June 10, 2020

Amy Bowne
Committee Secretary
Supreme Court Rules Committee
222 N. LaSalle Street, 13th Floor
Chicago, IL 60601

Re: Response to Proposal 19-11

Dear Ms. Bowne:

Chicago Appleseed and the Chicago Council of Lawyers are in a unique Collaboration for Justice, dedicated to making our courts fair and accessible for all people. We are a hub for lawyers, activists, and community members dedicated to identifying and fighting for evidence-based solutions to common daily injustices in our courts.

We write in support of the proposal to repeal Rule 23 and, at a minimum, allow citation to non-precedential orders as persuasive authority. This would mirror the current practice of the federal judiciary as reflected in Federal Rule of Appellate Procedure 32.1.

As other commenters have noted, one of the primary justifications for prohibiting citation to non-precedential decisions---saving space in bound volumes of reported decisions---no longer carries force. Lawyers and courts alike now rely primarily on online tools for their research, where space is not an issue and where the full text of non-precedential decisions is already available.

Respectfully, we also believe that Rule 23's prohibition on citation to non-precedential orders except as necessary to support contentions of double jeopardy, res judicata, collateral estoppel, or law of the case is not otherwise justified.

Forbidding citation to non-precedential decisions deprives practitioners of an important, substantial, and informative body of case law to cite in support of their arguments. Even if a non-precedential decision does tread new legal ground, the decision's application of existing precedent to a particular set of facts will often provide helpful guidance to parties and courts faced with similar fact patterns in subsequent cases.

Prohibiting citation to these decisions also reduces the accountability of the judiciary and confidence in its decisions. It does so by creating an entire class of decisions applicable to the parties only and deeming the rationale that the appellate court has expressly and publicly relied upon in deciding a given case off limits to litigants and courts for subsequent cases. To be clear, we believe it is always preferable for a court to explain its decision rather than providing no rationale at all. But if the court's rationale is

binding as to parties before the court, the decision ought to be available for citation as persuasive authority in other cases. To prohibit citation suggests that the court's rationale is somehow inferior or suspect.

Forbidding citation to non-precedential orders also deprives the Illinois judiciary of the constructive feedback that parties and courts could otherwise provide. Judicial precedent evolves positively over time as courts recognize the strengths and weaknesses of prior decisions and make appropriate adjustments. Precedential and non-precedential decisions alike (including concurrences and dissents) may illustrate these strengths and weaknesses, and likewise they may reflect patterns or points of distinction that can inform future decision-making. Restricting citation to non-precedential decisions unnecessarily limits the range of cases that parties may use to provide the court with the most thorough and informed briefing possible.

We recognize there may be valid reasons not to make every appellate decision precedential. For example, in evolving areas of the law, an appellate court may wish to allow further development of an issue through multiple cases before announcing binding rules; the facts in a particular case may be so atypical as to counsel against creating binding precedent for all later cases; or the parties in the case may not have briefed the issue adequately.

These concerns may be addressed by permitting the appellate court to designate a decision non-precedential, as Rule 23 presently provides, while nonetheless allowing the citation of such a decision as persuasive authority. This approach preserves the court's right to police its body of binding precedents while not depriving the bench and bar of the useful guidance that non-precedential decisions may provide. Moreover, permitting citation to non-precedential decisions as persuasive authority imposes no binding obligation on the court to which such a decision is cited. That court can and will exercise its own judgment as to what consideration it will give such a decision and whether to cite the decision itself, just as it does with non-binding precedent from other jurisdictions. Simply because the parties are free to cite a non-precedential order as persuasive authority does not require any court to give its imprimatur of approval to that order.

As the Committee and the Supreme Court aware, the federal appellate courts have allowed the citation to their non-precedential decisions for more than a decade, and we are aware of nothing but positive experiences with that practice. *See* Fed. R. App. P. 32.1.

Lastly, if the Committee and the Supreme Court decide to permit citation to non-precedential orders as persuasive authority, we hope that it will apply this change in practice to *all* existing non-precedential orders, not just those rendered after the change in rule. Because these orders can be cited for persuasive purposes only, we see no justification for keeping decades' worth of decisions off-limits to citation except for the limited purposes Rule 23 presently allows.

We thank the Committee for its consideration.

Sincerely,

David Baltmanis, President
Chicago Council of Lawyers

Mark Dupont, Chair
Access to Justice Committee
of Chicago Appleseed and the Chicago Council of Lawyers