

CITATION OF UNPUBLISHED OPINIONS COMMITTEE

INTERIM REPORT TO WISCONSIN SUPREME COURT

MAY 2009

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I. INTRODUCTION

On January 6, 2009, the Supreme Court issued an order¹ authorizing the citation of unpublished Court of Appeals opinions for their persuasive value. The rule amendment allows the citation of unpublished opinions issued on or after July 1, 2009, which are authored by a member of a three-judge panel or by a single judge. The rule excludes from citation per curiam opinions, memorandum opinions, summary disposition orders, and other orders. See Appendix B, Supreme Court Order. The court ordered that a committee gather information regarding the impact of the rule amendment. The order stated:

IT IS FURTHER ORDERED that the court will convene a committee that will identify data to be gathered and measured regarding the citation of unpublished opinions and explain how the data should be evaluated. Prior to the effective date of this rule amendment, the committee and CCAP staff will identify methods to measure the impact of the rule amendment and establish a process to compile the data and make effective use of the court's data keeping system. The data shall be presented to the court in the fall of 2011.

The committee members are:

Justice David T. Prosser Jr., Supreme Court
Judge Edward R. Brunner, Court of Appeals, District 3
Jean Bousquet, Chief Information Officer (CCAP)
Peg Carlson, Chief Staff Attorney, Court of Appeals
Jane Colwin, State Law Librarian
Joseph Ehmann, First Assistant State Public Defender
Michael Heffernan, Foley & Lardner
Gregg Herman, Loeb & Herman
Theresa Owens, executive assistant to the Chief Justice,
reporter for committee
David Schanker, Clerk of the Supreme Court & Court of
Appeals
April Southwick, Attorney, Judicial Council
Christopher Wren, Assistant Attorney General, Criminal
Appeals Unit
David Ziemer, Wisconsin Law Journal

On March 12, 2009, the committee met and discussed the potential impact of the rule amendment. Supreme Court Justice David Prosser Jr. facilitated discussion of issues including

¹ 311 Wis.2d xxv.

accessibility to unpublished opinions, potential consequences of the amendment, preparations that persons or organizations are making or should be considering pending the July 1, 2009 effective date of the rule, whether judges will cite unpublished opinions, what data should be gathered to analyze the impact of the rule, and methods by which the committee could measure the impact of the rule. Justice Prosser reviewed the draft minutes of the March meeting and asked that the minutes be revised, amplified, and transformed into an interim report. The report will serve as a reference and guide for the review of the rule's impact.

II. ACCESSIBILITY

The committee discussed whether it was necessary to expand or improve the accessibility to unpublished opinions. Access to unpublished opinions is available through (1) Wisconsin Court system and the State Bar of Wisconsin's web sites, (2) State Law Library, (3) Westlaw, (4) LexisNexis, (5) Loislaw, (6) Findlaw, and (7) Fastcase. The Wisconsin Law Journal and the State Bar's Caselaw Express also make available summaries of unpublished opinions with links to the full text. Committee members indicated that accessibility and availability were adequate and that substantial changes were not necessary. The committee reasoned that the rule impacts a limited number of opinions containing reasoning that may be helpful to litigants. The members noted that an increasing number of online resources provide access, and print and electronic media notify attorneys of new unpublished opinions.

The committee, however, identified several areas in which accessibility of unpublished opinions could be improved. Joseph Ehmann expressed concern about the lack of access for pro se litigants and some members of the private bar due to expense and experience. He stated the rule favors attorneys with time and resources. There are a number of sources for unpublished opinions but each source presents different search capabilities. One source may provide unpublished opinions in the search results but another source may require separate searches of published and unpublished opinions. Chief Information Officer Jean Bousquet offered that access to unpublished opinions could be improved in the way in which the opinions are presented on the court's website. CCAP is developing a new search engine to improve search capabilities for opinions. Clerk David Schanker recommended that opinions posted on the court's website should be updated if the court amends them at a later date. Currently,

an amended version of an opinion is not uploaded to the web site. Clerk Schanker explained that the opinions on the court's website include a disclaimer that they are subject to editing. In light of this new rule allowing citation as well as the ability to file an electronic brief with hyperlinks to opinions, Clerk Schanker recommended modifying the automated process to provide the final version of the opinion on the court's web site.

The committee discussed whether the assignment of public domain citations (PDC) should be revisited. Jane Colwin suggested that the court of appeals should assign a public domain citation to each unpublished opinion. The court's current practice is to assign a PDC to the table listing unpublished opinions but does not assign a PDC to each unpublished opinion. Ms. Colwin opined that a user could find an unpublished opinion more easily with a PDC. She also noted an accessibility issue on the court's web site. Ms. Colwin explained that a user conducting a search by PDC in Westlaw receives the table listing unpublished opinions but a search by PDC on the court's website fails to return this list. She recommended that guidelines on the implementation of the rule should inform attorneys that a PDC relates to the table but not a specific unpublished opinion. The committee noted that rule petitions might be filed during the review period of this rule amendment on issues such as PDC assignment or expansion of the rule to include other unpublished opinions.

III. PRACTICE OF LAW

The committee discussed the potential impact of the amendment on the manner in which attorneys and the courts conduct business. The rule specifically states that an attorney has no duty to research or cite unpublished opinions. Some committee members expressed concerns about this provision. It was suggested that the rule does create an obligation for an attorney to research unpublished opinions when the other party cites an unpublished opinion. In addition, Mr. Ehmann expressed concern that the rule imposed no obligation to research the unpublished opinions on the other side of an issue. He asserted the lack of an obligation to research the other side of an issue would be detrimental to pro se litigants and creates the perception that the rule favors attorneys with time and resources. Michael Heffernan further opined that the rule creates a needless complication to the practice of law that will increase costs. Mr. Heffernan explained that his opposition to

the rule was based on the reasoning that the court of appeals is a court that deals with a high volume caseload but is not a law-making court.

The new citation rule expands the body of law available to attorneys. An attorney may rely on the persuasive value of an unpublished opinion to support an argument or point out a need to clarify the law on an issue. Christopher Wren stated that the availability of unpublished opinions provides a mechanism for attorneys to alert judges to inconsistencies in opinions (e.g., operating while intoxicated law, family law). Mr. Wren noted that the rule amendment exposes legal reasoning that was otherwise hidden. Members acknowledged that attorneys have been using arguments from unpublished opinions but not citing the unpublished opinion. Gregg Herman pointed out that the rule brought more balance because prior to the amendment, it was acceptable to cite trial court decisions but not court of appeals unpublished decisions. Mr. Herman explained that the rule also alleviates the difficult situation in which an attorney has to explain to a client that the court has already decided an issue but the attorney is unable to cite the decision in support of his client's case because the decision is unpublished.

Since any meaningful research for unpublished opinions will have to be done using online databases, the new rule will impact an attorney's legal research and computer skills. Attorneys will now need to search online in addition to using the legal treatises they may have relied on in the past. Mr. Herman stated that the legal profession should not settle for the lowest common denominator regarding legal research skills but should expect a higher standard of legal practice.

The committee also discussed the potential impact of the rule on the judicial workload and case processing. In speaking on behalf of the Court of Appeals, District Three, only, Judge Brunner stated that judges expend the same effort in a per curiam opinion, regardless of whether the opinion is published or unpublished. He suggested that a published opinion might simply receive more proofing or editing. Judge Brunner predicts the amendment will not impact the court of appeals' workload, but he does expect an increase in the number of appeals on ineffective assistance of counsel. In response to Judge Brunner's prediction that ineffective assistance claims would increase, Mr. Ehmann stated that he anticipated that attorneys would pose the issue about ineffective assistance to the court soon after effective date of the amendment. Judge Brunner

projected an increase in the trial court workload but noted the requirement that an attorney provide a copy of an unpublished opinion will help a great deal. The committee recommends that feedback on the rule amendment be sought at a future Judicial Conference.

The committee questioned whether a judge might take more time to write an unpublished opinion that may be cited for its persuasive value. Chief Staff Attorney Peg Carlson stated that the court of appeals has a mechanism to measure the number of days from submission to disposition of a case. The issue would be whether this statistic provides any insight into the impact of this rule amendment. Some committee members noted that it would be difficult to attribute the length of time spent on writing an unpublished opinion to a rule allowing citation of unpublished opinions. Another issue that arose was whether the publication criteria or petition for review criteria would be modified following the implementation of the citation rule.

The committee briefly discussed a perception that a court may tend to decide cases differently because an unpublished opinion may be cited for persuasive value. Members of the committee believed that judges have been reviewing unpublished opinions and raised the question of whether the courts will cite an unpublished opinion. April Southwick noted the rule amendment might heighten the significance and court's perception of an unpublished opinion. As an example, Ms. Southwick explained that the Judicial Council had been asked to review the court's interpretation of a statute in an unpublished opinion to determine if the interpretation should be codified.

IV. PREPARATIONS FOR RULE CHANGE

The committee discussed the extent to which preparations had been made by firms or organizations for the July 1, 2009 effective date of the rule amendment. Members also raised a variety of issues, including whether there is a need to prepare judges for the rule change, whether education of the bar and public is necessary, and whether an increase in workload is anticipated.

Some organizations may have conducted internal education and circulated information to heighten awareness of rule amendment; however, members noted no other significant preparations in their offices or organizations. Several committee members intended to circulate a memo or send an email

to colleagues informing them of their participation in this committee and soliciting feedback on further rule changes related to this amendment and experience with the rule after the effective date. Members indicated an obligation to continue fact finding on how the new rule amendment was affecting their organization's practices.

Committee members indicated that they might analyze specific work processes or products to determine whether a change is necessary in light of the rule amendment. David Ziemer, news editor/attorney with the Wisconsin Law Journal, explained that he writes a one-sentence summary for each opinion recommended for publication and relies on the first paragraph of any unpublished opinion. Mr. Ziemer may evaluate whether it would be helpful and appropriate to prepare a one-sentence summary for all opinions. Mr. Ehmann explained that the public defender's staff analyzes every opinion recommended for publication. Mr. Ehmann opined that they might analyze whether it is necessary and effective to expand this review to include unpublished opinions.

V. SCOPE OF REVIEW

The court has directed the committee to report its findings on the operation of the rule in the fall of 2011. The committee discussed the feasibility of conducting a study and the challenges of compiling data. Some members debated whether there was information, other than anecdotal, by which the court could measure the impact of the rule amendment. Judge Brunner questioned whether the study might be trying to impose an empirical paradigm that does not fit the rule. Judge Brunner suggested that persons in the system would adjust accordingly. Ms. Colwin noted the court has a history of creating or modifying procedural rules without establishing a study committee. Ms. Colwin suggested that the market should be left to determine responses. As part of her research for the petition that requested this rule petition, Ms. Southwick explained that she had contacted the other states that had adopted a citation rule and inquired about the impact of the rule. Ms. Southwick found that the states had not conducted an impact study following implementation but rather that controversy over the amendment had dissipated.

Mr. Ziemer noted that United States Court of Appeals Judge Diane S. Sykes had reviewed the impact of the federal citation rule. Judge Sykes stated that it was difficult to evaluate the

impact of the rule based on the limited results of the study. See Hon. Diane S. Sykes, Citation to Unpublished Orders Under New FRAP Rule 32.1 and Circuit Rule 32.1: Early Experience in the Seventh Circuit, 32 S. Ill. U. L.J. 579 (Spring 2008). Following the January 1, 2007 effective date of Federal Rule of Appellate Procedure 32.1, Judge Sykes reviewed the approximately 237 briefs filed in the cases assigned to her from September through December 2007. Judge Sykes found only four citations to unpublished orders issued by the Seventh Circuit Court of Appeals after January 1, 2007. Judge Sykes recognized that perhaps the rule has not been in effect for a sufficient period of time for a meaningful empirical study. She opined, however, that attorneys might have overstated their interest in citing unpublished opinions.

The committee discussed how it might find data that supports or refutes the potential consequences of the rule amendment and whether the data to be measured could provide valid conclusions about the impact of the rule amendment. The committee questioned whether any statistics might be helpful in analyzing the impact of the rule amendment. The committee predicted that a body of case law would not develop for at least one year following implementation because the rule limits citation to unpublished opinions issued on or after July 1. In assessing these challenges, the committee agreed that it would be very difficult to measure or quantify how much more time an attorney spent researching unpublished opinions. The committee agreed it would be impossible to measure the persuasive value of an unpublished opinion. There was an interest in collecting data on the impact of the rule on circuit courts; however, the data could only be collected through self-reporting by the judges.

In considering data to collect, the committee explored the probability that attorneys would seek to expand the rule. Several committee members opined that the attorneys would seek to expand the rule by requesting amendments that would allow citation of per curiam opinions and opinions issued before July 1, 2009. Mr. Ziemer predicted that the prohibition to cite opinions issued before July 1, 2009 will cause frustration among attorneys.

The committee recommends compiling statistics on the following events. Most of the data will be gathered for twelve-month periods before and after implementation of the rule. The committee recognizes that it may be difficult to develop any direct correlation between the statistics and the rule amendment.

1. Number of per curiam opinions, three-judge opinions, and summary orders filed between July 1, 2008 and June 30, 2009, and between July 1, 2010 and June 30, 2011.
2. Percentage of opinions published between July 1, 2008 and June 30, 2009, and between July 1, 2010 and June 30, 2011.
3. Number of petitions for review filed on unpublished opinions filed between July 1, 2008 and June 30, 2009, and between July 1, 2010 and June 30, 2011.
4. Number of petitions for review granted on unpublished opinions filed between July 1, 2008 and June 30, 2009, and between July 1, 2010 and June 30, 2011.
5. Number of motions to publish filed pursuant to Wis. Stat. § (Rule) 809.23(4)(a) between July 1, 2008 and June 30, 2009, and between July 1, 2010 and June 30, 2011.
6. Number of days from submission to disposition of unpublished opinions issued between July 1, 2008 and June 30, 2009, and between July 1, 2010 and June 30, 2011.
7. Number of briefs in which unpublished opinions are cited. The Court of Appeals could review all briefs considered during screening in February, March, and April of 2010 and February, March, and April of 2011 and identify all briefs in which unpublished opinions are cited and the number of citations. The court's review may differentiate cases cited pursuant to Wis. Stat. § (Rule) 809.23(3)(a) or (b).

VI. PROPOSED CHANGES BEFORE IMPLEMENTATION

The committee discussed whether there is a need to amend other procedural rules or develop guidelines to address questions related to the citation rule amendment. The following list represents issues on which the committee recommends that

guidance be provided,² changes be made, and information be gathered.

1. Recommend that notwithstanding Wis. Stat. § (Rule) 809.19(1)(a), the parties should include unpublished opinions cited in a brief in a separate list in the Table of Cases. Parties should include unpublished opinions in a separate list in the Table of Contents of a Petition for Review.
2. Suggest a citation format for unpublished opinions. When citing an unpublished opinion a party should include the case caption, docket number, unpublished designation, paragraph number and court and date: Lukas v. Kerr, No. 2004AP730, unpublished slip op., ¶5 (Wis. Ct. App. Mar. 23, 2005). In the alternative, a party may use an electronic citation indicating where the unpublished opinion may be readily accessed on line. See The Bluebook, A Uniform System of Citation R. 18.1.1, at 151-52 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). The committee also recommended that the guidelines inform attorneys that a public domain citation should not be used when citing an unpublished opinion because the PDC relates to the table of unpublished opinions only.
3. Recommend that the copy of the unpublished opinion be included in the appendix to any brief or petition, or attached to a motion in which the unpublished opinion is cited.
4. File a rule petition seeking to modify Wis. Stat. § (Rule) 809.19(1)(a) regarding the table of cases, see 1. above, and Wis. Stat. § (Rule) 809.19 regarding a copy of the unpublished opinion, see 3. above.
5. Compile a list of sources that provide access to unpublished opinions.
6. Identify statistics and information to be compiled by mid-year 2011 for report to the court. See section IV., 1-7 of this interim report.

² See Appendix A, Notice providing guidance on implementation of rule amendment prepared by the Clerk of Supreme Court and Court of Appeals.

7. Enhance accessibility to unpublished opinions on the court's website by updating the opinions if they are amended.
8. Identify appellate decisions addressing ineffective assistance claims based on citation or research of unpublished opinions.
9. Solicit feedback on experiences with the rule by facilitating a breakout session at the Judicial Conference to be held in the fall of 2010. Submit request to the Judicial Education Committee.
10. Amend banners on unpublished opinions to reflect rule change.

- a. The following banner presently appears on unpublished opinions on Westlaw.

NOTICE: UNPUBLISHED OPINION. RULE 809.23(3), RULES OF CIVIL PROCEDURE, PROVIDE THAT UNPUBLISHED OPINIONS ARE OF NO PRECEDENTIAL VALUE AND MAY NOT BE CITED EXCEPT IN LIMITED INSTANCES.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

The banner will be modified on both Westlaw and LexisNexis to read:

SEE RULES OF APPELLATE PROCEDURE, RULE 809.23(3), REGARDING CITATION OF UNPUBLISHED OPINIONS.

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

- b. The Court of Appeals places the following banner on all court of appeals opinions. This banner will be removed after the appellate court's case management system is modified to allow an amended opinion to be uploaded to the web page.

THIS OPINION IS SUBJECT TO FURTHER EDITING.
IF PUBLISHED, THE OFFICIAL VERSION WILL
APPEAR IN THE BOUND VOLUME OF THE OFFICIAL
REPORTS.

- c. The Court of Appeals' Table of Unpublished Opinions includes the following header:

Pursuant to WIS. STAT. RULE 809.23(3) of Appellate Procedure, 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 res judicata, collateral estoppel or law of the case.

The court will amend this header to read:

Authored, unpublished opinions may be cited in Wisconsin courts for their persuasive value; they may not be cited as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or law of the case. Per curiam opinions may not be cited for any purpose, except to support a claim of claim preclusion, issue preclusion or law of the case. See Wis. Stat. Rule 809.23(3).

- d. Loislaw, Fastcase, and Findlaw also provide access to unpublished opinions, but their inclusion of any banners indicating an opinion's unpublished status is inconsistent. Loislaw categorizes the opinions in a separate database entitled Wisconsin Case Law (Unpublished). Users can choose to search for only published opinions, only unpublished opinions, or both. Fastcase does not designate the opinions as unpublished. Findlaw provides two websites, a consumer site and a legal professionals' site. A user may register on either site free of charge. The legal professionals' site provides a searchable database of Wisconsin appellate court cases since 1995, including unpublished opinions.³ A user may browse the opinions by date and searchable by title or party name, and docket number.

³ <http://www.findlaw.com/11stategov/wi/wica.html> (last visited 05/12/2009).

VII. CONCLUSION

The committee members agreed to continue to provide feedback on guidelines for implementation and forward questions that should be addressed. A goal of the committee is to make the rule work as well as possible and continue gathering information on how the rule is working. The committee will schedule a meeting after the effective date of rule amendment as needed.

Report submitted to the Wisconsin Supreme Court on May 12, 2009.



SHIRLEY S. ABRAHAMSON
CHIEF JUSTICE

DAVID R. SCHANKER
CLERK

CLERK OF THE
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RICHARD S. BROWN
CHIEF JUDGE

NOTICE

Effective July 1, 2009, Wis. Stat. § 809.23(3) has been amended to provide that unpublished opinions of the Court of Appeals may be cited for their persuasive value.

The newly created § 809.23(3)(b) provides that “an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under § 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.”

The newly created § 809.23(3)(c) provides that “[a] party citing an unpublished opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.”

In applying these new rules, please take note of the following:

1. Appellate Briefs and Petitions for Review. In the Table of Cases in appellate briefs and petitions for review, unpublished opinions cited to the court should be listed alphabetically under a separate heading (e.g., “Unpublished Opinions” or “Unpublished Cases Cited”).
2. Citation Format. When citing an unpublished opinion in a pleading before any court, a party should include the case caption, docket number, unpublished designation, paragraph number, court, and date. For example: Lukas v. Kerr, No. 2004AP730, unpublished slip op., ¶5 (Wis. Ct. App. Mar. 23, 2005). In the alternative, a party may use an electronic citation indicating where the opinion may be readily accessed online. See The Bluebook, A Uniform System of Citation R. 18.1.1, at 151-52 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005). Please note: Because the Public Domain Citation (PDC) for an unpublished opinion refers to a table, and not to the individual opinion, PDC numbers should not be used when citing to an unpublished opinion.

3. Copy of opinion for the court. The copy of cited unpublished opinions required under § 809.23(3)(c) should be placed in the appendix to any brief or petition for review or attached to a motion in which the unpublished opinion is cited.

4. Electronic briefs, petitions for review, and appendices. In electronic documents filed with the appellate courts beginning July 1, 2009 pursuant to §§ 809.19(8)(a)4. and 809.62(4)(b), (c), and (d), a copy of any unpublished opinions cited to the court should be included in the electronic appendix. Hyperlinks to unpublished opinions may be included in the electronic brief or petition, but if an electronic version of the appendix is provided, a hard copy of the unpublished opinion must be scanned in as part of the appendix along with the other appendix documents.

5. Availability of Unpublished Opinions. Access to unpublished opinions is available through the web sites of the Wisconsin court system (www.wicourts.gov) and the State Bar of Wisconsin (www.wisbar.org), Westlaw (www.westlaw.com), LexisNexis (www.lexisnexis.com), the State Law Library (<http://wilawlibrary.gov>), Loislaw (www.loislaw.com), and Fastcase (www.fastcase.com). The Wisconsin Law Journal and the State Bar's Caselaw Express also make available summaries of unpublished opinions with links to full text.

Please do not hesitate to contact the Clerk's Office at (608) 266-1880 or at clerk@wicourts.gov with any questions regarding the new rules.

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 08-02

In the matter of amendment of
Wis. Stat. § (Rule) 809.23(3) regarding
citation to unpublished opinions.

FILED

JAN 6, 2009

David R. Schanker
Clerk of Supreme Court
Madison, WI

On January 25, 2008, the Wisconsin Judicial Council petitioned this court for amendment to Wis. Stat. § (Rule) 809.23(3) to allow unpublished opinions to be cited for their persuasive value. The court held a public hearing on October 14, 2008, on the petition. Upon consideration of matters presented at the public hearing and submissions made in response to the proposed amendment, the court adopted the petition, with modifications, on a 6 to 1 vote. Justice Bradley dissented from the adoption of the petition. Further, the court voted the effective date of the amendments adopted herein will be July 1, 2009, and that the court will review the operation of this rule approximately three years from the effective date.

Therefore,

IT IS ORDERED that effective July 1, 2009:

SECTION 1. 809.23 (3) of the statutes is renumbered 809.23 (3) (a) and amended to read:

809.23 (3) ~~UNPUBLISHED~~ CITATION OF 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, and except as provided in par. (b).

SECTION 2. 809.23 (3) (b) of the statutes is created to read:

809.23 (3) (b) In addition to the purposes specified in par. (a), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

SECTION 3. 809.23 (3) (c) of the statutes is created to read:

809.23 (3) (c) A party citing an unpublished opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.

Judicial Council Note, 2008: 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, judgments, orders, and dispositions issued on or after January 1, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

IT IS FURTHER ORDERED that the court will convene a committee that will identify data to be gathered and measured regarding the citation of unpublished opinions and explain how the data should be evaluated. Prior to the effective date of this rule amendment, the committee and CCAP staff will identify methods to measure the impact of the rule amendment and establish a process to compile the data and make effective use of the court's data keeping system. The data shall be presented to the court in the fall of 2011.

IT IS FURTHER ORDERED that notice of this amendment of Wis. Stat. § (Rule) 809.23(3) be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 6th day of January, 2009.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court

¶1 ANN WALSH BRADLEY, J. (*dissenting*). This court has faced three previous petitions to amend the current citation rule, and has up until now declined to do so. I respectfully dissent for the reasons previously stated. In the Matter of the Amendment of Wis. Stat. § (Rule) 809.23(3), 2003 WI 84, 261 Wis. 2d xiii, ¶¶6-11. No sufficient problem has been identified to warrant the change. I continue to believe that the potential increased cost and time outweigh any benefits gained. Therefore, I would deny the petition.

