The Court of Appeals
of the
State of Washington

500 N Cedar ST
Spokane, WA 99201-1905

April 4, 2016

The Honorable Barbara Madsen
Chief Justice of the Washington State Supreme Court
Temple of Justice
PO Box 41174
Olympia, WA 98504-1174

Re: Proposed Amendment to GR 14.1

Dear Chief Justice Madsen:

We undersigned judges of the Court of Appeals are writing to express our opposition to the proposed amendment to GR 14.1 that would permit limited citation to unpublished Court of Appeals decisions while denying those opinions precedential value. We are concerned about the effect the rule change would have on our decision-making process, the quality of those decisions, and the time it takes us to issue opinions.

As you and your fellow justices all know, the Court of Appeals is a high volume appellate court. Each judge of this court authors more than 70 majority opinions per year. That figure reflects only one-third of the cases we hear and decide. It also does not include separate concurring or dissenting opinions.

We use the same decision-making process in each case, giving each matter its proper consideration and deliberation. However, the process of drafting an unpublished decision frequently is different than the process used to prepare a published opinion. An unpublished opinion is issued to resolve the case at hand, but a published opinion must also provide guidance in the future. The published cases tend to reflect well-briefed, discrete issues that are not well-settled. The panel (or at least the majority) agrees upon the disposition and drafts the opinion with regard to the fact that its rationale will be applied (or distinguished) in future cases. Greater care typically is taken in use of language because we know that it may be extended to different circumstances than those presented by the current case. Unpublished opinions reflect countless other circumstances—a well-settled principle of law that needs little explanation, a poorly briefed issue that can be addressed on other grounds or that should not be addressed thoroughly, unusual facts that should not impact a "normal" case, limited records that leave an appellate court uncertain of what happened at trial, etc. Unpublished opinions therefore often represent the common ground on which the panel can agree rather than a definitive answer to an argument presented. For example, if the panel is divided whether evidentiary error occurred, but all members agree that any error was harmless, the opinion can issue on harmless error grounds. However, a party later addressing a similar argument might argue that the court necessarily ruled that error occurred even

though the panel did not reach such a conclusion. Great care should be taken in drawing conclusions from unpublished decisions since the reason it was deemed non-precedential might not be apparent.

In order to avoid such "accidental" precedent, the decision-making process could change by answering questions that we might not otherwise address or expressly identifying any defects in the briefing or record that prevent us from reaching a question. It also likely would lead to more disagreements on language used in the draft opinion, resulting in more revisions or more separate opinions. In either event, more time will be spent preparing and finalizing unpublished opinions, further extending the time the case is before the appellate courts. An additional casualty of the process could be the collegiality of the court. Panel members now seldom significantly edit another author's unpublished opinions with the attention given to published opinions, but concern for the unintended consequences of an opinion may well change that practice and lead to less deference to the authoring judge's style and language.

Another option, used by panels of the Supreme Court before the creation of the Court of Appeals, would be to issue decisions that are devoid of the operative facts ("the facts are known to the parties and will not be recited here"). Similarly, the analysis of a case could be stated summarily. Either approach would effectively limit precedential use of the opinion, but likely would frustrate the litigants who might prefer a more thorough discussion of their case.

While we can put out uninformative opinions more rapidly, the other noted approaches will slow down our case processing time periods, already worsened by budget-related staff reductions, even more. Additional editing and/or the issuance of extra opinions will necessarily prolong the case in question and delay judicial attention to other pending matters.

There are few genuine benefits of citing to an unpublished opinion, primarily because there is a reason the opinion was deemed non-precedential by the panel that issued it. When the reason is obvious to the reader (well-settled law, trial court discretion), there is no purpose in citing the opinion as many published cases already provide controlling precedent. It is only when the reason is less obvious that litigants might desire to use the unpublished case, but that is precisely the time when accurate reliance is least certain. Even a facially similar case might have turned on what was not stated in the unpublished opinion or some other factor known only to the panel members who issued it.

For these reasons, we recommend rejecting the proposed rule amendment. Any benefits from the practice are slight in comparison to the noted costs to the litigants and the decision-making process.

We thank you for your consideration.

Sincerely,

Kevin M. Korsmo
Judge

J. Robert Leach
Judge

Laurel H. Siddoway
Judge

George B. Fearing
Judge

Robert J. Lawrence-Berrey
Judge

Rebecca L. Pennell
Judge

cc: The Honorable Charles W. Johnson, Chair of the Supreme Court Rules Committee