

Before FRAP 32.1 was adopted, there was opportunity for public comment, followed by studies conducted by the Appellate Rules Advisory Committee of the United States Judicial Conference. Professor Stephen R. Barnett, of Washington and Lee University, conducted his own study, interviewing federal defenders in circuits which already permitted citation of unpublished opinions. Below are some of his findings, taken from the 42 page article:

Effect of Citability Rule in those Circuits

No real complaints, not discussed at circuit conferences. Some problem in 11th circuit which had delayed in putting its unpublished opinions online. One defender voiced some concern about having to argue over the weight of unpublished opinions in a particular case.

Frequency of Citation

Unpublished opinions were cited in all circuits; frequency of such citation varied. No defender suggested there was too much citation of unpublished opinions in his/her circuit.

Research Burden

Virtually all defenders stated that they regularly research unpublished opinions. Numerous defenders emphasized the role of computers and that unpublished cases “just pop up on Westlaw.” Any additional research burden was minimal or insignificant.

Impact on Opinion Quality

Difficult for defenders to say whether citability forces judges to spend more time on their opinions; split in assessment of quality of unpublished decisions in the circuits.

One-line Dispositions

No evidence that one-line dispositions had increased following institution of citability rule.

Precedential v. Persuasive

No experience of having litigants argue that unpublished opinion should be treated as precedent, instead of as merely persuasive, *ie.*, no, attempts to blur the line.

Delay, Other Adverse Effects

No defender mentioned delay, slower dispositions, as a consequence of citability.

STATE OF WISCONSIN
SUPREME COURT

In re:

PROPOSED AMENDMENTS TO RULE 809.23(3)

**PETITION OF JUDICIAL COUNCIL REQUESTING THAT THE SUPREME COURT
CONSIDER WHETHER OR NOT TO ORDER AN AMENDMENT TO RULE 809.23(3)**

The Judicial Council respectfully petitions this Court to consider whether or not an order should be entered, pursuant to WIS. STAT. § 751.12, adopting the following amendment to WIS. STAT. RULE 809.23(3).

SECTION 809.23(3) of the statutes is amended to read:

809.23(3) CITATION OF UNPUBLISHED OPINIONS NOT CITED. An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of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~~ claim preclusion, collateral estoppel, issue preclusion, or law of the case. An unpublished opinion issued on or after [insert effective date] may also be cited for its persuasive value, provided that the party citing the opinion files a copy of the opinion with the court and serves a copy of the opinion upon all opposing parties together with the brief or other paper in which the opinion is cited. Because an unpublished opinion is not precedent, an unpublished opinion cited by a party is not binding on any court of this state, and the court need not distinguish or otherwise discuss an unpublished opinion cited by any party in its ultimate decision. For purposes of this section, "unpublished opinion" does not include summary dispositions.

RESPECTFULLY SUBMITTED

JUDICIAL COUNCIL

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