STATE OF WISCONSIN
SUPREME COURT

No. 08-02

In re:

PROPOSED AMENDMENTS TO
WISCONSIN STATUTE § (RULE) 809.23(3).

MEMORANDUM OF PETITIONER WISCONSIN JUDICIAL COUNCIL IN SUPPORT OF PETITION FOR AN ORDER AMENDING WIS. STAT. § (RULE) 809.23(3)

April M. Southwick, Staff Attorney
WI State Bar No 1070506
110 East Main Street
Madison, WI 53703
(608) 261-8290
(608) 261-8289 (facsimile)
april.southwick@wicourts.gov

Beth Ermatinger Hanan, Vice Chairperson
WI State Bar No. 1026989
309 North Water Street, 7th Floor
Milwaukee, WI 53202
(414) 223-3300
(414) 224-6116 (facsimile)
hanan@gasswebermullins.com

ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

September 16, 2008

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INTRODUCTION

Reaching a just result in a particular case is often the fruit of great effort by both lawyers and judges. Lawyers have an ethical duty to zealously assert their clients' position within the rules of the advocacy system,[1] and judges have a constitutional duty to decide cases.[2] When appellate judges perform that duty and reach a result, their reasoning should be available to other litigants, lawyers and judges.

Petition 08-02 marks the fourth time in almost 20 years that this Court will consider whether it should permit citation of unreported Wisconsin appellate opinions. Since the last time this Court visited the question, practical aspects favoring broadened citation have increased. Data to support restricting citation have not materialized. Policy factors supporting like treatment of like cases remain strong. For these reasons, the Wisconsin Judicial Council requests that this Court amend WIS. STAT. § 809.23(3) and allow parties and courts to cite to unreported appellate opinions for their persuasive value.

PROCEDURAL BACKGROUND

RULE 809.23 (3) currently prohibits the citation of an unreported or unpublished Wisconsin court of appeals opinion as precedent or authority, with three exceptions—claim preclusion, issue preclusion, and law of the

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[1] SCR 20 PREAMBLE, SCR 20:1.1.

[2] WIS. CONST. ART. VII, sec. 2 (judicial power of the state is vested in a unified court system); WIS. STAT. § 752.41(1), requiring court of appeals in each case to provide "a written opinion containing a written summary of the reason for the decision made by the court."

case. Since its adoption in 1978, there have been three previous requests to change the rule.[3]

Earlier this year, the Judicial Council petitioned this Court, pursuant to WIS. STAT. § 751.12, to enter an order adopting the following amendment and explanatory Note to WIS. STAT. § (RULE) 809.23(3):

> 809.23(3) CITATION OF ~~U~~UNPUBLISHED OPINIONS~~—NOT CITED~~. (a) An unpublished opinion~~ is of no precedential value and for this reason~~ may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case.
>
> (b) In addition to the purposes specified in sub. (a), an unpublished opinion may be cited for its persuasive value. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state, and a court need not distinguish or otherwise discuss it.
>
> JUDICIAL COUNCIL NOTE:
> Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions, and is compatible with, though more limited than, FED. R. APP. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgment, orders and dispositions issued on or after January 2, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

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[3] *See In re Amendment of Section (Rule) 809.23(3), Stats.*, 2003 WI 84, ¶ 7 n.1 2003 Wisc. LEXIS 1029 (July 1, 2003) (Bradley, J., concurring), *citing* 155 Wis. 2d 832, 456 N.W.2d 783 (1990) (unpublished).

An unpublished opinion is either an authored opinion or a per curiam opinion. Per curiam opinions tend not to involve new or unsettled questions of general importance.[4] In cases assigned for a per curiam opinion, the assigned judge supervises the preparation of the proposed opinion, and may rely on staff attorneys for assistance in drafting.[5] The Judicial Council's proposal does not seek permission to cite memorandum opinions or summary dispositions issued by the court of appeals.

When RULE 809.23(3) was adopted in the 1970s, this Court had multiple reasons for prohibiting citation of unpublished opinions.[6] Institutionally, the Court acknowledged that published and unpublished decisions generally are different—the Court expected that the latter often would require revision before it could be citable. Moreover, based on publication criteria of WIS. STAT. (RULE) 809.23(1), unpublished decisions should not represent new authority, but simply a repeated application of settled law.[7] The Court contemplated that if unpublished opinions of the

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[4] Wisconsin Court of Appeals Internal Operating Procedures, VI (5)(a). Per curiam opinions also are used in matters which address and clarify solely an issue of appellate jurisdiction or procedure. *Id.*, VI (4)(i).

[5] *Id.*, VI (5)(f).

[6] RULE 809.23 was adopted by this Court in 1978 shortly after creation of the Wisconsin Court of Appeals. The Rule was proposed by the Wisconsin Judicial Council. *In re Rules of Appellate Procedure*, 83 Wis. 2d xii, xxxii-xxxiii.

[7] The criteria which guide the discretionary decision to publish a court of appeals decision are set out at WIS. STAT. (RULE) § 809.23(1). Subsection 809.23(1)(b) provides that an opinion should not be published when the issues involve no more than the application of well-settled rules of law to a recurring fact situation, or where the issue is sufficiency of the evidence and the evidence is sufficient, or where the issues are decided based on controlling precedent and no reason appears for questioning or qualifying the precedent.

new court of appeals were citable, the lines between the force of precedent, and merely persuasive effect, might blur. Finally, the court was concerned about fairness to litigants. Because unreported opinions were not readily available in 1978, a rule barring their citation would prevent institutional litigants or large law firms that specialized in certain substantive areas from amassing private collections of unreported opinions and gaining an advantage over opponents without similar access.

Nonetheless, sound policies sometimes outlive their usefulness, or are belied by data and practice. Wisconsin's no-citation rule is a prime example of that phenomenon. In recent years, no-citation rules such as Wisconsin's have sparked much criticism and even constitutional debate, fueled primarily by technological advances and the recent changes to the federal rules, while also concerned with policies of judicial transparency and accountability, and efficient use of limited resources.

ARGUMENT

I. IMPORTANT ENVIRONMENTAL CHANGES SINCE 2003 FAVOR EXPANDING CITABILITY.

The arguments against citability of unreported appellate court opinions have changed little over the years, but the arguments for citability have seen several important developments since the last time this Court reviewed RULE 809.23(3). When the rule was adopted, the term "unpublished" implied inaccessibility, but no longer. When used in the context of appellate court opinions today, "unpublished" means "unreported," namely, that the court has decided against placing its opinion

or other disposition in an official reporter.[8] The federal judiciary recognized this evolution of informal publication, and in 2006 loosened restrictions on citation. These two environmental changes are the primary reasons the Judicial Councils asks this Court to amend and expand the Wisconsin citation rule.

A. Increased Access to Unreported Wisconsin Appellate Opinions Goes Far to Eliminate Disparities in Research Opportunities.

Technology has made judicial case information much more accessible and manageable. Included in this increasingly available pool of information are judicial opinions, both reported and unreported. Because WestLaw, LexisNexis, the courts, the state bar and many others maintain websites which include unreported courts of appeals opinions in their databases, practitioners and the general public now have access to these opinions regardless of whether or not they are "published" in the traditional sense.

Practitioners, the courts and the public can access unpublished opinions easily in a searchable format, often at no cost.[9] For instance, the Wisconsin State Law Library maintains a complete set of unreported court of appeals opinions. Anyone (including an incarcerated person) can contact a reference librarian at the State Law Library and request a copy of an

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[8] Dean A. Morande, *Publication Plans in the United States Courts of Appeals: The Unattainable Paradigm*, 31 FLA. ST. U. L. REV. 751, 754 (2004) *at* http://www.law.fsu.edu/journals/lawreview/downloads/313/morande.pdf.

[9] Special thanks to librarians Jane Colwin, Connie VanDerHeide and Amy Crowder, Wisconsin State Law Library, for assisting with the compilation of this accessibility information, including the information contained in Attachment A.

unreported opinion.[10] For a fee of seventy-five cents per page, the opinion will be delivered to the requester via email, fax or regular mail.[11] Additionally, the State Law Library maintains computer terminals on which patrons may conduct internet legal research, including access to services such as WestLaw and LexisNexis, free of charge.[12]

Unreported opinions also are available at no cost through websites maintained by the Wisconsin Court System and the State Bar of Wisconsin.[13] Both databases are public and searchable. In addition, LexisOne offers access to the LexisNexis database, including unpublished opinions, priced by document, or by the day, week or month.[14] With a subscription, unreported opinions are available electronically via the Westlaw and LexisNexis legal databases, as well as the LoisLaw CD-ROM and website.[15] Additional details regarding the availability and

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[10] Incarcerated persons also are provided computer access to the LexisNexis database, which contains all unpublished opinions since the creation of the court of appeals. Interview with Jane Colwin, State Law Librarian, Wisconsin State Law Library, August 8, 2008.

[11] Interview with Jane Colwin, State Law Librarian, Wisconsin State Law Library, August 8, 2008.

[12] *Id*

[13] http://www.wicourts.gov/opinions/appeals.htm and http://www.wisbar.org/AM/CustomSource/ASPCode/caseindex.asp?lap=1&MoreOpener=&ci=1&OrdMode=DESC&Offsethi=20&Lio=1&Area=2&Numlines=20.

[14] http://www.lexisone.com/legalresearch/index.html.

[15] *Id.* Interview with Connie VanDerHeide, July 24, 2008. Email from Amy Crowder to April Southwick (August 6, 2008) (copy on file with authors). Email from Jane Colwin to April Southwick (August 13, 2008) (copy on file with authors).

searchability of unreported opinions can be found in Attachment A to this Memorandum.

The growing frequency at which courts are reconsidering curbs on citation reflects an awareness that the full range of appellate opinions is widely available. To the extent that the rule originally was designed to impose a "level playing field" of research opportunity, there now is little imbalance in opportunity to research unreported Wisconsin appellate decisions.

B. Recent Changes at the Federal Level and Among the States Demonstrate that Permitting Citation is the Trend, and Thus Far Has Revealed No Harmful Results.

Since this Court last considered the no-citation rule, other jurisdictions have loosened their restrictions, with little or no adverse consequence.

1. The Federal experience.

Many courts have adopted rules allowing unreported opinions to be cited for their persuasive and sometimes even precedential value. Two years ago, the United States Supreme Court adopted a new uniform rule applicable to all federal appellate courts.[16] Effective December 1, 2006, individual circuits may no longer "prohibit or restrict the citation of federal judicial opinions . . . or other written dispositions" regardless of any designation like "unpublished" or "non-precedential."[17] The rule is prospective only, permitting citation to unpublished appellate dispositions

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[16] FED. R. APP. P. 32.1 (2007) ("FRAP 32.1").

[17] *Id.*

issued on or after January 1, 2007.[18] The adoption of this uniform federal rule followed several circuits' use of more permissive citation rules, which left only four circuits that generally had prohibited the citation of unpublished opinions.[19]

Not only has the federal citation rule changed since 2003, but in studying whether and what kind of change it should make, the federal judiciary held hearings and then amassed significant data regarding judicial workload and allocation of resources, lawyer use, both actual and predicted, of unpublished opinions, and statistics regarding the citation of unreported federal decisions in those circuits where limited citation already was permitted. This data, while directly applicable to the federal appellate system, was unavailable for consideration by this Court in 2002 and 2003, when the last rule change petition was pending. Some description of the federal findings is instructive, particularly when attempting to assess what changes in use of judicial and lawyer resources might occur if the Wisconsin restriction is relaxed.

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[18] In the federal system, "unpublished opinions are often prepared by staff law clerks and reviewed by judges to ensure the result and explanation are correct, but are not crafted with the care, reflection, and attention to language, legal nuance, and factual and procedural context that precedential opinions require." Hon. Diane S. Sykes, *Citation to Unpublished Orders Under New FRAP 32.1 and Circuit Rule 32.1: Early Experience in the Seventh Circuit*, 32 So. Ill. U.L.J. 579, 586 (2008).

[19] Stephen R. Barnett, *No-Citation Rules Under Siege: A Battle Field Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 474 (Jan. 2004) (summarizing changes made by the federal circuits and states); *see also* Melissa M. Serfass and Jessie Wallace Cranford, *Federal and State Rules Governing Publication and Citation: An Update*, 6 J. APP. PRAC. & PROCESS 349 (Sept. 2004) (summarizing the circuits' and states' current rules).

When the United States Judicial Conference Advisory Committee on Appellate Rules voted in favor of FRAP 32.1, predictions about adverse consequences abounded.[20] Notably lacking from the comments was criticism from judges who already had experience presiding over courts that allowed the citation of their unreported opinions.[21]

At a hearing on the proposed amendment, Judge Alito asked the Honorable Myron H. Bright, United States Circuit Court of Appeals for the Eighth Circuit, whether he had noticed a greater burden in circuits allowing citations to unreported opinions, or whether the practice made producing opinions much more burdensome. Judge Bright's response: "I have to say in all honesty there really doesn't seem to be any difference."[22]

Judge Edward Becker, U.S. Court of Appeals for the Third Circuit, testified that unpublished opinions, or non-precedential opinions, as they are called in the Third Circuit, "often have been useful in a number of respects," including allowing insight into the thought process of a previous panel, and identifying issues on which the court should be writing a

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[20] Statement of Stephen R. Barnett, *Hearing on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Appellate Rules Committee, United States Judicial Conference* (April 13, 2004).

[21] *See id.*

[22] Statement of the Honorable Myron H. Bright, *Hearing on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Appellate Rules Committee, United States Judicial Conference* (April 13, 2004). At the time of the hearing, Judge Bright had been a federal appellate judge for over 35 years, and sat as a senior judge for almost 19 years. As a senior judge, he served frequently in his own circuit, the Eighth, and also served with the Second, the Third, the Sixth, the Ninth, and the Eleventh Circuits and somewhat less consistently with the Fifth, the Seventh and the Tenth Circuits.

precedential opinion.[23] Judge Becker's observations make sense. If an appellate court observes a party citing only unreported opinions in support of an ostensibly "settled" area of law, that observation may alert the court to the need to issue a reported opinion.

After the Committee hearings, a comprehensive survey was undertaken. The Federal Judicial Center ("FJC"), a statutorily authorized research and education agency, conducted empirical research to understand the impact of allowing citation to unpublished opinions in all federal circuit courts.[24] The FJC surveyed all 257 sitting circuit judges and a random sample of federal appellate practitioners.[25] The FJC also studied a random sample of 650 case files, taken from all federal circuits.[26]

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[23] Statement of the Honorable Edward Becker, U.S. Court of Appeals for the Third Circuit, *Hearing on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Appellate Rules Committee, United States Judicial Conference* (April 13, 2004).

[24] Federal Judicial Center, *Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report* 1 (April 14, 2005) *at* http://www.fjc.gov/public/pdf.nsf/lookup/Citatio1.pdf/$File/Citatio1.pdf., hereinafter, "FJC study."

[25] The National Center for State Courts (NCSC) has confirmed that no such research has been conducted at the state level, nor is it aware of any research conducted following a jurisdiction's change in rules to allow citation. Email from Amy McDowell, NCSC Knowledge and Information Services, to April Southwick (July 29, 2008) (copy on file with authors).

[26] After a lengthy debate process which had begun in 1988, but with some breaks in the action, in 2004 the Advisory Committee to the United States Judicial Conference, and the Standing Committee on Rules of Practice and Procedure designed an empirical study to be conducted by the Federal Judicial Center to solicit views of judges and lawyers, and determine the frequency of citation to unpublished opinions in those circuits which permitted it. *See* Hon. Diane S. Sykes, *Citation to Unpublished Orders*, 32 So. Ill. U.L.J at 585-89.

The survey found that judges who believed that allowing citation to unpublished opinions would adversely affect the functioning of the judiciary generally sat in circuits that prohibited such citation, namely, the Second, Seventh, Ninth and Federal Circuits (the "restrictive" circuits). In circuits where some citation already was allowed (the "permissive" and the "discouraging" circuits), the judges generally agreed that changing the federal rule would have no impact on the number of unpublished decisions, the length of unpublished decisions, or the time it took to draft them.[27] Judges from the First Circuit and the D.C. Circuit (both had recently changed their local rules to allow citation) also did not describe experiencing the problems the opponents predicted.[28] The majority of lawyers responded that a rule permitting citation to unreported decisions would not impose a burden on their work, and most expressed support for such a rule.[29] In the random sampling of cases, over one-third of the lawyers contacted had located at least one unpublished opinions which they wanted to cite, but could not.[30] The proposal to adopt FRAP 32.1 passed after completion of the FJC study.

Now, nearly two years since FRAP 32.1 went into effect, there is little evidence that the adverse consequences predicted to follow from the federal rule change have come to fruition. Thus far, law review articles,

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[27] The FJC study, at 3.

[28] *Id.* at 11-13.

[29] *Id.* at 15.

[30] *Id.* at 15, 45.

studies or research demonstrating negative effects, or even complaints as a result of FRAP 32.1 are virtually nonexistent.[31] Of particular interest to this Court and to Wisconsin lawyers who also practice in the Seventh Circuit may be some data collected by the staff of Judge Diane S. Sykes.[32] Judge Sykes wanted to track early experience with FRAP 32.1 in the Seventh Circuit, at least on the panels in which she participated. Of the 79 cases heard in the Fall of 2007, and of the 237 briefs submitted in those cases, there were only four citations to unpublished Seventh Circuit dispositions, including two within a string cite.[33] While acknowledging the preliminary nature of the data and the infancy of the new rule, the Sykes article questioned whether lawyers surveyed by the FJC overstated their interest in citing unpublished dispositions. Overall, the early findings suggested to Judge Sykes that the case for a permissive citation rule was one of principle, not practicality.[34] Nonetheless, she acknowledged that if citation of federal unpublished opinions remains infrequent, the concerns about case management, integrity of the judicial process and the clarity, consistency and quality of appellate case law will have been allayed.[35]

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[31] Email from Amy McDowell, NCSC Knowledge and Information Services, to April Southwick (July 29, 2008) (copy on file with authors).

[32] Hon. Diane S. Sykes, *Citation to Unpublished Orders*, 32 So. Ill. U.L. J. 579.

[33] *Id.* at 580-81.

[34] *Id.* at 590.

[35] *Id.*

The federal rule on citation was changed in large part to promote uniformity and clarity across federal circuits with diverse rules, as well as the principle that like cases be treated alike.[36] Given the fact that each district in our unified court of appeals is bound by the same no-citation rule, uniformity is not as great a problem.[37] The FJC findings and Judge Sykes' post-rule efforts demonstrate that whether judicial resources shift to writing longer or shorter unpublished decisions, or to recommending greater or fewer decisions for precedential status, such effects will remain primarily a matter of individual panel preference. It is not the role of the Wisconsin Judicial Council to affirmatively predict what individual appellate judges will do if restrictions on citation are loosened. But the Council is comfortable with the fact that thus far, negative predictions about change in the federal system have not come to pass.

2. Experience in other states.

In recent years, a significant number of states also have modified their citation rules. At current count, 23 states have rules permitting citation of their unreported appellate opinions. For instance, Texas, which had prohibited citation of its unreported court of appeals opinions, discontinued the category of unpublished opinions in civil cases and made all new civil case opinions citable without restriction.[38] Likewise, Alaska's

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[36] *Id.* at 6-7.

[37] Though, as noted below, there has been an uneven imposition of sanctions when practitioners have disobeyed the citation rule.

[38] Texas Rule of Appellate Procedure 47.7 (prior unpublished opinions are citable, but have no precedential value).

Appellate Rule 214(d) providing that unreported opinions may not be cited, has been interpreted by the courts to mean that they may not be cited as precedent. The Rule does not forbid citation to unpublished opinions "for whatever persuasive power they may have."[39] Iowa's rule prohibiting the citation of unreported opinions was replaced in 2002 with a new rule that an unpublished opinion of any appellate court may be cited in a brief, but it "shall not constitute controlling legal authority."[40] The Kansas rule regarding citation of unreported opinions was amended to provide that "unpublished memorandum opinions of any court or agency" are not binding precedent and while "not favored for citation," they "may be cited if they have persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court and they would assist the court in its disposition."[41] Hawaii, the most recent state to adopt a change, finally approved an amendment to its Rules of Appellate Procedure to provide that "[a]ny disposition filed in this jurisdiction . . . may be cited in any proceeding," although memorandum opinions and summary disposition orders are still not precedent and there is no duty to cite them. A party may cite them as persuasive authority so long as the disposition is "appended to the brief or memorandum [.]"[42]

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[39] *McCoy v. State*, 59 P.3d 747, 753-760 (Alaska App. 2002).

[40] Iowa Appellate Rule 6.14(5)(b) (2002).

[41] Kansas Supreme Court Rule 7.04 (2003).

[42] Hawaii Rule of Appellate Procedure 35(c)(2) (2008).

Arizona is considering an amendment to allow unreported opinions to be cited for persuasive value.[43] Illinois weighed the issue, but has tabled the proposed amendment pending more studies on the effects the changes have in other states and at the federal level.[44] With these recent changes, approximately half of the states now allow citation to unreported opinions.[45] It is interesting to note that since this Court last considered the no-citation rule, no state has reversed course away from allowing citation to unpublished opinions.

Many of our neighboring states, including Iowa, Michigan and Minnesota, allow citation to unreported opinions.[46] As previously noted, Iowa amended its rules to permit citation in 2002. Iowa recently proposed additional amendments to the appellate rules, and received public comments. Notably, no comments were received on the current rule allowing citation to unpublished opinions.[47] Similarly, the Clerk of the Michigan Supreme Court stated that the court has received no complaints

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[43] Petition to Amend Rule 111 of the Arizona Supreme Court and Rule 28 of the Arizona Rules of Civil Appellate Procedure *at* http://www.dnnsupremecourt.state.az.us/AZ/SupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/forumid/7/postid/451/view/topic/Default.aspx.

[44] Serfass & Cranford, *supra* note 10, at 349–50 nn.2, 5.

[45] *Id.*, n.2, at 349-50.

[46] Iowa Rule of Appellate Procedure 6.14(5).

[47] Email from Roberta Gilbert, staff person to the Iowa Supreme Court's Rules Subcommittee, to April Southwick (July 23, 2008) (copy on file with authors).

with regard to its rule allowing citations to unreported opinions.[48] Minnesota also reported no problem with its citation practice.[49]

In short, the change proposed by the Judicial Council conforms to the practice in numerous other jurisdictions and our neighboring states, and is compatible with FRAP 32.1. The proposed revision does not alter the non-precedential nature of unreported Wisconsin appellate opinions; it simply makes state procedure more consistent with its federal counterpart and the trend in sister states.

II. OTHER POLICY CONSIDERATIONS FAVORING CITATION REMAIN STRONG.

In 2003, both concurrences and the dissent, to varying degrees, acknowledged the range of public policy factors supporting citation of unreported appellate opinions.[50] The Wisconsin Judicial Council has located no data to undercut those positive policy considerations. Several of those policies hold particular weight.

A. Unreported Wisconsin Appellate Opinions Should Be Granted as much Citable Stature as Other Secondary Authority.

Virtually everything else—from Shakespeare, to the *Bible*, to the *New York Times*—can be cited to Wisconsin courts. While none of these sources has any precedential value, they can be used for persuasive

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[48] Email from Corbin R. Davis, Clerk of the Michigan Supreme Court, to April Southwick (July 25, 2008) (copy on file with authors).

[49] Email from Richard S. Slowes, Minnesota Supreme Court Commissioner, to April Southwick (July 25, 2008) (copy on file with authors).

[50] *See* 2003 WI 84, generally.

purposes. If parties can cite to these sources, they should be able to cite to unreported appellate decisions. Most members of the legal community would agree that non-legal sources provide less direction and insight in a legal proceeding than would an unpublished opinion from the Wisconsin Court of Appeals. Since judges and parties alike are likely to derive greater benefit from the wisdom found in an unreported opinion of the court of appeals than from a recommendation by the *New York Times* or a quote from the Bard, that judicial source of analysis should not be withheld.

In its current form, the application of RULE 809.23(3) produces some curious results. While unreported appellate opinions may not be cited, unpublished decisions of other tribunals may be cited to the courts of this state. For example, there is no bar to the citation of unreported decisions from the Wisconsin circuit courts "for whatever persuasiveness may be found in their reasoning and logic."[51] Alerting a court to the subsequent appellate history of a cited circuit court decision, however, may result in a sanction.[52]

Likewise, there is no bar to citing unpublished state agency decisions.[53] In an interesting twist, an unpublished state agency decision

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[51] *Brandt v. LIRC*, 160 Wis. 2d 353, 365, 466 N.W.2d 673, 677 (Ct. App. 1991), *aff'd*, 166 Wis. 2d 623, 480 N.W.2d 494 (1992). Sanctions for violation of the no-citation rule are discretionary and have not been imposed routinely.

[52] *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 467-68, 510 N.W.2d 826, 832 (Ct. App. 1993), *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995).

[53] *Seebach v. Pub. Serv. Comm'n*, 97 Wis. 2d 712, 728-29, 295 N.W.2d 753, 762 (Ct. App. 1980); *Friendship Village v. City of Milwaukee*, 181 Wis. 2d 207, 225, 511 N.W.2d 345, 352-53 (Ct. App. 1993).

may be cited to the court of appeals, but an unreported court of appeals opinion may not be cited to a state agency.[54]

In another irony, the current rule does not preclude many citable sources, such as law review articles, from extensively discussing unpublished opinions while still serving as citable authority. The effect of RULE 809.23(3) in its present form is that Wisconsin courts can consider nearly any written matter a litigant wishes to urge upon them, except for the portions of their own work that they designate "unpublished. The rule creates a strange anomaly for litigants and the courts, and in some cases, creates more work for both.

B. Permitting Citation to Unreported Appellate Opinions Would Legitimize the Current Implicit, and Occasionally Explicit, Practice.

In the FJC study, researchers found that over a third of the lawyers contacted had uncovered at least one unpublished opinion of the forum circuit that they wanted to cite but could not.[55]

The Judicial Council does not expect that the proposed amendment will change Wisconsin research practices significantly. If no controlling authority exists, practitioners already move on to secondary authority for information or insight. Prior surveys, articles, and anecdotal evidence reveal that unreported opinions already are often read, and sometimes cited by judges and lawyers precisely because they do contain valuable

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[54] *Metropolitan Holding Co. v. Board of Review*, 167 Wis. 2d 134, 141, 482 N.W.2d 654, 657(Ct. App. 1992) (finding error on a violation of RULE 809.23(3) when a board of review in a property tax matter admitted an unpublished court of appeals decision).

[55] FJC Study at 15, 45 (2005).

analysis.[56] The proposed amendment removes the risk of sanction from the current, if mostly covert, practice that judges and practitioners already undertake.

Recently, this Court held that the court of appeals impermissibly gave persuasive effect to an unpublished case that had no precedential or persuasive authority. The Court directed a portion of a footnote to be stricken, which had concluded that the unpublished opinion on which the circuit court relied was wrongly decided.[57] The court of appeals described the practical reality, "This court is not so naïve as to believe that unpublished opinions, whether one-judge opinions, per curiam opinions or authored opinions sit in a file serving as dinner for book lice [a tiny, soft-bodied wingless *psocoptera*, that actually feeds on molds and other organic matter found in ill-maintained works....]"[58]

Chief Justice Abrahamson has also acknowledged the covert use of unpublished opinions. "[S]avvy practitioners search unpublished opinions

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[56] *Marotz v. Hallman*, 302 Wis. 2d 428, 439, 734 N.W.2d 411, 417 (2007); *DaimlerChrysler v. Labor & Industry Review Comm'n*, 299 Wis. 2d 1, 16, N.W.2d 311, 318 (2007); *Washington v. Washington*, 2000 WI 47, ¶ 25 n.14, 234 Wis. 2d 689, 611 N.W.2d 26 (2000); *State v. Rachwal*, 159 Wis. 2d 494, 517, 465 N.W.2d 490 (1991); *Winnebago County DSS v. Darrel A.*, 194 Wis. 2d 627, 652, 534 N.W.2d 907 (Ct. App. 1995). These cases serve as a representative sample only; many additional Wisconsin cases include citation to unpublished decisions.

[57] *City of Sheboygan v. Nytsch*, 2008 WI 64, 750 N.W.2d 475, 476 (2008). The real offense may not have been the persuasive effect attributed to the unpublished decision, but the fact that the court of appeals essentially overruled the earlier opinion, contravening the rule of *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) (Only the supreme court has the power to overrule, modify or withdraw language from a previous appellate decision).

[58] *City of Sheboygan v. Nytsch*, 2006 WI App 191, ¶ 18 n.6, 296 Wis. 2d 73, 722 N.W.2d 626 (Ct. App. 2006).

for insight and legal arguments that can be adopted, adapted, and incorporated into appellate briefs and legal memoranda, borrowing their language without citation. Appellate courts look to unpublished opinions to ensure consistency in outcome as well as to support their legal conclusions in subsequent opinions, sometimes expressly citing to unpublished opinions but more often than not doing so without citation. The proposed rule would bring a clandestine practice out into the open."[59]

C. Citation Would Enhance Lawyers' Ability to Advocate for Their Clients, and Could Provide the Courts With Better Guidance.

A litigant who can point to a prior decision of the court and demonstrate its applicability should be able to do so as a matter of justice and fundamental fairness. Making unpublished opinions citable should not suspend the advocate's usual judgment about which authority is most persuasive, or be used to clutter briefs without adding persuasive force.[60]

Certain areas of practice in particular suffer from a shortage of precedent because an opinion issued by a single judge of the court will not be published.[61] Single judge appeals include small claims, municipal ordinance, traffic regulation, non-moving traffic violation, habitual traffic offender, implied consent law driver license revocation and suspension,

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[59] 2003 WI 84, ¶ 47.

[60] *See* Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 11.31 at 28-29 (4th ed. 2006) ("string citations are uniformly criticized but are still widely used in the mistaken belief that they evidence scholarship. . . . Judges, too, need to be reminded to avoid excessive verbiage, string citations, footnotes and recitations of unnecessary facts.")

[61] Wis. Stats. § 752.31(2) and (3); WIS. STAT. (RULE) § 809.23(4)(b).

termination of parental rights, juvenile, misdemeanor, mental commitment, protective placement, civil forfeiture and contempt of court cases. The ability to cite unpublished decisions in those areas, for whatever persuasive value they may have, further equips lawyers to urge that like cases be treated similarly.

Equally important, the ability to cite unreported opinions can be particularly helpful to trial judges who must exercise discretion in applying relatively settled law to an infinite variety of facts while at the same time striving for uniformity. By loosening the rule, judges can engage in a deeper intra-court dialogue before reaching a firm resolution on a new or difficult legal issue.

The Sykes concurrence of 2003 and others have theorized that permitting citation would interfere with court of appeals' ability to strike the right balance of resources between its primary error-correcting function and its secondary law-developing function. Yet the court of appeals will not be bereft of mechanisms to manage its workload if the citation rule is amended. There are many such mechanisms. For instance, section (RULE) 808.03 reduces the burden on the court of appeals by giving the court discretion as to whether to take an intermediate appeal. *See Bearns v. DILHR*, 102 Wis. 2d 70, 306 N.W.2d 222 (1981). The court has other means to limit the issues and arguments placed before it, such as the rule that it need not consider arguments not fully developed, or which lack pinpoint citations. *See Roehl v. American Family Mut. Ins. Co.*, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998); *see also* WIS. STAT. (RULE) § 809.19(1)(e); SCR 80.02(3).

Other means of conserving appellate resources include the rule that court will not decide an issue based on hypothetical facts, *State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998) nor will it decide abstract legal principles. *Weber v. Town of Saukville*, 197 Wis. 2d 830, 840 541 N.W.2d 221 (Ct. App. 1995), *aff'd on other grounds*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997). If an issue is moot, the reviewing court usually will decline to decide it, *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425, and likewise, the court usually declines to review issues raised for the first time on appeal, or discussed only in a reply brief. *See, eg., Jackson v. Benson*, 218 Wis. 2d 835, 901, 578 N.W.2d 602 (1998); *State v. Marquardt*, 2001 WI App 219, ¶ 14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188. If a party has failed to object to evidence below, appeal of the issue is deemed waived. WIS. STAT. § 901.03(1)(a). Normally, the court's opinion in a particular case will be limited to a decision on the narrowest possible ground. *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997), *overruled on other grounds* by *State v. Morford*, 2004 WI 5, 268 Wis. 2d 300, 674 N.W.2d 349.[62]

The significance of the mechanisms described above is not just that they work to limit arguments and issues the court of appeals must take up, but that they usually abbreviate what an appellate court will discuss in a particular opinion. These resource-saving rules, however, do not deprive

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[62] Many of the cases described in this paragraph are categorized as identifying "negative standards of review" in the comprehensive resource, Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, (4th ed. 2006), and are specifically set out in Appendix C, prepared by Hon. Richard S. Brown, Chief Judge, Wisconsin Court of Appeals, District II.

litigants and other courts of appellate analysis already produced. The current no-citation rule, in contrast, makes appellate work product expressly unavailable.

This Court's treatment of unreported opinions also supports expanding the no-citation rule. Unpublished opinions can present significant variations or meaningful explanations that go beyond the application of settled law. This Court accepts for review numerous unpublished opinions, indicating that not all unreported opinions are merely repeated application of settled law for which there is ample authority.[63] Given the limited discretionary caseload of the supreme court, the court of appeals is the court of last resort for most litigants. Under the current rule, many novel applications of the law are trapped and officially unusable in unpublished opinions, even though they readily appear on the computer screen every time a lawyer runs a WestLaw search.

Foundational to the rule of law is that the law applies equally to all citizens. Allowing parties to inform a court of its own prior decisions helps to institutionalize the equality of law by promoting consistent judicial decision making. Given the foundational importance of the equal application of law, a court should not prohibit those who come before it from citing one of the court's own decisions.

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[63] "About 30% of the cases that this court decides after granting petitions for review are unpublished opinions of the court of appeals." 2003 WI 84, n.29.

D. The Distinction Between Precedential Authority and Merely Persuasive Authority Would Be Preserved.

When an appellate opinion is ordered published in an official reporter, that publication means that the opinion has become law for the state. *See* WIS. STAT. § 752.41(1), (2) and (3). The publication criteria, developed by this Court and found in WIS. STAT. (RULE) § 809.23(1), define which decisions are significant enough to bind persons and entities beyond the parties to the particular case. The appellate rules also provide a mechanism for non-parties to request publication of an opinion which, in their view, meet publication criteria.[64] The Judicial Council's proposal would expressly preserve the distinction between precedential reported opinions, and non-binding unreported opinions.

E. The Judicial Council Considered, and Declined, Several Variations to the Proposed Amendment.

1. *The Proposal Creates No Requirement That Courts Cite to Unpublished Opinions.* Subsection (b) of the proposed amendment clarifies that unpublished opinions would not be deemed binding precedent. Such opinions could be cited for persuasive value only, and would be treated as part of the spectrum of non-binding authority such as decisions from other states, treatises and law review articles. With that limited attribute in mind, the Council also considered how to avoid potentially burdening the courts with needless motions for reconsideration. Thus, the proposal provides that a deciding court need not distinguish or cite any unpublished opinion in its

[64] WIS. STAT. (RULE) § 809.23(4).

written decision. This provision also helps preserve the distinction between binding precedent and the non-binding nature of unreported opinions.

2. *The Proposed Amendment Would Permit Citation of Existing Unpublished Appellate Decisions.* In the federal debate on citability, the chief judge of one of the restrictive circuits requested that the Judicial Conference limit FRAP 32.1 to be prospective only. The Advisory Committee's note was updated to reflect this last–minute alteration: "Rule 32.1(a) applies only to unpublished opinions issued on or after Jan. 1, 2007. The citation of unpublished opinions issued before Jan. 1, 2007, will continue to be governed by the local rules of the circuits."

Yet as Chief Justice Abrahamson has pragmatically observed "when court of appeals judges write under the existing rule, they know now that their opinions are widely available and discussed and that the opinions, both published and unpublished, are subject to review by legal journals and newspapers and this court."[65] With this practical assessment in mind, and bolstered by the desirable policy that like cases be treated alike, the Judicial Council proposal encompasses unreported opinions issued both before and after the amendment would take effect.

3. *The proposed rule change does not require filing and service of copies of any cited unreported opinions.* Because unreported opinions are widely accessible, the Judicial Council considered that those opinions, when cited, would be equally available to courts and opposing parties. Moreover, requiring that copies be provided would add unnecessarily to the

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[65] 2003 WI 84, ¶ 75.

expense of copying and to court and law office storage. The Council recognized that some other states' rules, as does FRAP 32.1, require that a party who cites to an unpublished opinion must provide a copy of that opinion to the court and the parties. Yet section 809.23(3)(a) currently does not require that a copy be provided when an unpublished opinion is cited to support a claim of claim preclusion, issue preclusion, or the law of the case. To preserve consistency between subsections (a) and (b), the Council declined to propose a new requirement that copies be provided.

CONCLUSION

In the Judicial Council's proposed amendment, WIS. STAT. (RULE) § 809.23(3) is revised to reflect the fact that unreported Wisconsin appellate opinions are increasingly available in electronic form. Grant Gilmore wrote that the advent of modern legal publishing fundamentally changed the legal system by allowing lawyers to see more cases and for the first time analyze each one, making the law more consistent. Internet publishing will have an equally great effect on the legal system, making the law more broadly available, and rendering the current prohibition obsolete. As more unreported cases become permissibly citable, the law will grow more internally consistent. Legal publishing made the law stronger a hundred years ago, and today, the Internet continues that process. No adverse consequences have been documented in the jurisdictions which already permit citation.

Therefore, the Wisconsin Judicial Council respectfully urges this Court to amend RULE 809.23(3) to permit parties to cite to unpublished Wisconsin appellate opinions for persuasive purposes.

Dated September 16th, 2008.

RESPECTFULLY SUBMITTED,
WISCONSIN JUDICIAL COUNCIL

April M. Southwick, Staff Attorney
WI State Bar No 1070506
110 East Main Street
Madison, WI 53703
(608) 261-8290
(608) 261-8289 (facsimile)
april.southwick@wicourts.gov

Beth Ermatinger Hanan, Vice Chairperson
WI State Bar No. 1026989
309 North Water Street, 7th Floor
Milwaukee, WI 53202
(414) 223-3300
(414) 224-6116 (facsimile)
hanan@gasswebermullins.com

Attachment A					
Service	**Is the service available to the public?**	**Does the service include unpublished opinions?**	**Does the service offer a way to search unpublished opinions?**	**Time period covered?**	**Is there a charge for the service?**
Loislaw	Subscription Required	Yes	Yes	3/1995 to present	Yes
FindLaw	Yes	Yes, via link to court web site	Yes	3/1995 to present	No
Wisconsin Court System	Yes	Yes	Yes	3/1995 to present	No
State Bar of Wisconsin	Yes	Yes	Yes	3/1995 to present	No
Westlaw	Subscription Required	Yes	Yes	All cases since creation of the appellate courts	Yes
LexisNexis	Subscription Required	Yes	Yes	All cases since creation of the appellate courts	Yes
LexisOne	Yes	Yes	Yes	All cases since creation of the appellate courts	Yes, but subscription can be per document, daily, weekly or monthly