

CITATION OF UNPUBLISHED OPINIONS COMMITTEE

FINAL REPORT TO WISCONSIN SUPREME COURT

MARCH 2012

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I. INTRODUCTION

In January 2009 the Supreme Court amended Wis. Stat. § (Rule) 809.23(3) to allow for the citation of unpublished Court of Appeals opinions for their persuasive value.¹ The rule, which became effective July 1, 2009, provides:

Wis. Stat. § (Rule) 809.23(3) Citation of Unpublished Opinions.

(a) An unpublished opinion may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of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).

(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 (a), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its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 Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

The court convened the Citation of Unpublished Opinions Committee to identify data that should be gathered and explain how the data should be evaluated. In May 2009 the committee submitted its interim report to the Supreme Court. The committee's interim report is available at <https://www.wicourts.gov/publications/reports/docs/unpublishedopinions.pdf>. The committee recommended the collection of statistics and proposed procedures regarding the citation of unpublished opinions.

¹ 311 Wis.2d xxv. The Court's order is also available on its rules web page at <http://wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=35116>

This final report of the committee analyzes the procedures implemented and the statistics compiled since the court's adoption of the rule in 2009. The committee also makes several recommendations to the Supreme Court.

II. REPORT FOLLOWING IMPLEMENTATION

Procedures have been implemented and rules adopted to support the rule amendment allowing the citation of unpublished opinions for their persuasive value. The rules of appellate procedure have been amended to require parties to provide a copy of any unpublished opinion cited in a court filing; an unpublished opinion is updated on the court's website if the court amends the opinion; and guidance has been provided on citation format and access to unpublished opinions.

A. Procedures.

In its interim report, the committee recommended that parties should include a copy of a cited unpublished opinion in the appendix. Prior to the effective date of the rule amendment court staff prepared and began distributing a notice that provided guidance to the public. See Interim report, Appendix A.² The Clerk of the Supreme Court and the Court of Appeals filed rule petitions 10-02 and 10-01, respectively. In May 2010, the court granted the petitioners' proposed amendment that the party include a copy of a cited unpublished opinion in the appendix. The rule became effective January 1, 2011.³ The petitioners, however, did not pursue a rule amendment requiring a cited unpublished opinion be included in the list of the Table of Contents or Table of Cases of an appellate brief or petition.

² Citation of Unpublished Opinions Committee Interim Report to Wisconsin Supreme Court (May 2009), available at <https://www.wicourts.gov/publications/reports/docs/unpublishedopinions.pdf>.

³ 323 Wis.2d xxiii-xxvi. The Court's order is also available on its rules web page at <http://wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=50520>

Court staff also worked with publishers to amend the banners on Court of Appeals unpublished opinions to reflect the rule amendment. The banner now reads:

See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value. NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

The header on the Table of Unpublished Court of Appeals Opinions was also amended 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) (2009-10).

Due to a lack of sufficient interest, the committee did not develop a survey or schedule a breakout session at the Judicial Conference to seek feedback on the rule amendment. The committee distributed a draft of this report to the circuit court judges and the court of appeals judges for comment. Two judges submitted comments stating that the value of the rule is that it encourages lawyers to read the case law pertaining to an issue, published or unpublished, before writing the brief.

Finally, no cases were reported by court staff where ineffective assistance claims had been based on citation or research of unpublished opinions.

B. Statistics.

Statistics were compiled for twelve-month periods before and after the effective date of the rule amendment. See

Appendix A. The percentage of opinions published remained the same and the number of petitions for review filed on unpublished opinions did not increase. In fact, the number of petitions for review filed on unpublished opinions decreased by two percent. The Supreme Court granted the same number of petitions filed on unpublished opinions and the number of motions to publish decreased.

The committee also attempted to collect the number of briefs in which unpublished opinions were cited. The Court of Appeals judges documented the number of briefs reviewed during February through April, 2010, and February through April, 2011, that included citations. The court differentiated cases cited pursuant to Wis. Stat. § (Rule) 809.23(3)(a) [claim preclusion, issue preclusion, law of the case] or (3)(b) [persuasive value]. The statistics do not identify the total number of briefs reviewed during each of these three-month periods. The number of briefs that included citations to unpublished opinions for their persuasive value increased from 4 in the 2010 period to 8 in the 2011 period.

The committee recognized that it would be difficult to develop any direct correlation between the statistics and the rule amendment. Interim Report, p. 8.⁴ In comparing these statistics there does not appear to be any significant difference or any negative change that could be attributed to the rule amendment.

C. National experience. At the time that the Wisconsin Supreme Court amended its citation rule to allow the citation of unpublished opinions for their persuasive value, seventeen other states allowed the same type of citation. Another ten jurisdictions either allowed unrestricted citation or published

⁴ Citation of Unpublished Opinions Committee Interim Report to Wisconsin Supreme Court (May 2009), available at <https://www.wicourts.gov/publications/reports/docs/unpublishedopinions.pdf>.

all appellate decisions. Two dozen jurisdictions prohibited the citation of unpublished opinions. Recently, the New Mexico Supreme Court amended its Rule of Appellate Procedure 12-405 to allow for the citation of unpublished opinions. N.M. R. App. P. 12-405 (Adopted by Supreme Court Order No. 11-8300-031, effective for cases pending or filed on or after Sept. 12, 2011).

III. RECOMMENDATIONS

A. Citation format.

The committee recommends that guidance on a citation format for unpublished opinions be posted to the court's website. The committee suggests the following web page at <http://www.wicourts.gov/opinions/appeals2.htm> be amended as follows:

Court of Appeals opinions Precedential value of opinions

Under Wis. Stat. § (Rule) 809.23, ~~Stats.~~, selected "judge-authored" opinions of the Court of Appeals are published in the official reports: *Callaghan's Wisconsin Reports* and *West's North Western Reporter*. Published opinions have precedential value and may be cited as controlling law in Wisconsin. ~~Unpublished opinions, on the other hand, are not precedential and may not be cited as authority in any Wisconsin court.~~ Unpublished authored opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished authored opinions issued on or after July 1, 2009 may be cited for persuasive value.

Rule 809.23 sets forth criteria for publication of a Court of Appeals opinions—including whether it enunciates a new rule or modifies, criticizes or clarifies an existing rule of law, whether it resolves a conflict in prior decisions, whether it contributes to the legal literature and whether it decides a case of substantial and continuing public interest. Under ~~§§ 752.31 (2) and (3)~~ Rule 809.23(1)(b), ~~Stats.~~, single-judge, *per curiam* and "summary" opinions are generally not ~~eligible~~ considered appropriate for publication. Thus the initial publication decision is made by the deciding panel, which

determines, based in large part on the publication criteria, the format an opinion will take -- judge-authored, *per curiam* or summary. In addition, all judge-authored opinions contain a written recommendation by the deciding panel whether to publish or not.

The final publication decision is made by a committee, which meets monthly, and is comprised of one judge from each of the four Court of Appeals districts and chaired by the chief judge. Committee members read and discuss each eligible opinion and, based on the criteria stated in the rule, vote whether or not to publish. Of the ~~499~~ full, 319 three-judge opinions (~~the only kind eligible for publication~~) considered by the Court in ~~1998~~ 2010, ~~279~~ 164 were ordered published. That represents ~~56~~ 51 percent of ~~eligible~~ three-judge opinions and ~~19~~ 16 percent of all ~~written opinions~~ (three-judge, *per curiam*, and single-judge opinions).

Citation of unpublished opinions

When citing an unpublished opinion in a pleading or brief 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 (WI App Mar. 23, 2005)~~ Marquez v. Herbeck, No. 2010AP552, unpublished slip op., ¶19 (WI App Sept. 11, 2011).

The Public Domain Citation (PDC) for an unpublished opinion refers to a table, not to the individual opinion; therefore, PDC numbers should not be used when citing to an unpublished opinion.

B. Committee's reports. The committee suggests that the interim and final reports be posted on the rule page for petition 08-02 at <http://wicourts.gov/scrules/0802.htm> as well as at Publications-Reports at <http://www.wicourts.gov/publications/reports/index.htm>.

C. Review.

The Supreme Court adopted this rule amendment in 2009 and scheduled a review for the fall of 2011. Based on the information the committee has reviewed and procedures that have been implemented, the committee concludes that it is not

necessary for it to continue to review this rule amendment. If problems develop, they should be brought to the attention of the Supreme Court.

A draft version of this report was circulated to all circuit court and court of appeals judges for comment. The committee submitted this report to the Wisconsin Supreme Court on March 2, 2012.

APPENDIX A. Statistics.

In its interim report issued in May 2009, the committee recommended compiling statistics for the following categories. See Interim Report, pp. 8-9.⁵ Statistics are provided below.

1. Number of per curiam opinions (PER), three-judge opinions (3J), and summary orders (SMD) filed between July 1, 2008 and June 30, 2009, and between July 1, 2010 and June 30, 2011.

<u>2008-2009</u>		<u>2010-2011</u>	
Per Curiam	525	Per Curiam	577
3 Judge	335	3 Judge	373
1 Judge	235	1 Judge	266
Summary Disposition		Summary Disposition	
Screened	256	Screened	320
No merit	618	No merit	635

2. Percentage of opinions published between July 1, 2008 and June 30, 2009, and between July 1, 2010 and June 30, 2011.

<u>2008-2009</u>	<u>2010-2011</u>
16.6% published of Per Curiam, 3 Judge, 1 Judge	16.9% published of Per Curiam, 3 Judge, 1 Judge

Details of Published Opinions

Per Curiam	2 published	Per Curiam	0 published
3 Judge	177 published	3 Judge	206 published
1 Judge	3 published	1 Judge	0 published

Details of Unpublished Opinions

Per Curiam	523 unpublished	Per Curiam	577 unpublished
3 Judge	158 unpublished	3 Judge	167 unpublished
1 Judge	232 unpublished	1 Judge	266 unpublished
Summary Disposition		Summary Disposition	
Screened	All unpublished	Screened	All unpublished
No merit	All unpublished	No merit	All unpublished

⁵ Citation of Unpublished Opinions Committee Interim Report to Wisconsin Supreme Court (May 2009), available at <https://www.wicourts.gov/publications/reports/docs/unpublishedopinions.pdf>.

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.

<u>2008-2009</u>	<u>2010-2011</u>
Petitions filed on 46% of unpublished Per Curiam, 3 Judge, 1 Judge	Petitions filed on 43.8% of unpublished Per Curiam, 3 Judge, 1 Judge

<u>Details of Unpublished Opinions</u>			
<u>2008-2009</u>		<u>2010-2011</u>	
Per Curiam	264	Per Curiam	259
3 Judge	86	3 Judge	94
1 Judge	71	1 Judge	89
Summ. Disp.	171	Summ. Disp.	163

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.

<u>2008-2009</u>	<u>2010-2011</u>
Per Curiam/3Judge/1Judge 19	Per Curiam/3Judge/1Judge 19
Summary Disposition 3	Summary Disposition 4

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.

<u>2008-2009</u>	<u>2010-2011</u>
9	3

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.

<u>2008-2009</u>	<u>2010-2011</u>
Average: 93 days	Average: 79

*Summary Dispositions not included in calculation of average days from submission to disposition.

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) [claim preclusion, issue preclusion, law of the case] or (3)(b) [persuasive value].

Feb. - Apr. 2010
Cited under (3)(a)
2

Cited under (3)(b)
4

Feb. - Apr. 2011
Cited under (3)(a)
1

Cited under (3)(b)
8

APPENDIX B. Procedures.

In its interim report issued in May 2009, the committee proposed the following changes be implemented before the July 1, 2009 effective date of the rule. See Interim Report, pp. 9-12.⁶ The committee's action on each of these procedural recommendations is set forth below:

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.

[Action Taken: The Court of Appeals and the Clerk of the Supreme Court and Court of Appeals filed rule petitions 10-01 and 10-02, respectively, proposing a rule requiring a party to include a copy of a cited unpublished opinion in the appendix. The Supreme Court granted both rule petitions and the rules became effective January 1, 2011. See In the matter of the petition to amend Wis. Stat. § (Rule) 809.19 & 809.62 relating to the content of appendices, 2010 WI 42 (May 27, 2010). The petitioners discussed this committee's recommendation but decided not to pursue a rule amendment requiring a cited unpublished opinion be included in the list of the Table of Contents or Table of Cases of an appellate brief or petition.]

2. Suggest a citation format for unpublished opinions.

[Action Taken: In [section III.A](#) of this report the committee proposes a citation format for unpublished opinions: *Marquez v. Herbeck*, No. 2010AP552, unpublished slip op., ¶19 (WI App Sept. 11, 2011). This citation format would be available for reference on the court's website at <http://www.wicourts.gov/opinions/appeals2.htm>].

⁶ Citation of Unpublished Opinions Committee Interim Report to Wisconsin Supreme Court (May 2009), available at <https://www.wicourts.gov/publications/reports/docs/unpublishedopinions.pdf>.

3. Recommend 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.

[Action Taken: The Court of Appeals and the Clerk of the Supreme Court and Court of Appeals filed rule petitions 10-01 and 10-02, respectively, proposing a rule requiring a party to include a copy of a cited unpublished opinion in the appendix. The Supreme Court granted both rule petitions and the rules became effective January 1, 2011. See In the matter of the petition to amend Wis. Stat. § (Rule) 809.19 & 809.62 relating to the content of appendices, 2010 WI 42 (May 27, 2010).]

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.

[Action Taken: The Court of Appeals and the Clerk of the Supreme Court and Court of Appeals filed rule petitions 10-01 and 10-02, respectively, proposing a rule requiring a party to include a copy of a cited unpublished opinion in the appendix. The Supreme Court granted both rule petitions and the rules became effective January 1, 2011. See In the matter of the petition to amend Wis. Stat. § (Rule) 809.19 & 809.62 relating to the content of appendices, 2010 WI 42 (May 27, 2010). The petitioners discussed this committee's recommendation but decided not to pursue a rule amendment requiring a cited unpublished opinion be included in the list of the Table of Contents or Table of Cases of an appellate brief or petition.]

5. Compile a list of sources that provide access to unpublished opinions.

[Action Taken: The Clerk of the Supreme Court and Court of Appeals prepared and distributed a notice that listed sources where unpublished opinions were available. See Interim Report, Appendix A.⁷ The notice also set for the rule amendment and the committee's recommendation on a citation format.]

⁷ Citation of Unpublished Opinions Committee Interim Report to Wisconsin Supreme Court (May 2009), available at <https://www.wicourts.gov/publications/reports/docs/unpublishedopinions.pdf>.

6. Identify statistics and information to be compiled by mid-year 2011 for report to the court.

[Action Taken: The committee identified and compiled statistics relevant to the new rule. The statistics are provided in [Appendix A](#) of this report.]

7. Enhance accessibility to unpublished opinions on the court's website by updating the opinions if they are amended.

[Action Taken: The Court of Appeals updates the website version of its opinions when they are amended. Beginning in the 2011-2012 term the staff of the Supreme Court Clerk's Office will update the website version of supreme court opinions when they are amended.]

8. Identify appellate decisions addressing ineffective assistance claims based on citation or research of unpublished opinions.

[Action Taken: Staff advised that this statistic was difficult to collect accurately and consistently. No statistics were compiled.]

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.

[Action Taken: Feedback solicited on the need and productivity of a breakout session suggested that such a discussion may not provide any tangible outcome data. The committee circulated a draft of this report to all circuit court judges and appellate court judges for comment to address this recommendation.]

10. Amend banners on unpublished opinions to reflect rule change.

[Action Taken: Court staff worked with publishers to amend banners on Court of Appeals unpublished opinions and related documents to reflect the rule amendment. Banners have been amended.]

APPENDIX C. Citation of Unpublished Opinions Committee

Justice David T. Prosser Jr., Supreme Court

Jennifer Andrews, Chief Staff Attorney, Court of Appeals
(2011)

Judge Edward R. Brunner, Court of Appeals, District 3
(Retired 2011)

Jean Bousquet, Chief Information Officer (CCAP)

Peg Carlson, former Chief Staff Attorney, Court of Appeals

Jane Colwin, former State Law Librarian (2009)

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 (2009)

April Southwick, Attorney, Judicial Council

Julie Tessmer, Acting State Law Librarian (2011)

Christopher Wren, Assistant Attorney General, Criminal
Appeals Unit

David Ziemer, Wisconsin Law Journal