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The Noncitation Rule and the Concept of Stare Decisis

David L. Walther*

Introduction

A number of jurisdictions have been concerned with the increasing flow of appellate decisions. To reduce the volume of literature which must be reviewed by a researcher, many jurisdictions have adopted standards for the selective nonpublication of appellate opinions.\(^1\) Because of this procedure a question arises whether such unpublished opinions constitute precedent and whether they may or should be cited by appellate counsel or by the court.\(^2\) Amidst the chaos observed in those jurisdictions that have proscribed the citation of unpublished opinions,\(^3\) Wisconsin has adopted a noncitation rule for its new court of appeals.\(^4\)

The Nonpublication Rule

In 1971, the Federal Judicial Center brought together a group of lawyers, teachers and judges who, with the National Center for State Courts, formed the Advisory Council on Appellate Justice which, in 1973, recommended standards for publication of judicial opinions in American jurisdictions.\(^5\) In making its recommendation, the Council stated its objective to

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3. See Gardner, supra note 2.


be the reduction of "the publication of appellate opinions that are without general significance to the public, to the legal profession, or to advancing the functions of the law." Under the Council's standards, the nonpublication determination was to be made by the judge who decided the case. Thereafter, in 1977, the American Bar Association Commission on Standards of Judicial Administration published similar standards relating to nonpublication of judicial opinions. Under the ABA standards, the mechanism for triggering publication was also dependent upon the author of the opinion, although a concurring or dissenting justice could compel publication of the majority opinion.

6. Id. at 5.
7. "The Model Rule on Publication of Judicial Opinions" reads as follows:
   1. Standard for Publication
      An opinion of the (highest court) or of the (intermediate court) shall not be designated for publication unless:
      a. The opinion establishes a new rule or law or alters or modifies an existing rule; or
      b. The opinion involves a legal issue of continuing public interest; or
      c. The opinion criticizes existing law; or
      d. The opinion resolves an apparent conflict of authority.
   2. Opinions of the court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out in section (1) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order any unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.
   3. If the standard for publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part shall be published.
   4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the case at the conference on the case before or at the time the writing assignment is made, and at that time, if appropriate, they shall make a tentative decision not to publish.

Id. at 22-23.
8. ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.37 (Approved Draft 1977) [hereinafter cited as ABA STANDARDS].
9. Id. The American Bar Association standards provide in part:
   3.37 Publication of Opinions.
      (a) Public Access. Opinions of an appellate court should be a matter of public record. Parties should be provided copies of a decision or opinion when it is filed, even if general dissemination is withheld [sic] until the opinion is in printed form.
      (b) Formal Publication. An opinion of an appellate court should be published in the series of printed volumes in which the opinions of the court appear only if, in the judgment of the judges participating in the decision, it is one that:
In California the adoption of a nonpublication rule resulted in the nonpublication of seventy-one percent of the opinions of the court of appeals in fiscal year 1971. Thus, in that year, more than two-thirds of appellants' counsel in California presented cases to the court of appeals which the court determined not to be of publishable quality. The conclusion is inescapable that in California counsel are either presenting frivolous appeals or the court is inappropriately withholding opinions from publication. In discussing the history of the California rule, one commentator noted that,

The fond hope that non-publication under Rule 976(b) would remove from the reports only the cut-and-dried, old-hat reiterations of familiar rules, unworthy of researching or even occupying lawyers' library shelf space, has in application proved to be unjustified. Imbedded in the bulk of unpublished opinions is a not-inconsiderable body of law dealing with novel points and giving rise to conflicts among decisions. Whether this is a result of judicial ineptitude, or a manifestation of momentary lapses, or a desire to hide from general view decisions whose authors—for one reason or another—do not wish bruited about, is as unimportant as it is unfathomable.

What is important is that Rule 976(b) has generated a climate in which no litigant can be certain that his case will be decided by the Court of Appeal in accordance with principles of law followed in other, similar cases.

In creating the new Wisconsin Court of Appeals, the legislature provided:

(1) In each case, the court of appeals shall provide a written opinion containing a written summary of the reasons for the decision made by the court.

(2) Officially published opinions of the court of appeals shall have statewide precedential effect.

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(1) Establishes a new rule of law, alters or modifies an existing rule, or applies an established rule to a novel fact situation;

(2) Involves a legal issue of continuing public interest;

(3) Criticizes existing law; or

(4) Resolves an apparent conflict of authority.

A concurring or dissenting opinion should be published if its author believes it should be; if such an opinion is published the majority opinion should be published as well.

*Id.* § 3.37(a)-(b).


The supreme court shall determine by rule the manner in which the court of appeals determines which of its decisions shall be published.\(^{12}\)

Pursuant to this statute, the Wisconsin Supreme Court adopted Rule 809.23 which states, in part:

(1) CRITERIA FOR PUBLICATION

(a) Criteria for publication in the official reports of an opinion of the court include whether the opinion:

1. enunciates a new rule of law or a modification of an old rule;
2. applies an established rule of law to a factual situation significantly different from that in published opinions;
3. resolves a conflict between prior decisions of the court; or
4. decides a case of substantial public interest.

(b) An opinion should not be published when:

1. the issues involve no more than the application of well-settled rules of law to a recurring fact situation;
2. the issue asserted is whether the evidence is sufficient to support the judgment, and the briefs show the evidence is sufficient; or
3. the disposition of the appeal is clearly controlled by a prior holding of the court or a higher court, and no reason appears for questioning or qualifying the holding.

(2) DECISION ON PUBLICATION

The judge or judges of the Court of Appeals who join in an opinion in an appeal or other proceeding shall make a recommendation on whether the opinion should be published. A committee composed of the chief judge and one judge from each district of the Court of Appeals selected by the Court of Appeals judges of each district shall determine whether an opinion is to be published.\(^{13}\)

The reason for the adoption of the rule was best explained by the Judicial Council Committee which noted that, "The 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-

\(^{12}\) 1977 Wis. Laws ch. 187, § 112 (to be codified as Wis. Stat. § 752.41).

\(^{13}\) Wis. Sup. Ct. Order, 83 Wis. 2d xxvii, xlv-xlvi (1978) (to be codified as Wis. R. App. P. 809.23(1)-(2)).
consuming and expensive.”

As noted in the Committee’s Notes, Rule 809.23 adopts a practice which the Wisconsin Supreme Court has already been using in response to its previously unmanageable case load. For example, the Wisconsin Supreme Court recently granted summary reversal of a Milwaukee County Circuit Court decision in which a previously uninterpreted provision of the Wisconsin open meeting statute was involved. In that case of first impression, the court overruled the circuit court and adopted a ruling in favor of a closed meeting. The court then sheltered its opinion from jurisprudential currency and further judicial scrutiny by ruling that the decision had no precedential value and was not to be cited as authority. Surely many other such skeletons also lie buried by the rules of nonpublication and noncitation.

**The Noncitation Rule**

Rules allowing nonpublication of opinions create a real difficulty with respect to whether such opinions may be cited as authority. The American Bar Association Commission approach allows citation only if the opposing party and the court is given prior notice of the contents of the opinion.

(c) Citation of Opinions Not Formally Published. Rules of court should provide that an opinion which is not formally published may be cited before a court only if the person making reference to it provides the court and opposing parties with a copy of the opinion or otherwise gives them reasonable advance notice of its contents.

The Advisory Council standards resolved this issue by forbidding any judicial citation of nonpublished opinions.

5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication. Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other materials presented to any court.

14. 83 Wis. 2d at xlvi.
15. Id.
18. ABA STANDARDS, supra note 8, § 3.37(c).
19. Standards, supra note 5, at 23. The reasons for the noncitation rule stated by
One court has gone so far as to state that "we will not ourselves in published opinions cite or refer to memorandum decisions." Of course, no provision can require the appellate court itself to forget that it may have already rendered a decision on any given issue. One author wonders the extent to which "there exists a 'grapevine' among appellate judges and their research attorneys, whereby earlier unpublished opinions are relied on expressly or implicitly."

The Wisconsin Supreme Court adopted the noncitation rule by providing that, "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." As a safeguard against mistaken nonpublication decisions, the court provided further that, "A person may at any time file a motion in the court to have an unreported opinion published in the official reports."

The reasons given for adopting the noncitation rule in Wisconsin were set forth in the Judicial Council Committee's Note.

There are several reasons why an unpublished opinion should not be cited: (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

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the Advisory Council were:
1. It is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable.
2. Cost will be reduced by eliminating the need to obtain and examine the mass of opinions that are not designated for publication.
3. The absence of a non-citation rule would encourage the inclusion in opinions not designated for publication of facts and details of reasoning, thus frustrating the purposes underlying non-publication.
4. Cost and delay of cases appealed only because they are apparently at odds with unpublished opinions, can be reduced.
5. Great difficulty, if not impossibility, would be involved in determining whether an unpublished opinion has been overruled.

*Id.* at 19.

22. Wis. Sup. Ct. Order, 83 Wis. 2d xxvii, xlvi (1978) (to be codified as *Wis. R. App. P.* 809.23(3)).
23. *Id.* at xlvi (to be codified as *Wis. R. App. P.* 809.23(4)).
purpose of nonpublication; (3) permitting the citation of un-
published 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.  

PUBLICATION COMMITTEE

The Wisconsin rule establishes a system for determining
publication not found in either the Advisory Council's or the
American Bar Association's recommendations. Rule 809.23(2)
creates a committee, composed of the chief judge and one judge
from each district of the court of appeals, to make the decision
as to publication. By virtue of Rule 809.23(3), only published
opinions are given precedential value or may be cited. In a
court as small as the Wisconsin Court of Appeals, this commit-
tee, no doubt, will have intramural and nonofficial notice of
conflicts in unpublished opinions by the various panels. Thus,
elimination of chaotic appellate decisions is purchased at the
price of the creation of a committee with the power to deter-
mine which of the decisions of the court will, by statute, have
statewide controlling precedential effect upon the entire court
of appeals. Thus, the committee becomes a super tribunal,
unempowered by the Wisconsin Constitution and unendorsed
by the legislature.

The new appeal statutes adopted by the legislature and
the rules adopted by the supreme court were derived from the
work product of the specially appointed Judicial Council Ap-
pellate Practice and Procedure Committee whose report on
the rules was approved by the statutory membership of the

24. 83 Wis. 2d at xli-xlvi.
25. See text accompanying note 13 supra.
26. See text accompanying note 22 supra.
27. 1977 Wis. Laws ch. 187, § 112 (to be codified as Wis. Stat. § 752.41).
ch. 809).
30. "The Judicial Council Appellate Practice and Procedure Committee was
formed in February, 1976, and consisted of seven members appointed by the Judicial
Council and eight by this Court." Supreme Court Hearing on April 10: In the Matter
of Promulgation of Rules of Appellate Practice and Procedure For the State of
31. Id.
was discussed by this committee with the opposing position being freely expressed. However, there was neither time nor opportunity for a full review of the materials which had been published on this narrow issue. There are no public records indicating the extent to which the legislature or the court examined this issue prior to the adoption of the recommended statutes and rules, if such an examination took place at all.

The legislature did not expressly authorize the court to adopt a noncitation rule, albeit the power to do so is inherent with the court. Since the legislature has expressly authorized the supreme court to determine how publication of the decisions of the court of appeals shall be made, the court thus has the power to revise rules which it has adopted. As experience with the noncitation rule grows, this, no doubt, will be an issue to which the Wisconsin Supreme Court will be compelled to devote attention. As the committee itself noted, “Some argue that even accepting the premise that a court may properly decide not to publish an opinion this should not prevent that opinion from being cited as precedent since in common law practice any decision of a court is by its nature precedent.”

**The Concept of Stare Decisis**

In *Justice on Appeal*, Professors Carrington, Meador and Rosenberg, distinguished scholars of appellate procedure, state that:

Experience with the no-citation rule suggests that it raises difficulties that are as distressing as the problems that non-publication is designed to overcome. A no-citation rule may prevent counsel from urging by name an unpublished decision as a binding or authoritative precedent. But the rule will not prevent counsel from trying to divine the reasoning of that decision and then using it in the case at bar. Further, it will not prevent wise counsel from attempting to insinuate its existence and its persuasive force. After all, the reasoning that led to the decision is imperishable, however mortal or vanishing its printed form is said to be.

Experience in the United States Court of Appeals for the Fourth Circuit shows that trying to impose a non-precedent status on decisions by declaring them non-citable is like attempting to throw away a boomerang. The earlier decisions

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32. 1977 Wis. Laws ch. 187, § 112 (to be codified as Wis. Stat. § 752.41(3)).
keep coming back because of lawyers' and judges' ingrained devotion to the force of stare decisis.\textsuperscript{34}

Furthermore, at least three district courts within the Fourth Circuit have continued to rely upon unpublished memorandum decisions with one court stating that it would "continue to give the appropriate weight to the memorandum decisions of the Court of Appeals, regardless of form."\textsuperscript{35}

The noncitation rule may also leave the law in a state of irremediable disarray since it prevents counsel from calling attention to contradictory or chaotic decisions. For example, Ninth Circuit opinions contain several cases dealing with the proposition that government officers may stop individual vehicles in certain circumstances for brief questioning or investigation where there is "founded suspicion."\textsuperscript{36} James Gardner, writing in the \textit{American Bar Association Journal}, has found that the Ninth Circuit panels are not only inconsistent on deciding what facts are sufficient to constitute a "founded suspicion," but they are even in disagreement as to the threshold issue of the review standard to be applied.\textsuperscript{37} Thus, the courts continue to struggle with the question of whether the trial judge's determination is an issue of fact or an issue of law. Professors Carrington, Meador and Rosenberg argue that,

The conflict can be perceived only by looking at the unpublished opinions, but because of the no-citation rule there is no way to bring this to the surface and present the conflict to the court for resolution. These conditions created by a no-citation rule undermine one of the imperatives of an appellate system—that the system should promote uniform and coherent enunciation and application of the law.\textsuperscript{38}

These authors further note the inherent risk of abuse by judges who prefer to secrete some decisions which should be published.\textsuperscript{39} The authors conclude "that the no-citation rule

\textsuperscript{34} P. Carrington, D. Meador & M. Rosenberg, \textit{Justice on Appeal} 37 (1976) (footnote omitted) [hereinafter cited as Carrington].


\textsuperscript{37} Gardner, \textit{supra} note 2, at 1226-27.

\textsuperscript{38} Carrington, \textit{supra} note 34, at 38 (footnote omitted).

\textsuperscript{39} "[W]e would only add a reference to United States v. Martinez, 530 F.2d 976 (5th Cir. 1976), an opinion which was published only after five members of the court
has such undesirable side effects that it should be abandoned. The absence of a no-citation rule means, in turn, that a non-publication policy is undesirable and unworkable, for the reasons mentioned above. Accordingly, . . . that policy too should be abandoned."

Gideon Kanner in the California State Bar Journal has warned that:

[S]tare decisis cannot operate as a "workable doctrine" as long as courts, while adjudicating sets of identical facts, are able to reach directly contrary results on diametrically opposed legal theories, by the simple expedient of publishing one set of results but not the other. . . . [S]tare decisis . . . means that we let the prior decision stand and control later, similar cases. That means that the prior decision stands, and not that the prior decision stands or falls depending on the medium of its publication. Certainly where a litigant can point to a prior adjudication of the very point in issue, how can the court—in the name of stare decisis—refuse to consider such precedent?

. . . [S]urely it is grossly unfair to gag a litigant who wants to advise a Court of Appeal that the issue which he now presents for adjudication has already been passed on, and with what results.41

There would, of course, be no reason for the rule of noncitation were lawyers not otherwise tempted to cite unpublished opinions. Why would lawyers persist in relying on unpublished opinions? Gideon Kanner noted,

that unpublished opinions which truly comply with Rule 976(b) are largely not cited and thus pose no problem. It is principally the novel but unpublished opinions that hold an attraction to counsel in need of precedent. Otherwise, why would any lawyer in his right mind go to the trouble of finding and citing unpublished opinions which merely reiterate rules and rely on precedents already larding the published reports?42

Should not the question of whether opinions are to be given currency be left, in our common law, adversary and free market
dissent from a denial of a petition for a rehearing en banc." CARRINGTON, supra note 34, at 38 n.19.
40. Id. at 39.
41. Kanner, supra note 2, at 445-46 (footnote omitted) (emphasis in original).
42. Id. at 446 n.75 (emphasis in original).
system, to the judgment of the advocates? If so, what can be
done to unburden the already sagging bookshelves? Perhaps
"much could be done by way of increased self-discipline on the
part of appellate judges, both in terms of writing and editing
skills applied to their output, and through reduction of many
pointless distinctions enshrined in much of our law."43

Professors Carrington, Meador and Rosenberg propose a
solution particularly apt for a state with as manageable a body
of decisional law as Wisconsin.44 They suggest the use of memo-
randum decisions, the standards of which would overlap with
the standards for nonpublication, so that a memorandum deci-
sion would normally have little stare decisis value. The memo-
randa would not carry the name of an individual judge as au-
thor and would not display the full reasoning of the court. The
memorandum decisions would be published in a different fash-
ion and in a separate set of books, preferably in paperback on
low quality paper. They would therefore be generally available
and citable, but would be regarded as having fleeting signifi-
cance, except for the occasional gem which, if through contin-
ued use proved to have significance, could later be ordered
printed with the official reports. It should be noted that this
method of digesting circuit court opinions in the area of unem-
ployment compensation has been useful to the bar in Wiscon-
sin for many years.

In this era of widespread loss of faith in the government,
"This kind of disregard for the people's right and ability to
decide for themselves what aspects of their government's activ-
ties are worthy of their attention displays a regrettable lack of
understanding of the essence of a free society."45 Furthermore,

[N]on-publication inevitably reduces the visibility of the
correcting function of the appeal. Over time, it must depre-
ciate that basic function, leaving trial courts and administra-
tive agencies more on their own, and increasing general anxi-
ety about the integrity of the legal process at all levels. Visi-
bility is too important to too many of our imperatives to be
abandoned in favor of the limited benefits of non-
publication.46

43. Id. at 447 n.78. See O'Connell, Streamlining Appellate Procedures, 56
44. Carrington, supra note 34, at 39-41.
45. Kanner, supra note 2, at 448.
46. Carrington, supra note 34, at 39.
CONCLUSION

The noncitation rule is a fundamental departure from the concept of *stare decisis* and such a concept is so deeply rooted in the common law that it should not be altered without more thought, debate and argument than the issue has attracted to date. The possible ramifications of the noncitation rule on Wisconsin law and practice are incalculable, and as already indicated many of the possible results may be detrimental. Thus the adoption of Rule 809.23 should be the first step in a continuing debate as to the desirability of its demise.

Writing in the 1760s, the Italian jurist Cesare Becarria concluded that the most significant factor behind Europe’s emergence from a dark age of lawless tyranny was not better rulers, better judges, or even better laws. It was rather “the art of printing, which makes the public, and not a few individuals, the guardians of the sacred laws.”

47. Gardner, *supra* note 2, at 1227.