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LETTER TO THE EDITOR: Courts Must Publish or Cut Bait

Kelly McCourt is mistaken in her letter to the editor ("Justices Don't Game Publication Rules," April 16) when she asserts that "no one ... has come up with any evidence demonstrating that unpublished decisions are inconsistent with published ones." No one? How quickly they forget.

In 1977, I chaired a State Bar committee to review unpublished opinions submitted by members of the bar. Though practitioners promptly supplied us with 30 such opinions, and we made recommendations to publish only some of those, the committee's effort was a failure. The Supreme Court refused to respond favorably to any of our recommendations.

In 1978, the state chief justice's Advisory Committee on Effective Publication of Appellate Opinions examined widespread complaints that too many unpublished opinions were inconsistent with published ones and with one another. Among the committee's recommendations were two that called for indexing and providing convenient and inexpensive access to unpublished opinions. Neither was approved by the Supreme Court.

True, all that was 20 years ago, but I have seen nothing since then to suggest that appellate judges have been born again and are now exercising a higher degree of intellectual self-discipline when deciding whether to publish their handiwork. During that time, too many good people have grown discouraged and cynical about this process, but as evidenced by the current controversy, not everyone has given up on this problem.

In the 1960s, some called for introduction of the nonpublication practice because lawyers' libraries would be overwhelmed by a proliferation of case report volumes crowding their shelves, such that nonpublication would weed out only those opinions that decided nothing new or important and were, therefore, of no interest to anyone other than the parties involved. However, now that widespread use of computers has solved the shelf space problem, and close to 90 percent of appellate opinions are unpublished, new reasons are being invented to justify this unsatisfactory practice.

If the courts played the game according to Hoyle and kept unpublished only those opinions that genuinely do not decide anything new or important, the problem would either go away or be reduced to minimal proportions. But as long as appellate judges issue unpublished opinions that de facto deviate from the ostensible criteria of nonpublication, lawyers will be interested in what those opinions say, and the problem will continue to fester.

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