficiency. It encourages law firms to research every potential issue in the case to the nth degree, and to write memos that will never see the light of day.

Our vision was to build a law firm where experienced partners do the work, and get paid based on their results, rather than on hours worked. We focus constantly on how to win the case. We do the research necessary to win the case, and no more.

In our experience, this approach results in better results for our clients, without unnecessary expense.

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In my view, the proposed rule is a step in the wrong direction, rewarding the inefficient churning of billable hours, with no corresponding benefits for litigants or the quality of legal argument or decision.

There is nothing wrong with the existing rule, which allows each circuit court of appeals to decide for itself which opinions merit treatment as citable precedent and which opinions do not. Courts focus more time and attention on those decisions that are selected for publication. Litigants in turn need not review thousands of published cases on each legal issue, but can focus on the narrower set of precedential decisions that provide the best and most authoritative statements of the law.

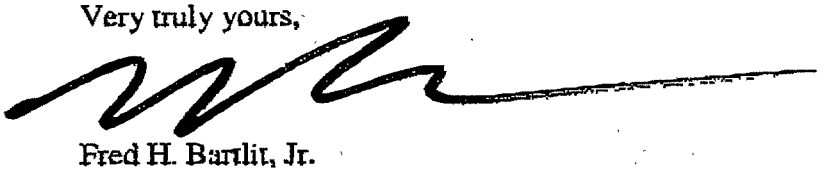
Having a limited universe of precedent improves the quality of legal argument, and leads to better results on the merits. Where both parties' arguments focus on a small set of authoritative cases, the court can explore the law from both sides and in depth. By contrast, adding the vast bulk of unpublished cases to the body of citable authority will encourage lawyers to base their arguments on lucky similarities between the case at hand and an unpublished decision.

Adding a large data base of unpublished decisions will also encourage the present deplorable practice of citing felicitous-sounding, but inapposite, phrases from opinions never meant to apply to the case in question.

The proposed rule purports to make unpublished decisions available only as "persuasive" authority, but in practice lawyers will view the body of unpublished decisions as a significant source of authority that can and must be mined in every case.

I oppose Proposed Rule 32.1 because it will encourage the wasteful and ineffective practice that is the old way of doing things.

Very truly yours,



Fred H. Bartlit, Jr.

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