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The Revised Rules of Appellate Procedure and the Substantive Right of Appeal in West Virginia

September 20, 2010

W. Henry Jernigan Jr.

As seen in the September 17th issue of *The State Journal*.

In 2008, the West Virginia Supreme Court refused to hear appeals in the *Tawney* and *Wheeling Pitts* cases. Those two cases involved awards exceeding a half a billion dollars collectively and represented two of the five largest judgments in the United States that year. This action by the Court, which was taken without explanation, shocked many. It also highlighted the fact that, unlike virtually every other state, there is no automatic right to have a judgment in a civil or criminal case substantively reviewed by an appellate court in West Virginia.

The criticism that followed led Governor Manchin to appoint an "Independent Commission on Judicial Reform" to review our court system. Among that Commission's findings was that this State needed an intermediate court of appeal. The Commission recognized that our Supreme Court is already one of the busiest in the Nation. An intermediate appellate court would lessen that workload. It would also serve two other important purposes:

1. ensure that litigants were afforded the opportunity to have their cases substantively reviewed on appeal, thereby bolstering public confidence in our judicial system.
2. establish legal precedent that would, in turn, provide certainty regarding how our laws would be applied going forward.

Surprisingly, the Supreme Court opposed legislative efforts to create this court. It has, instead, attempted to address the concerns that led to the Commission's recommendation by means of changes in its procedural rules governing appeals. These changes, according to the Court, will ensure that every appeal is completely and carefully reviewed by the entire Court and disposed of in a decision on the merits.

Unfortunately, the proposed rules, in the opinion of many, fall short. While they do provide that each appeal will be disposed of either by means of a "full opinion" or a "memorandum decision," the distinction between the two is critical. As Chief Justice Davis has recently noted, a court speaks only through its opinions. In terms of appellate courts, those opinions again serve two core functions. They explain why the Court has decided to appeal as it has and they establish precedent that can be relied upon in the future.

Under the proposed rules, "opinions" issued by the Court fulfill both those core functions. However, not so in cases disposed of by "memorandum decision." Those decisions will have "no precedential value" and cannot be cited as legal precedent anywhere. Indeed, they are not to be published in the West Virginia Reports.

Why this distinction?

The commentary accompanying the proposed rules does not say. Given the Court's workload, however, one can surmise that it is largely a function of resources. The proposed rules will triple the number of decisions by the Court. If each of those decisions were to establish legal precedent, the resources needed to carefully craft those decisions would far exceed those available.

What then is the practical effect of these new rules?

With deference to the obvious hard work that has gone into the drafting of these rules, their practical effect appears to be minimal. In cases where the Court is not disposed to render an "opinion", rather than denying a petition without explanation, the Court may issue a memorandum decision that says no more than that it "finds no substantial question of law and does not disagree with the decision of the lower tribunal." Such a decision will provide little insight as to the reasoning of the Court beyond that afforded by the current procedure. Moreover, such summary decisions will offer absolutely no guidance as to how the law will be applied to similar cases in the future.

The only way to address the concerns that led the Governor's Commission to recommend the creation of an appellate court, is to follow that recommendation. This would provide a system of justice similar to those in 40 of our 50 sister states as well as that established at the federal level. The opinions of that court would serve to enhance the body of law that may be looked to for precedence while freeing up the Supreme Court to consider cases that involve constitutional or substantive policy issues of statewide significance. While there are costs associated with establishing such a court, those costs, when considered in the context of the larger state budget, are not insurmountable. Moreover, when the benefits of such a court are factored in, those costs pale by comparison.