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United States Court of Appeals
for the Federal Circuit

Chambers of
Paul R. Michel
Circuit Judge

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Washington, D.C. 20439
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February 26, 2004

03-AP-505

Mr. Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of
the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544-0001

Dear Mr. McCabe:

Re: Proposed Amendments to Federal Rules of Appellate Procedure

Like my colleagues Judges Plager and Dyk, I strongly support all the objections in Chief Judge Mayer's letter of January 6, 2004, against allowing citation of non-precedential opinions. Like them, however, I wish to add a personal observation. It is this:

The quality and hence the value of important opinions will degrade if such citation is allowed. At present, appellate judges "triage" the growing, voluminous, almost unbearable caseload, devoting limited time to non-precedential opinions and extensive time to those appeals meriting precedential opinions. We thereby seek to provide maximum clarification and exposition for the benefit of all counsel, all district judges and all affected agencies on difficult points of law.

If the majority of opinions, necessarily issued in short, non-precedential form, become citable, judges will feel compelled to devote far more time to their preparation. As there is no slack time, that time will be diverted from the minority of appeals meriting full-dress, citable opinions. Consequently, the quality of opinions in the important appeals will decline.

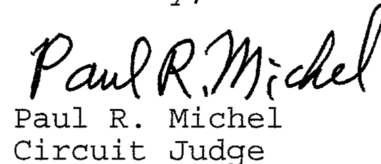
Nor will an increase in the length and preparation time of opinions in lesser appeals provide offsetting benefits. In my experience, about one-third of all appeals lack substantial merit, and in an earlier era probably would never have been filed. Another third, while of some arguable merit, do not involve unsettled points of law of widespread applicability. They are properly seen as involving review merely for possible "error correction," not "law clarification." Both groups, then, are suitably disposed of by short opinions which need not be citable as even persuasive authority, for they are addressed only to counsel and parties in the particular case.

In fact, the new rule will have at least one perverse effect: it will triple the body of case law that can be cited in briefs. Already, briefs often cite over 100 decisions. Checking those opinions to verify what they each mean is very burdensome. If the number cited enlarges, so must the time spent in verification.

If Congress were to triple the number of appellate judges (which I neither expect nor advocate), full-dress opinions could be written in every case. As it is, however, quality opinions in the one-third of appeals that need them can only be prepared by concentrating most of our efforts on them. That requires shorter and less carefully written opinions in the other cases. Moreover, those cases do not warrant opinions with extensive analysis, anyway.

The proposed rule change will ruin the above practice that evolved to meet growing volume and that I think has worked well. The ability of each judge to allocate time among competing appeals is crucial to good judging. Any interference with it -- whether by rules changes or legislation -- will be harmful to the proper administration of justice. Moreover, to restrict that ability just so counsel can cite more cases and quote more dicta seems entirely unjustified to me.

Sincerely,



Paul R. Michel
Circuit Judge

cc: All CAFC Judges