

FOREWORD

“MAY IT PLEASE THE COURT”

The Honorable Edward C. Stringer[†]

A sense of epoch proportion begins to settle in to the process of opinion drafting in the Supreme Court due, in no small part, to the reality that between the parties who have been litigating for so long and who have so much at stake, it is the final word. There is no place to go from here, as in only rare instances is review granted by the U.S. Supreme Court. The court feels this weighty responsibility, as well as the responsibility that we are setting the course of the law perhaps for generations to come.

Crafting the opinion begins to feel like how an artist or a composer must feel in approaching a new creation—that it must clearly and fully express the point being made without saying too much, that the parts must interrelate and that it must have enduring meaning. It begins as a concept in the minds of the justices when we grant the petition for further review not knowing what the end result will be, and evolves through the briefs, the court’s internal bench memo, oral arguments, conference, opinion drafting, and finally, the decision. Before the opinion is filed each member of the court has the opportunity to review it from different points of view to see if its main premise works to resolve the dispute, and if it meets the needs of the trial court, practicing attorneys and members of the public impacted by it. When it does, it is filed and emerges into the sunlight to take its own life.

The court never comments on the process of reaching the final result, or on the opinion itself—it is an ironclad rule that the opinion speaks for itself. But many others should and do comment. Practicing attorneys, academics, policymakers and members of the public having an interest in an opinion of the court frequently express their views on court decisions. As creators

[†] Justice Stringer retired from the Minnesota Supreme Court on August 31, 2002, after eight years of distinguished service.

of this new work of art, we hope that it will be universally and eternally admired, but we are not so naïve as to believe that critique will always be in the spirit of the traditional judicial salutation “may it please the court.” We know it won’t always please the court, but thoughtful critical comment—comment that goes beyond the mere grumping about an unsuccessful appeal—is expected, needed, and welcomed. It tests the resilience of the rule of law to changing circumstances and probes the boundaries of its application. It is helpful to the practitioner in advising clients and in advocating before the courts, and is a rich resource for the trial courts in rulings in other cases. For the court, it may be a mirror in which to view the opinion from new and interesting perspectives.

Most often there is some kind of precedent for the court’s ruling, and an opinion of the court based on prior case law that a critic might consider out of date or an inappropriate rule of law for the specific case raises particularly complex issues because *stare decisis* is a weighty principal of appellate review. While *stare decisis* appropriately venerates stability and predictability in the law, the rub is that the rule of law is ever alive and always evolving. As Mr. Justice Frankfurter wrote in his dissenting opinion in *United States v. International Boxing Club: Stare decisis* “is not, to be sure, an imprisonment of reason. But neither is it a whimsy. . . . [I]f *stare decisis* be one aspect of law, as it is, to disregard it in identic situations is mere caprice.”¹ The evolution of the law must carefully thread its way along this ephemeral path between imprisonment and whimsy, and courts should proceed with great caution. Critical commentary is helpful along the journey.

So it is in this vein that I extend our gratitude to the William Mitchell Law Review for undertaking review of many significant rulings of the Supreme Court in our 2001-2002 term. It is a service to the practitioners and to the courts—and whether or not “it may please the court,” it is welcome. We also extend our gratitude to Professor Peter Knapp who fearlessly yet perennially reviews selected appellate court opinions at the Annual Conference of Judges in December with thoughtful, well-balanced comment sufficiently witty to hold the attention of a tough crowd—he draws a full house.

Thanks and congratulations.

1. 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting).