2003 WI 84

SUPREME COURT OF WISCONSIN

No. 02-02

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 § (Rule) 809.23 (3) regarding citation to unpublished opinions.

FILED

JULY 1, 2003

Cornelia G. Clark
Clerk of Supreme Court

¶1 PER CURIAM. On May 31, 2002 Judge Patience Roggensack, Howard Eisenberg, Christopher Wren, and Warren Weinstein filed an amended petition seeking the amendment of Wis. Stat. § (Rule) 809.23(3) to allow for the citation of unpublished opinions for persuasive purpose only. The court held a public hearing on October 22, 2002, on the amended petition. Upon consideration of the matters presented at the public hearing and submissions made in response to the proposed amendment, the court has determined that the petition to amend Wis. Stat. § (Rule) 809.23 (3) be denied.

¶2 IT IS ORDERED that the petition to amend Wis. Stat. § (Rule) 809.23 (3) is denied.

¶3 ANN WALSH BRADLEY, J. *(concurring).* The petition before the court sets forth a proposed amendment to Wis. Stat. § (Rule) 809.23(3) which would permit citation of unpublished court of appeals opinions for their persuasive value. The arguments on both sides of this issue have merit.

¶4 Those who oppose amending the rule argue that no sufficient problem in the current rule has been identified to warrant adoption of the proposed amendment. They assert that allowing citation to unpublished opinions will increase the scope and cost of legal research and create new professional obligations for lawyers. Additionally, they raise concerns that the amendment will interfere with the court of appeals' ability to fulfill its primary error correcting function and, given the court's high volume of cases, unduly increase the work of an already very busy court.

¶5 Supporters of the proposed amendment argue that considerations of public policy strongly favor allowing citation to unpublished opinion as persuasive authority. Unpublished opinions are widely available and often referred to by practitioners and relied on sub silencio by judges. They observe that adopting the petition would acknowledge this reality. Further, they contend that the noncitation rule threatens the principle that like cases be treated alike and erodes confidence in the integrity of our justice system.

¶6 Ultimately, for me, the denial of this rule amendment comes down to the fact that the reasons offered in support of the amendment fail to demonstrate a need for change at this time

and the suggested benefits do not outweigh the potential negative consequences.

¶7 This court has faced two previous requests to change the citation rule, and has declined to do so, emphasizing the original justifications for adopting a noncitation rule.[1] I realize that the persuasive value of some of these justifications diminishes with the change of time and circumstances. For example, one of the original justifications for the noncitation rule was that permitting citation to unpublished opinions gives those who know about the case an advantage over those who do not. While this may be true, the same can be said of those who read published opinions. In light of the fact that unpublished opinions are now widely available, this justification for a noncitation rule becomes less persuasive.

¶8 Further, it appears that the general trend is for change of noncitation rules. Eight of 13 federal circuits now allow some citation to unpublished opinions. Several of our surrounding states, including Iowa, Minnesota, and Michigan, permit citation to unpublished opinions. Additionally, as noted by the dissent, the U.S. Advisory Committee Comment to New [Federal] Rule 32.1 has concluded that restricting the citation of unpublished opinions is against public policy. Dissent, ¶44.

[1] The current noncitation rule was adopted in 1978. In 1982 and 1989 there were requests to change the rule. See In re Amendment of Section (Rule) 809.23(3), Stats., 155 Wis. 2d 832, 456 N.W.2d 783 (1990).

¶9 This court should be mindful of this movement and attentive to the effects of these changes, if any, in other states and in the federal circuits. Over time, these courts may serve as models of how to effectively curb or minimize the potential adverse effects of allowing citation to unpublished opinions, while also taking advantage of the benefits it can bring, such as providing persuasive authority in areas lacking published opinions.

¶10 Significant technological advances since the adoption of the noncitation rule in 1978 have led to greatly increased access to both published and unpublished opinions. Currently, this court makes unpublished opinions of the court of appeals available online at no charge, and these opinions are also readily available through numerous database services. Increasing numbers of lawyers have access to these databases, and this number will likely continue to increase.

¶11 I am mindful that as part of our superintending authority over the court system in Wisconsin, this court must keep abreast of such technological developments and adapt to changed circumstances when appropriate. Yet, because the arguments of the proponents have not convinced me that currently the need for or benefits of change outweigh the potential adverse consequences, I respectfully concur.

¶12 DIANE S. SYKES, J. *(concurring)*. I agree with the court's decision to deny Rules Petition No. 02-02, which proposed to amend a rule of appellate procedure. The petition proposed a major amendment to an important foundational appellate rule——the prohibition against citation of unpublished appellate opinions, Wis. Stat. § (Rule) 809.23(3). The proposed new rule would have permitted citation of unpublished opinions issued on or after July 1, 2003, for their persuasive value. The proposed new rule excluded per curiam and summary dispositions, and required the party citing an unpublished opinion to supply a copy to the court and opposing parties.

¶13 No particular or pressing need for this amendment to the noncitation rule has been demonstrated; no real problem or anomaly in the current rule has been identified as justifying the change. Nor has the noncitation rule been shown to be obsolete, unworkable, unnecessary, or wrong. At best, the proponents of the amendment have demonstrated that 1) technological progress has diminished, though not eliminated, a small part of the original justification for the noncitation rule; and 2) the current rule is sometimes violated.

¶14 This is insufficient reason to alter the status quo in an area so fraught with consequence for the judiciary, for the orderly development of precedential case law, for the practice of law, and for persons who pay legal bills. The proposed new rule permitting citation to unpublished opinions would expand the scope and increase the expense of legal research and create new professional obligations for lawyers. It would also

increase the court of appeals' workload, interfere with its ability to develop a consistent body of appellate case law, and perhaps decrease the quality of both its published and unpublished opinions.

¶15 The rule prohibiting citation to unpublished opinions, Wis. Stat. § (Rule) 809.23(3), was adopted by this court in 1978 following the creation of the court of appeals, and currently provides that "[a]n 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 law of the case."[2] The Judicial Council Committee Note accompanying the rule states that "[t]he trend toward nonpublication of opinions is nationwide and results from the explosion of appellate court opinions being written and published. Many studies of the problem have concluded that unless the number of opinions published each year is reduced legal research will become inordinately time-consuming and expensive." Wis. Stat. § (Rule) 809.23, Judicial Council Committee Note, 1978.

¶16 In 1990, this court denied a petition to amend Wis. Stat. § (Rule) 809.23(3) to allow citation to unpublished

[2] The original exceptions were "res judicata, collateral estoppel, or law of the case." In re Rules of Appellate Procedure, 83 Wis. 2d xiii, xxxii (1978)(order adopting rules of appellate procedure). Effective July 1, 2002, the rule was amended to substitute "claim preclusion" for "res judicata" and "issue preclusion" for "collateral estoppel". In re Amendment of Wis. Stat. § 809.23, 2001 WI 135, 248 Wis. 2d xvii.

opinions for "persuasive and informational purposes." In the Matter of the Amendment of Section (Rule) 809.23(3), Stats., 155 Wis. 2d 832, 835, 456 N.W.2d 783 (1990). In doing so, the court reaffirmed the primary original justifications for the noncitation rule:

> The reasons for which the court adopted the rule limiting citation of unpublished appellate opinions in 1978 are set forth in the Judicial Council Committee's Note to the rule:
>
> 1. The type of opinion written for the benefit of the parties is different from an opinion written for publication and often should not be published without substantial revision;
>
> 2. If unpublished opinions could be cited, services that publish only unpublished opinions would soon develop forcing the treatment of unpublished opinions in the same manner as published opinions thereby defeating the purpose of nonpublication;
>
> 3. Permitting the citation of unpublished opinions gives an advantage to a person who knows about the case over one who does not;
>
> 4. An unpublished opinion is not new authority but only a repeated application of a settled rule of law for which there is ample published authority.
>
> The court continues to adhere to those expressions of general policy.

Id. at 833.

¶17 The first, second, and fourth of these justifications are substantive and relate to the nature and purpose of unpublished opinions and the role of the court of appeals. The third primarily addresses access and procedural fairness.

¶18 Taking the third consideration first, it is undoubtedly true, as the proponents of the amendment point out,

that the current prevalence and broad availability of electronic legal databases has diminished the problem of access to unpublished opinions. Nevertheless, allowing citation to unpublished opinions, even as persuasive rather than fully precedential authority, has serious consequences for the scope and cost of legal research. That unpublished opinions are now generally accessible online has not erased legitimate concerns about increasingly burdensome and expensive legal research. As this court observed in 1990:

> [I]f unpublished opinions were permitted to be cited for persuasive and informational purposes, lawyers would not be entitled to rely on published precedent in advising clients concerning their legal matters. Competent representation could well require research into a large body of unpublished appellate opinions lest some of them ultimately be considered persuasive or informative on issues relevant to the client's matters.
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> This additional burden on the practitioner, with a concomitant increase in fees to the client, would not be alleviated by the availability of services printing the unpublished appellate opinions or their inclusion in automated legal research tools or availability at law libraries. All law offices are not created equal: differences in geographical location, client base and economic resources create an inequality in the ability of a practitioner, whether a lawyer practicing alone in a small town or one practicing in a 35-member firm in a large metropolis, to easily and affordably conduct the research needed for adequate client representation.

Id. at 834.

¶19 These concerns remain and have not been adequately addressed by the petitioners. There has been a steady upward trend in the court of appeals' annual case filings——1,915 in

1979, 3,342 in 2002.[3] Even if we were to assume that intermediate appellate caseloads would stay relatively constant, the number of unpublished opinions will obviously multiply and the body of citable unpublished caselaw will inexorably expand. Necessarily then, any rule allowing the citation of unpublished opinions would broaden the scope of legal research and may well create new professional obligations for lawyers. This would carry a price tag.

¶20 Under the current noncitation rule, lawyers can safely choose whether to take the extra, time-consuming step of searching for and reading unpublished opinions, depending upon the nature and complexity of the legal question under consideration, the needs and means of the client, and sound professional judgment. Under the proposed new rule, they would not likely have that choice. Lawyers would not want to be accused of foregoing an opportunity to convince a court to adopt the holding and/or rationale of a persuasive-if-not-precedential unpublished opinion. If the value of unpublished appellate opinions as citable authority is no longer zero, ignoring them would no longer be an option. Legal research would become more time-consuming and therefore more expensive.

¶21 For institutional participants in the legal system, such as the Department of Justice (DOJ), allowing citation to unpublished opinions for persuasive value would substantially

[3] Caseload statistical reports, 1979 and 2002, Office of the Clerk of the Court of Appeals.

alter the approach to appellate practice. The DOJ, representing the state and appearing more frequently in Wisconsin appellate courts than any other party, has advised this court that any rule allowing citation to unpublished opinions would require unpublished opinions to be scrutinized more closely for their impact on the development of the law:

> The Department carefully assesses decisions by the court of appeals that are adverse to the state to determine the potential merits of a petition for review. This assessment includes the likely effect of a particular decision on future cases. Because an unpublished decision cannot be cited in future cases under the current rule, the fact that an adverse court of appeals decision (such as a one-judge decision) will not be published generally weighs strongly *against* filing a petition for review. . . .
>
> The proposed rule change will alter that calculus. If the proposed rule is adopted, the Department will no longer be able to rely on the fact that an unpublished decision cannot be cited adversely to the state's position in future cases. The Department will need to consider the possible impact of an adverse unpublished decision——except per curiam decisions and summary disposition orders, under the proposed rule——on future cases in which the state is a party. Although it is impossible to predict the number of additional petitions for review that the state may file if the proposed rule is adopted, it is a virtual certainty that the state would give stronger consideration to filing petitions for review from unpublished decisions.

Memorandum of the Wisconsin Department of Justice at 1-2 (Oct. 21, 2002) (on file with the court).

¶22 This brings me to a more fundamental set of objections to allowing the citation of unpublished opinions: it runs contrary to the nature and purpose of unpublished opinions, and

interferes with the court of appeals' ability to strike the proper balance between its primary error-correcting function and its secondary law-development function. These concerns are captured in the first, second, and fourth of the original justifications for the noncitation rule. The court of appeals decides cases involving error-correction in unpublished opinions, which are intended for the parties alone. This allows the court to give more comprehensive written treatment to those cases that require law-development and will result in published, precedential opinions.

¶23 The court of appeals is a high-volume, primarily error-correcting court. State ex rel. Swan v. Elections Bd., 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1982). In some cases, it also declares law.

> The court of appeals, a unitary court, has two functions. Its primary function is error correcting. Nevertheless under some circumstances it necessarily performs a second function, that of law defining and law development, as it adapts the common law and interprets the statutes and federal and state constitutions in the cases it decides.

In re Cook v. Cook, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997).

¶24 The court of appeals is required by statute to provide in each case "a written opinion containing a written summary of the reasons for the decision made by the court." Wis. Stat. § 752.41(1). The statutes, however, also limit the precedential effect of the court of appeals' opinions to those that are published, and charge this court with the duty to "determine by rule the manner in which the court of appeals determines which

of its decisions shall be published" and therefore have precedential effect. Wis. Stat. § 752.41(2) and (3).

¶25 The publication criteria adopted by this court are contained in Wis. Stat. § (Rule) 809.23(1); subsection (2) of that rule provides that a committee of the court of appeals applies the criteria and makes the decision on publication. The court of appeals' Internal Operating Procedures require the panel of judges deciding each case to make a recommendation regarding publication. Wisconsin Court of Appeals Internal Operating Procedures VI (7) (Jan. 1, 2002). The statutes also establish procedures for parties to request publication of an unpublished opinion, Wis. Stat. § (Rule) 809.23(4), and to request a three-judge panel in a case ordinarily governed by the one-judge rule, Wis. Stat. § 752.31(3).

¶26 In 2002, there were 3,486 "terminations"——case determinations——by the court of appeals.[4] Of these, 1,284 were decided by opinions——761 signed opinions and 523 per curiam opinions.[5] The non-opinion terminations consisted of 1,087 cases decided by summary disposition (this category includes no-merit criminal appeals), 867 decided by memorandum opinion (e.g., writs granted or denied, leaves to appeal denied) and 248 terminations by other types of orders (including orders granting voluntary or stipulated dismissals.)[6]

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[4] Caseload statistical report, 2002, Office of the Clerk of the Court of Appeals.

[5] Id.

[6] Id.

¶27 There are 16 court of appeals judges. The court of appeals' Internal Operating Procedures provide that each judge has direct writing responsibility for his or her assigned single-judge and three-judge opinions, as well as direct supervisory responsibility over the preparation of his or her share of per curiam opinions. Wisconsin Court of Appeals Internal Operating Procedures VI (1) and (5)(a) and (f). In addition, while cases decided by summary or other non-opinion disposition are assigned to staff attorneys for preparation of a written order implementing the court's decision, these orders must be reviewed and approved by the judges who participated in the decision. Id. at VI (1).

¶28 Each court of appeals judge thus has direct writing responsibility for approximately 50 signed opinions per year, or roughly one per week. Each judge also has supervisory responsibility over the preparation of 33 per curiam opinions, 68 summary dispositions, 54 memorandum opinions, and 16 dispositions by other orders per year. Each court of appeals judge is therefore responsible for approximately 220 total dispositions per year——a little more than four written decisions per week. These statistics do not reflect motion practice in the court of appeals (there were 9,850 motions decided by the court of appeals in 2001).[7] Nor do they reflect concurrences or dissents written, or the time that must be devoted to reading

[7] Caseload statistical report, 2002, Office of the Clerk of the Court of Appeals.

the briefs and studying the record in each case on which the judge sits.

¶29 In 2002, the court of appeals published 304 opinions, which translates to approximately 19 published, precedential opinions per judge. This leaves 457 signed, authored, but unpublished opinions, or approximately 29 per judge. It is this category of cases that the proposed new rule would make citable.

¶30 The court of appeals, unlike this court, cannot control its own docket. No intermediate appellate court has the resources to write an opinion suitable for citation in every case. Intermediate appellate courts must manage their heavy caseloads by identifying those cases that warrant decision in a published, precedential opinion and those that can be decided in a more summary fashion. See Hart v. Massanari, 266 F.3d 1155, 1177 (9th Cir. 2001). This reality is recognized and accounted for in the statutes, rules, and operating procedures just summarized.

¶31 This "case triage" by the court of appeals is not only necessary to the court's ability to manage its caseload, it is also essential to the court's achievement of an appropriate balance between its error-correcting and law-development functions, and its allocation of time, staff resources, and the intellectual energy of its judges. It is also central to the court's ability to develop a coherent and consistent body of precedential appellate case law. Id. at 1179.

¶32 There is a vast difference between preparing an opinion that may be cited in future cases and one that may not.

Published, precedential opinions are for posterity; all others are for the parties only, or perhaps also for the trial court. The Honorable Alex Kozinski, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, has aptly described the intellectual process of writing a published, precedential opinion:

> Writing an opinion is not simply a matter of laying out the facts and announcing a rule of decision. Precedential opinions are meant to govern not merely the cases for which they are written, but future cases as well.
>
> In writing an opinion, the court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant. Omitting relevant facts will make the ruling unintelligible to those not already familiar with the case; including inconsequential facts can provide a spurious basis for distinguishing the case in the future. The rule of decision cannot simply be announced, it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed——which is often the case——the court must explain why it is selecting one and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutation of facts that might arise in the universe of future cases. Modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not collide with other binding precedent that bears on the issue. . . . Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task.

Id. at 1176-77.

¶33 On the other hand, opinions not intended for publication (and therefore not intended for citation, either) have a more limited purpose, and are easier and faster to prepare. Unpublished opinions can consist of a factual and procedural summary and brief application of the legal principles that decide the case. This does not mean that the case has been given short shrift; cases decided by unpublished opinion have received full consideration by the court, and the decision is reliable and fair to the parties. The purpose of the opinion, however, is simply to inform the parties of the reason for the result, not to provide guidance for future cases.

¶34 Needless to say, because caseload pressures are so great, court of appeals judges cannot be expected to engage in the "reflective personal craftsmanship" of writing an opinion for publication (and thus possible future citation) in every case. Id. at 1177 n.32. In any event, most appeals do not present law-development issues, or are unsuitable vehicles for law-development because of waiver rules, procedural bars, or other impediments to reaching the substantive merits.

¶35 This court's primary and most profound constitutional responsibility is to declare and develop the law. Cook, 298 Wis. 2d at 189. Nevertheless, the court of appeals decides three times as many published, precedential cases every year than this court. Our oversight and control of statewide law-development is carried out not only in the cases we accept and decide, but also in the establishment and maintenance of

conditions and procedures that are most conducive to the court of appeals' effective performance of its own law-development role.

¶36 So, while the statutes require the court of appeals to issue a written decision in every case, they also limit the precedential effect of those decisions, and vest in this court the duty to establish rules by which the court of appeals determines which of its cases fall into the law-development (and therefore publication) category, and which involve mere error-correction. See Wis. Stat. § 752.41(1), (2) and (3). The noncitation rule contained in Wis. Stat. § (Rule) 809.23(3) is an integral part of this system. If unpublished cases are to be citable even as persuasive rather than precedential authority, the virtue and value of treating published and unpublished opinions differently would be lost. Again, Judge Kozinski:

> An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision. Deciding a large portion of our cases in this fashion frees us to spend the requisite time drafting precedential opinions in the remaining cases.
>
> Should courts allow parties to cite to those dispositions, however, much of the time gained would likely vanish. Without comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients' cases and unpublished dispositions. Faced with the prospect of parties citing these dispositions as precedent, conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been decided might well be inadequate

> if applied to future cases arising from different facts. And, although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even if those differences had no bearing on the case before them.

Hart, 266 F.3d at 1178.

¶37 Permitting citation to unpublished opinions for "persuasive value" would establish a second-tier of caselaw that is in essence quasi-precedential. This would require court of appeals judges to spend more time tending to the language and nuances of their unpublished opinions in order to avoid misconstruction or misapplication in future cases. A published appellate opinion is, of course, binding on future courts. An appellate opinion that has the status of "persuasive" authority, while not binding, is nonetheless powerfully influential, because it comes from a court, not a commentator or other secondary source. This phenomenon would put the court of appeals in an untenable position: spend more time crafting the language of unpublished opinions (at the expense of published opinions), or say very little in these opinions at all, lest they be misunderstood. It seems to me that the proposed amendment to the noncitation rule would increase the pressures on the court of appeals, and may well affect the quality of published and unpublished opinions alike.

¶38 The noncitation rule allows the court of appeals to balance its error-correcting and law-development functions at a

time of high caseloads and limited resources. Even more importantly, it fosters the orderly development of clear, consistent, and coherent appellate caselaw. The noncitation rule also provides lawyers a measure of professional flexibility to tailor legal research to the needs and resources of the client, knowing that unpublished opinions may not be cited and therefore may——but need not necessarily——be researched.

¶39 Amending the noncitation rule would disturb this careful balance. As I noted at the outset, the proponents of the amendment have not identified a compelling reason to adopt such a sweeping and consequential change. There is certainly no dearth of published, precedential case law as a general matter. It may be true that in certain discrete categories of cases—— those decided by one-judge opinions pursuant to Wis. Stat. § 752.31, for example——there are fewer published, precedential opinions than is desirable from a systemic standpoint. The answer to this problem, if indeed it is a problem, is to evaluate and perhaps amend the publication criteria in those categories, not to enact a wholesale change to the noncitation rule.

¶40 Because the proposed amendment to the noncitation rule would expand the scope and increase the expense of legal research, create new professional obligations for lawyers, interfere with the ability of the court of appeals to balance its dual functions and develop a coherent and consistent body of appellate caselaw, as well as increase its workload, this court has wisely denied this petition.

¶41 I am authorized to state that Justices WILLIAM A. BABLITCH and JON P. WILCOX join this concurring opinion.

¶42 SHIRLEY S. ABRAHAMSON, CHIEF JUSTICE *(dissenting)*. I write separately to state that I would adopt the rule proposed in the petition, replacing an outright ban on citation to unpublished opinions with permission to cite these opinions as persuasive authority.

¶43 Thus the proposed rule would accord unpublished court of appeals opinions the same status presently enjoyed by law review articles; treatises; newspaper columns; poetry; dictionaries; encyclopedias; opinions of Wisconsin circuit courts,[8] Wisconsin administrative agencies, federal district courts, federal circuit courts of appeals, courts of other states,[9] and courts of foreign jurisdictions; and other persuasive authorities that litigants and courts frequently use. I agree with the U.S. Advisory Committee Comment to New [Federal] Rule 32.1 (May 15, 2003) that it "is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence except those contained in the court's own 'unpublished' opinions." (emphasis in original).

¶44 The strongest reason for adopting the proposed rule is that considerations of public policy demand it. I agree with

[8] See Memorandum of Petitioner Christopher G. Wren in Support of Petition for an Order Amending Wis. Stat. § (Rule) 809.23(3) at 11 n.18 (Oct. 15, 2002) (citing Wisconsin cases that cite Wisconsin circuit court opinions) (on file with the Clerk of the Supreme Court, Madison, WI).

[9] See id. at 11 n.17 (citing Wisconsin cases that cite unpublished decisions of courts of other states and federal courts).

the U.S. Advisory Committee Comment to New [Federal] Rule 32.1 that concluded that restrictions on the citation of unpublished opinions are wrong as a matter of public policy.[10]

¶45 A fundamental principle of our legal system is that like cases will be treated alike. The noncitation rule seriously threatens this principle, creates an aura of unfairness, seemingly renders the court of appeals unaccountable, and undermines trust and confidence in the integrity of our judicial system.

¶46 The proposed rule permitting citation to unpublished opinions for persuasive value acknowledges the widespread availability of and reliance on unpublished opinions. The proposed rule would move into the open what is already happening covertly and recognizes the tenuousness of the current rule, which asks that everyone avert their eyes and ignore the useful information that is on the computer screen in front of them.

¶47 Judges and practitioners already use and rely upon unpublished opinions. Savvy practitioners search unpublished opinions 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

[10] The proposed rule is subject to a public comment period of six months and approval by the Judicial Conference and the U.S. Supreme Court. For the text of the proposed rule, see note 18.

opinions but more often than not doing so without citation.[11] The proposed rule would bring a clandestine practice out into the open.

[11] The Wisconsin Court of Appeals often cites to its unpublished opinions, asserting that the citation is not for precedential value but for illustrative purposes. See, e.g., State v. Morrissey, No. 99-2624, unpublished slip op. ¶14 n.7 (Wis. Ct. App. April 4, 2000), referring to an unpublished opinion as follows:

> Additionally, in another one-judge appeal, this court, while also not addressing the precise theory presented here, stated "that a . . . warrantless blood draw to obtain blood alcohol concentration (BAC) evidence is available to law enforcement agencies regardless of the existence of the implied consent law if the officer meets the Bohling criteria." State v. Krogman, No. 97-3400, unpublished slip op. at 5 (Wis. Ct. App. March 18, 1998) (emphasis added), petition for review denied, 218 Wis. 2d 168, 578 N.W.2d 211 (1998). The latter case is noted here, of course, not for any precedential value, but rather, to further alert the parties to the need for supreme court review of the very important and intriguing issue presented in the instant appeal.

See also Washington v. Washington, 2000 WI 47, ¶25 n.14, 234 Wis. 2d 689, 611 N.W.2d 261 (citing two unpublished opinions of the court of appeals for illustrative purposes); State v. Rachwal, 159 Wis. 2d 494, 517, 465 N.W.2d 490 (1991) (Abrahamson, J., concurring) (citing an unpublished opinion of the court of appeals for illustrative purposes); Winnebago County DSS v. Darrel A., 194 Wis. 2d 627, 652, 534 N.W.2d 907 (Ct. App. 1995) (Nettesheim, J., concurring) (citing an unpublished opinion of the court of appeals for an interpretation of a statute).

See Memorandum of Petitioner Christopher G. Wren in Support of Petition for an Order Amending Wis. Stat. § (Rule) 809.23(3), at 3 n.3, citing numerous other examples of the court of appeals' use of noncitable opinions and noting the inconsistency of the court of appeals' use of noncitable opinions yet sanctioning litigants for similar use.

¶48 Under the proposed rule, attorneys would be relieved of concern of being sanctioned or accused of unethical conduct for improperly citing unpublished opinions.[12] Finally, the proposed rule repairs the damage to a court's perceived legitimacy resulting from noncitable cases. Litigants will be able to inform a court of prior decisions unhindered by rules of noncitation.

¶49 The new rule is an improvement over the current rule and presents a viable solution for assisting attorneys and appellate judges further the ends of justice.

Moreover, the federal Seventh Circuit Court of Appeals, which does not allow citation to its unpublished opinions, has cited Wisconsin Court of Appeals "unpublished, uncitable" decisions as precedential to govern its decision, even though the Wisconsin Supreme Court would not give the court of appeals decision that standing. See, e.g., Western States Ins. Co. v. Wisconsin Wholesale Tire, Inc., 184 F.3d 699, 703 (7th Cir. 1999), relying on Diversified Investments Corp. v. Regent Ins. Co., No. 98-2461, unpublished slip op. (Wis. Ct. App. April 8, 1999), to decide the case according to Wisconsin law. The decision did not acknowledge that Diversified was an unpublished opinion.

For additional cases from several federal circuits and the United States Supreme Court, see Memorandum of Petitioner Christopher G. Wren in Support of Petition for an Order Amending Wis. Stat. § (Rule) 809.23(3) at 8 n.6.

[12] The U.S. Advisory Committee on Appellate Rules stated in its comment to proposed Rule 32.1(a) that "game playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an 'unpublished' opinion can now directly bring to that 'unpublished' opinion to the court's attention, and the court can do whatever it wishes with that opinion."

I

¶50 The proposed amendment to Wis. Stat. § (Rule) 809.23(3) provides that litigants may cite to an unpublished opinion issued on or after July 1, 2003, for its persuasive value, if a copy is given to all parties and all references to it clearly indicate that it is an unpublished opinion. The proposed rule would not permit citation to unpublished per curiam or summary disposition orders for persuasive value. The rule further provides that because an unpublished opinion is not precedent, it need not be distinguished or otherwise discussed by any court.

¶51 Section (Rule) 809.23(3) of the Statutes would be amended under the proposed rule to read as follows:

> An unpublished opinion is of no precedential value except that it may be cited in support of claim preclusion, issue preclusion, or the law of the case. An unpublished opinion issued on or after [insert effective date], that is not a per curiam opinion or a summary disposition order, may also be cited for its persuasive value, provided that the party citing the opinion files a copy of it with the court, serves a copy of it upon all parties together with the brief or other paper in which the opinion is cited and clearly disclosed in all written materials and in all oral presentations that it is an unpublished opinion. Because an unpublished opinion is not precedent, it need not be distinguished or otherwise discussed by any court.

¶52 Wisconsin is not alone in reviewing the noncitation rule and examining the impact of changing the rule. Considerable debate is taking place (and has taken place) at the state and national levels about noncitability rules. Judges, lawyers, and academics are debating the constitutionality of

noncitability rules, the amount of time and energy that noncitable opinions save for appellate judges, the proper method for determining which cases to publish and which cases to leave unpublished, and the impact that computer databases and online research tools have had on the burden and expense of legal research.[13]

[13] See, e.g., Eugene R. Anderson et al., Out of the Frying Pan and Into the Fire: The Emergence of Depublication in the Wake of Vacatur, 4 J. App. Prac. & Process 475 (2002); Stephen R. Barnett, From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules, 4 J. App. Prac. & Process 1, 4-5 (2002); Jeffrey O. Cooper, Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel, 35 Ind. L. Rev. 423 (2002); Michael Hannon, A Closer Look at Unpublished Opinions in United States Court of Appeals, 3 J. App. Prac. & Process 199 (2001); David Greenwald & Frederick A.O. Schwarz, Jr., The Censorial Judiciary, 35 U.C. Davis L. Rev. 1133 (2002); Daniel N. Hoffman, Publicity and the Judicial Power, 3 J. App. Prac. & Process 343 (2001); Salem M. Katsh & Alex V. Chachkes, Constitutionality of "No-Citation" Rules, 3 J. App. Prac. & Process 287 (2001); Kenneth Anthony Laretto, Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals, 54 Stan. L. Rev. 1037 (2002); Drew R. Quitschau, Anastasoff v. United States: Uncertainty in the Eighth Circuit——Is There a Constitutional Right to Cite Unpublished Opinions?, 54 Ark. L. Rev. 847 (2002); Lauren Robel, The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community, 35 Ind. L. Rev. 399 (2002); Melissa M. Serfass & Jessie L. Cranford, Federal and State Court Rules Governing Publication and Citation of Opinions, 3 J. App. Prac. & Process 251 (2001); Suzanne O. Snowden, "That's My Holding and I'm Not Sticking To It!" Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law, 79 Wash. U.L.Q. 1253 (2001) Stephen L. Wasby, Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish, 3 J. App. Prac. & Process 325 (2001); Melissa H. Weresh, The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?, 3 J. App. Prac. & Process 175 (2001).

¶53 The movement is toward permitting citation. Federal and state courts have begun to adopt new rules allowing for citation. A majority of the federal circuits (eight of the thirteen federal circuits) permit some citation to unpublished opinions.[14] In contrast, in 1985 eight of the federal appellate circuits had rules similar to Wisconsin's prohibiting citation.[15] Recently the D.C. Circuit amended its rule to allow citation to all cases decided after January 1, 2002.[16] Iowa, Minnesota,

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This list is a partial list of very recent articles. Approximately 200 additional authorities discussing the issue of publication and citation are available by a search of the electronic legal databases using the words "nonpublication rule" and "no citation rule."

[14] Barnett, supra note 13, at 4-5 (2002) (the federal circuits that do not ban citation to unpublished opinions include the Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and the D.C. Circuit).

Eleven of the 13 federal circuits post their unpublished opinions on line and make them available to legal publishers. Id. at 3-4.

[15] See In re Amendment of Section (Rule) 809.23(3), Stats., 155 Wis. 2d 832, 832 n.1, 456 N.W.2d 783 (1990)

[16] See Greenwald & Schwarz, supra note 13, at 1139 n.6; Serfass & Cranford, supra note 13 (chart showing federal and state rules).

Apparently three federal circuits do not make their unpublished opinions available online. Only 10 states make their appellate court unpublished opinions available online. Twenty states apparently do not make any information concerning unpublished opinions available online. Jurisdictions in which "unpublished" opinions are not online present different issues than those presented in Wisconsin. See Cooper, supra note 6, at 433.

Michigan, North Carolina, Ohio, and Texas allow citation to unpublished opinions.[17]

¶54 Furthermore, on May 15, 2003, the U.S. Advisory Committee on Appellate Rules, on a 7-1 vote with 1 abstention, approved a proposed rule requiring federal courts to permit citation of judicial opinions, orders, judgments, or other written dispositions that have been designated "unpublished."[18] The Committee took no position on the constitutionality of

[17] See Serfass & Cranford, supra note 13 (chart showing federal and state rules).

[18] The proposed federal rule provides as follows:

Rule 32.1 Citation of Judicial Dispositions

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment or other written disposition with the brief or other paper in which it is cited.

designating opinions as "unpublished."[19] The proposal is silent about the effect that a court must give to its own opinions or to the "unpublished" opinions of other courts.

¶55 Wisconsin should follow this lead. The reasons for adopting the proposed rule far outweigh the perceived fears that change will bring.[20] Moreover, I am not convinced that adopting this rule will derail the development of Wisconsin's common law, jeopardize the representation available to Wisconsin's citizens, or create chaos for the lawyers of the state or the court of appeals. The sky will not fall if lawyers and judges are

[19] For discussions of constitutionality, see Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found., 277 F.3d 1361, 1366-68 (Fed Cir. 2002); Hart v. Massanari, 266 F.3d 1155, 1159-80 (9th Cir. 2001); Williams v. Dallas Area Rapid Transit, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); Anastasoff v. United States, 223 F.3d 898, 899-905, vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000).

[20] There is no perfect way to manage the large volume of unpublished decisions emanating from both the federal and state courts of appeals. Every solution presented to the publication/citation issue has its own particular advantages and tribulations. Solutions range from full publication of and granting full precedential value to every decision of a court of appeals to no publication in any form of any "unpublished" court of appeals decision and no citation to unpublished decisions. The difficulty is in choosing a path that introduces the fewest difficulties to the legal system. Numerous solutions have been adopted by the courts, and others have been floated in the literature. See commentaries cited at note 13, supra.

I favor the proposed rule because it provides a better way of dealing with the issues related to noncitation than the present rule.

permitted to cite to certain future unpublished Wisconsin Court of Appeals opinions for their persuasive value.[21]

II

¶56 The strongest reason for adopting the proposed rule, as discussed above, is that considerations of public policy demand it. The noncitation rule threatens the principle that similar cases be treated similarly, eroding confidence in the integrity of our judicial system, and it ignores the reality that the bench and bar already clandestinely rely upon unpublished opinions.

¶57 There are, however, other reasons for adopting the proposed rule. First, all Wisconsin Court of Appeals opinions are published and available. The word "unpublished" is misleading. The proposed rule addresses unreported opinions of the court of appeals.

¶58 Second, the bench and bar have thrice petitioned this court to change the "noncitation" rule, recognizing that the present "noncitation" rule is broken and should be fixed.

¶59 Third, the reasons for the adoption of the noncitation rule in 1978 and its retention are no longer persuasive. Times have changed.

¶60 Fourth and finally, the current rule of noncitation raises numerous problems for the bench and bar.

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[21] Barnett, supra note 6, at 20. I supported the 1989 petition to change the noncitation rule. See In re Amendment of Section (Rule) 809.23(3), Stats., 155 Wis. 2d 832, 456 N.W.2d 783 (1990) (Abrahamson, J., dissenting) (critiquing the four reasons for noncitation of unpublished opinions).

A

¶61 The proposed rule addresses "unreported" opinions of the court of appeals. The word "unpublished" is misleading. All Wisconsin Court of Appeals opinions are published and available. Some court of appeals opinions are not reported, that is they are not printed in West's or Callaghan's Wisconsin reports, but they are readily available through major Internet legal databases to the bench, bar, and public.

¶62 A casual search for a legal issue in a Wisconsin state case legal database will automatically pull up published and unpublished opinions alike. All of the courts in Wisconsin have access to these databases and apparently use them regularly for their legal research. Moreover, many (and an increasing number) of the lawyers in Wisconsin have access to these databases and rely on them for their legal research as well.[22] In addition, this court makes all unpublished opinions of the court of appeals available to the public at no charge on its own searchable Web site.[23]

B

¶63 The current system in effect in Wisconsin has been subject to multiple requests for reform since the rule was

[22] One commentator reports that "significant percentages of lawyers do not feel free to ignore these [unpublished federal courts of appeals] opinions either generally or with respect to specific cases." Robel, supra note 13, at 406.

[23] See http://www.courts.state.wi.us/.

adopted 25 years ago upon the creation of the court of appeals.[24] The diversity and number of the supporters of the proposed rule demonstrate that a widespread belief that the current rule does not work.

¶64 The petition before us was brought by Court of Appeals Judge Patience Roggensack, the late Howard B. Eisenberg (then Dean of Marquette University Law School), Attorney Christopher Wren (an Assistant Attorney General) and Attorney Warren D. Weinstein (an Assistant Attorney General).

¶65 This petition has the widespread support of the bar and the bench. The Board of Governors of the State Bar of Wisconsin approved the proposed rule by a vote of 27-16.[25] The Milwaukee Bar Association also appeared in favor of the rule. Seventy-two percent of respondents to the 2001 Bench/Bar Survey of State Bar members agreed that the court should adopt the proposed rule.[26]

¶66 The Wisconsin Department of Justice did not take a position for or against the proposed rule. The Department of

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[24] There have been three requests to change the current rule since 1978, in 1982, 1989, and 2002. See In re Amendment of Section (Rule) 809.23(3), Stats., 155 Wis. 2d 832, 837, 456 N.W.2d 783 (1990) (Abrahamson, J., dissenting).

[25] State Bar of Wisconsin Statement re Citation of Unpublished Opinions (October 21, 2002) (on file with the Clerk of Supreme Court, Madison, WI); Jane Pribek, State Bar Supports Unpublished Opinion Citation, Wis. L.J., Sept. 18, 2002.

[26] State Bar of Wisconsin Statement re Citation of Unpublished Opinions (October 21, 2002) (on file with the Clerk of Supreme Court, Madison, WI).

Justice acknowledged that attorneys in the Department of Justice have "differing opinions on the impact on their workloads and on the substantive impact of the proposed rule change on the briefs they file in the appellate courts."[27] The Department of Justice expressed its institutional concern that the proposed rule might alter its calculus of when to seek review of an adverse decision.

¶67 The court of appeals has taken no position on the proposed change. Court of Appeals Judge Richard Brown appeared in favor of the proposed rule. In 1989 the court of appeals affirmatively supported the proposed rule change.

C

¶68 The reasons for the adoption and retention of the noncitation rule in 1978 are no longer persuasive. The reasons why the court adopted the noncitation rule in 1978 and why it refused to change the rule in 1990 are as follows:

(1) If unpublished opinions could be cited, services that publish only unpublished opinions would soon develop, forcing the treatment of unpublished opinions in the same manner as published opinions, thereby defeating the purpose of nonpublication.

(2) Permitting the citation of unpublished opinions gives an advantage to a person who knows about the case over one who does not.

[27] Memorandum submitted by the Wisconsin Department of Justice at 6 (October 21, 2002) (on file with the Clerk of the Supreme Court, Madison, WI).

(3) An unpublished opinion is not new authority but only a repeated application of a settled rule of law for which there is ample published authority.

(4) The type of opinion written for the benefit of parties is different from an opinion written for publication.

¶69 In 1990, I explored each of these reasons for adopting the 1978 noncitation rule and concluded that none supported retaining the current rule. I will not repeat my 1990 dissent to the court's refusal to adopt a substantially similar proposal submitted in 1990,[28] except to say that the responses remain the same.

¶70 Unpublished opinions are published and are easily accessible and routinely accessed. Furthermore, the proposed rule requires that notice of the unpublished opinion be given to everyone.

¶71 Experience has demonstrated that numerous unpublished opinions are new authority and are not merely repeated application of a settled rule of law for which there is ample published authority.[29]

[28] See In re Amendment of Section (Rule) 809.23(3), Stats., 155 Wis. 2d 832, 838-45, 456 N.W.2d 783 (1990) (Abrahamson, J., dissenting) (critiquing the four reasons for noncitation).

[29] About 30% of the cases that this court decides after granting petitions for review are unpublished opinions of the court of appeals. I reached this figure by examining a sampling of cases decided by this court over the last three years. In making this estimate I have omitted the cases we take on certification in which the court of appeals has not rendered an opinion. (continued)

¶72 I remain unpersuaded that eliminating the noncitation rule will significantly change the court of appeals judge's writing process.

¶73 This last conclusion deserves additional attention today in light of Justice Sykes's concurrence. Indeed, the most frequent and vigorously argued reason for noncitation is that the type of opinion written for the benefit of the parties is different from an opinion written for publication and citation of "unpublished" opinions would lead judges to spend more time on them, time the judges do not have.

¶74 Justice Sykes's concurrence stresses the stress the proposed rule would impose on the judges of the court of appeals. That the noncitation rule is "postively indispensable is a completely ungrounded empirical claim."[30]

¶75 Yet 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. I am confident the judges keep these facts in mind in all their writings——published and unpublished.

Unpublished opinions of the Wisconsin Court of Appeals are not just sufficiency-of-the-evidence or error-correcting cases. For a similar conclusion about unreported federal cases, see Cooper, supra note 6, at 428; Mitu Gulati & C.M.A. McCauliff, On Not Making Law, 61 L. & Contemp. Probs. 157 (1988); Donald R. Songer et al., Nonpublication in the Eleventh Circuit: An Empirical Analysis, 16 Fla. St. U. L. Rev. 963 (1989).

[30] Daniel N. Hoffman, Publicity and the Judicial Power, 3 J. App. Prac. & Process 343, 346 n.8 (2001).

The proposed rule would not require the court of appeals to change how or what it writes in its "unpublished" opinions.[31]

¶76 The underlying and unexpressed question the concurrence poses is, how do the court of appeals judges manage to decide all these cases and to decide them well? The caseload of the court of appeals and that of the individual judges is large, as the concurring opinion points out. These caseloads exist regardless of citation rules. What procedures are in place at the court of appeals to attain uniformity and consistency in decision-making and quality decisions? These are the questions with which the court of appeals must struggle. We should not bury them in a noncitation rule. More light and discussion are needed about the operation of the court of appeals as it celebrates its 25th anniversary, not less.

¶77 The best and most persuasive response to the fear that the eliminating the noncitation rule will overwhelm the court of appeals, of course, is that the dire results that the concurrence and others paint have not come to pass in the

[31] In opposing citation to unpublished opinions, the concurrence places great reliance on Judge Kozinski's opinion in the Hart case that declared the noncitation rule to be constitutional. Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001). Judge Kozinski sits on the 9th Circuit, one of the minority of circuits that do not allow citation to unpublished opinions. Treating unpublished opinions as persuasive authority has, as Judge Kozinski's Hart decision well demonstrates, a strong basis in common law and his arguments undermine his conclusion. Barnett, supra note 6, at 25 ("The arguments of history and common law tradition that Judge Kozinski invokes, particularly his insistence that earlier authority be 'acknowledged and considered,' confirm the essential role of precedent in our law and undermine the case for no-citation rules.").

numerous jurisdictions that allow citation of unpublished opinions.

D

¶78 Finally, the current rule of noncitation is riddled with problems, raising numerous difficulties for the bench and bar. As mentioned above, it undermines consistency in appellate decision-making and discourages transparency in the law. It also causes circuitous drafting by lawyers and courts to restate or reargue the same rationale already expressed in unpublished opinions. Furthermore, it burdens lawyers and litigants in substantive areas with few published opinions, such as traffic, probate, family, and juvenile law. The noncitation rule raises legitimate constitutional questions, and finally, it undervalues the technological changes that have made unpublished opinions so readily accessible at reduced financial costs at the state courts' website and at private legal databases.[32]

¶79 Moreover, the same sky that now stretches across our State rests securely above those federal circuits and states that have adopted citation rules. The new rule will not cause the sky to fall.

¶80 Indeed, were the proposed rule be adopted it may even cause the sky to appear brighter and bluer as the cloud casting a shadow over the technological advances and covert reliance on unpublished opinions in Wisconsin will be lifted, allowing the sun to shine through.

[32] Indeed, the West Group has launched its Federal Appendix, consisting entirely of unpublished opinions from federal courts of appeal. See Barnett, supra note 13, at 2.

¶81 For the foregoing reasons, I support adoption of the new rule and dissent from the court's denial of the petition.

¶82 I am authorized to state that Justice N. PATRICK CROOKS joins this dissent.