UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, N. W.
WASHINGTON, D. C. 20439

03-AP-506

DANIEL M. FRIEDMAN
SENIOR CIRCUIT JUDGE

February 27, 2004

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

Re: Proposed Amendments to Federal Rules of Appellate Procedure

Dear Mr. McCabe:

I am in full agreement with the views set forth in Chief Judge Mayer's letter of January 6, 2004 opposing the proposal to permit citation of non-precedential opinions. The additional views here expressed reflect my 25 years of service as a federal appellate judge (the first four of them as Chief Judge of the United States Court of Claims), as well as my experience in sitting with eight other circuits. I regret my delay in submitting this letter.

Although the proposal is explained as merely permitting citation of non-precedential opinions without making those opinions binding and precedential, this is an unrealistic distinction. The only reason lawyers are seeking this change is to permit citation for precedential purposes of opinions that hitherto were not citable. If this proposal is adopted, a large number of previously deemed non-precedential opinions will be cited as persuasive authority, and it will be extremely difficult for courts of appeals to ignore those decisions because they were designated non-precedential. Indeed, to permit citation of and reliance upon such opinions would result in giving them greater effect than the court intended them to have when they were issued. It must be remembered, as critics of this proposal have pointed out, that when a court issues a non-precedential non-citable opinion, it may not take the same care in preparing it that it does in issuing a precedential opinion, because such opinion will not be precedential.

If this proposal is adopted, it is likely to have one of two consequences, each of which would be both unfortunate and contrary to what the proponents of the proposal hope to achieve. On the one hand, if the appellate courts continue to issue a large number of opinions that hitherto have been issued as non-precedential but which now will be precedential, courts will require more time to do so. This will delay the decision of cases in which such opinions are used. On the other hand, there are likely to be many cases in which non-precedential opinions ordinarily would be used in which,

instead of writing an opinion, the court will merely issue a short memorandum or order, perhaps of only one or two sentences, summarizing its conclusion. The effect of the latter practice would be to give attorneys and litigants less rather than more information about the basis for the decision.

In short, I strongly urge that the treatment to be given non-precedential non-citable opinions should be left, as it now is, to the informed judgment and discretion of each court of appeals.

Sincerely,

Daniel M. Friedman

Cc: All CAFC Judges