From: Eaton, J. Timothy
To: Amy Bowne
Cc: Michael T. Reagan
Subject: FW: Proposal Letter to Amend Supreme Court Rule 23 (2016)
Date: Tuesday, June 16, 2020 10:20:33 AM
Attachments: Proposal Letter to Amend Supreme Court Rule 23 (2016).pdf

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Dear Amy,

It is our understanding that the Supreme Court Rules Committee is considering a proposal at its June 24 meeting to eliminate Rule 23. In 2016 a Special Committee on Supreme Court Rule 23 was formed consisting of representatives of the Appellate Lawyers Association, the Executive Committee of the Illinois Judges Association, the Chicago Bar Association and the Illinois State Bar Association. The Committee explored revisions to Rule 23 and conducted a national search on similar rules. The result of the Committee's activities was a proposed amendment to the rule which was sent to the Illinois Supreme Court for its consideration. We are attaching our report and recommendations for the Rules Committee's consideration at its June 24 Committee meeting.

Mike Reagan and Tim Eaton, Co-Chairs of the Special Committee on Supreme Court Rule 23

Taft /

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August 22, 2016

Hon. Rita B. Garman
Chief Justice of the Illinois Supreme Court
3607 N. Vermillion, Suite 1
Danville, IL 61832

Re: Joint Bar Association proposal for amendment to Supreme Court Rule 23

Dear Chief Justice Garman:

On behalf of the Special Committee on Supreme Court Rule 23, consisting of appointees from the Chicago Bar Association, the Illinois State Bar Association, the Appellate Lawyers Association, and the Executive Committee of the Illinois Judges Association, we write to report on the Committee's recent action and to request that the Court's adopt an amendment to Supreme Court Rule 23 which would permit citation to Rule 23 orders as being persuasive only.

While we will comment below on the longer overview of interactions with the Court concerning the substance of our proposal, we relate at the outset the mid-term portion of that history. In 2014, the presidents of the Chicago Bar Association, the State Bar Association, and the Appellate Lawyers Association wrote to the Court to propose new Supreme Court Rule 23(e)(3) which would permit citation to unpublished orders of the appellate court as persuasive authority only. A copy of that letter is attached as Exhibit A.

By letter from Director Tardy to the presidents of those Bar Associations dated April 21, 2014, the Bar Associations were advised that the Court deferred adoption of the proposal at that time. The Court requested that the proposal be returned to the Associations with an invitation to undertake a comprehensive review of all Rule 23 issues presented by moving to a universal citation format. That letter further stated that the Associations may wish to consider whether there is continued value to distinguishing between published and non-published dispositions, since the latter are available electronically. The Court also generously invited the Associations to ask for the assistance of Ms. Katherine Murphy of the Administrative Office as a legal resource. A copy of Director Tardy's letter is attached as Exhibit B.

In response to that invitation from the Court, this Special Committee was formed to undertake that review. As the Committee began its work, the Executive Committee of the Illinois Judges

Association, desiring to express its position on whether Rule 23 unpublished orders be cited, also designated representatives to participate on the Special Committee.

The members of the Special Committee are:

J. Timothy Eaton, Co-Chair
Michael T. Reagan, Co-Chair
Jonathan B. Amarilio
Donald D. Bernardi
Garrett L. Boehm, Jr.
Matthew R. Carter
Hon. Israel A. Desierto
John M. Fitzgerald
Hon. Russell W. Hartigan
Hon. Michael B. Hyman
John P. Long
Hon. Mary L. Mikva
Michael W. Rathsack

On August 18, 2016, the Special Committee voted unanimously to again propose to this Court an amendment to Supreme Court Rule 23, by the addition of a new Rule 23(e)(3) which would provide:

> Notwithstanding the foregoing, an order entered under sub-part (b) or (c) of this rule, may be cited as persuasive authority if that order was filed on or after (the effective date of this rule).

In response to the Court's request expressed in Director Tardy's letter, the Committee evaluated a broad spectrum of issues relating to unpublished opinions. Much of the discussion centered on concerns expressed by some members of the appellate bench, trial judges, and members of the Bar concerning the prohibition contained in this Court's rule against the citation of unpublished opinions for any purpose other than the narrow same-case purposes set out in the rule. The Executive Committee of the Illinois Judges Association, being aware of the positions already uniformly adopted by the three Bar Associations in favor of permitting citation for persuasive-only purposes, also voted to support that proposal.

The Committee also examined the status of relevant rules and trends around the country. Federal Rule of Appellate Procedure 32.1(a) prohibits all restrictions on citation:

> *A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication,"*

> *"non-precedential," "not precedent," or the like; and (ii) issued on and after January 1, 2007.*

Two representative law review articles documented the ongoing trend in favor of permitting citation and the status of Illinois as being in a minority on this point. Professor David R. Cleveland updated a prominent appellate journal's tracking of this issue in *Appellate Court Rules Governing Publication, Citation, and Precedential Value of Opinions: An Update*, Cleveland, David R., Journal of Appellate Practice and Process, Vol. 16, No. 2 (Fall 2015). A Comment took up the same topic and proposed that a uniform practice among the states be adopted: *Out of Cite, Out of Mind: Navigating the Labyrinth That is State Appellate Court's Unpublished Opinion Practices*, 45 U.Balt.L.Rev. 561, (Summer 2016).

John Fitgzerald and Uri Abt, both of Tabet, DeVito & Rothstein, summarized Professor Cleveland's findings in a Memorandum to the Committee which is attached as Exhibit C. As stated in Professor Cleveland's article, and reflected in the Fitzgerald and Abt Memorandum, only five jurisdictions do not allow courts to issue unpublished opinions. Five states have rules which are context-specific and do not lend themselves to easy categorization. Twenty-five states permit citation to unpublished opinions, and of that number, eight states attach precedential weight to those opinions. Only fifteen states, other than Illinois, currently prohibit citation of unpublished opinions. (A listing of those states is set out on Page 2 of the Memorandum, Ex. C)

The University of Baltimore Comment also classifies the posture of the states on this issue. While the tabulation is slightly different than the Cleveland article, that small difference is perhaps accounted for both by the fact that the Comment is more recent, having just been published, and the difficulty in classifying the rules of some states. The Comment classifies the states as follows:

- 4 States publish all opinions
- 4 states with unpublished opinions afford them precedential value
- 18 states, stated to be a growing number, allow citation for persuasive-only value
- 10 states are difficult to classify
- 13 states plus DC prohibit citation

We also offer the following excerpts from that Comment:

- "An examination of states' publication policies over the last decade reveals a clear trend in favor of citability and judicial transparency."

- "Any concerns a court might have that particular case does not warrant an opinion of precedential value … is adequately addressed by limiting citation … for its persuasive value only and by imposing no obligation on the court or parties to research or distinguish the decision."

- "The expansion of technology makes high quantities of information exponentially more manageable, and ... renders the philosophies supporting states' no-citation rules antiquated."

- "Although they once may have been an effective method to combat unmanageable appellate caseloads, no citation rules, in whole or part, have no place in today's technological age. The trend is clearly supportive of citation to unpublished opinions for persuasive value, so as to maintain a predictable, transparent and cohesive body of law.[1]"

Illinois trial judges have expressed their concerns deriving from the ban on citation, primarily because of the conundrum they are presented with when they have knowledge, as they frequently do, of a pertinent unpublished order, yet are barred from citing the order and thus publicly relying on it.

In 2003, the Court appointed its own Special Committee to Study Supreme Court Rule 23. The Committee was composed of lawyers and justices from all of the judicial districts, and was chaired by Hon. Thomas R. Appleton and J. Timothy Eaton. That Committee reported to Chief Justice McMorrow on July 31, 2003. It recommended a number of changes in Rule 23, many of which were adopted. Among other matters, the Committee recommended that the limit on the length of opinions be eliminated and that unpublished orders be made available electronically to the Bar and public, both of which proposals were subsequently adopted by the Court. Relevant to this proposal now being presented to the Court, the Court's Special Committee, by overwhelming but not unanimous vote, requested that unpublished opinions be made citable for persuasive value only. That Committee's report to Justice McMorrow stated:

> *The overwhelming majority of the Committee agreed with the Judicial Conference of the United States Advisory Committee's observation 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 accept those contained in the court's own non-published opinions." Therefore, the Committee proposes that Rule 23 orders may be cited for persuasive authority.*

Those proposals were then taken up by the Supreme Court Rules Committee. Part of the discussion at the Rules Committee hearing was the proposal for the need for electronic publication and a system of universal citation. This Committee believes that the Rules Committee favorably

[1] Although the Comment advocates in favor of a uniform national regime permitting citation, it does not offer draft language, most likely because of the great variances in the terms and rules used throughout the country.

recommended to the Court that that proposal be adopted, but we do not have a record of that action to relate to the Court.

Thereafter, a system of universal citation was adopted, effective July 1, 2011. Supreme Court Rule 23(g) was adopted, by which unpublished orders are universally available on the Court's website. Those orders are searchable through the Court's website. All of the major commercial case law databases also contain the unpublished orders, with full search capability attached to them.

By statute, Congress required that all federal unpublished orders be electronically available. West also publishes those orders in the Federal Appendix. Those actions preceded the adoption of Federal Rule of Appellate Procedure 32.1.

Permitting citations to unpublished orders for persuasive value only is widely recognized as being an appropriate and efficient compromise between the existence of unpublished orders and the interest of the public and all participants in the legal system in being able to cite those dispositions. The 2014 proposal from the Bar Associations to this Court writes about many of those reasons, and comments in some detail about the Illinois experience. That material will not be duplicated in this report, but this Committee asks that the Court take the matters set forth in that proposal into consideration.

The proposal made here is identical to the 2014 proposal transmitted by the presidents of the three Bar Associations, with the exception of a different effective date.

The 2014 proposal suggested that the rule be effective on January 1, 2011, which was the date on which the Illinois system of universal citation came into force. The 2003 proposal made to this Court by the Court's Special Committee on Rule 23 proposed that the amendment apply only to orders filed after the effective date of the rule change. Using the proposed effective date limitation reduces any potential objection to this proposal based on a potential complaint that an order was made citable only after the fact.

This Committee investigated whether there were adverse consequences experienced in those jurisdictions which permit citation of unpublished orders for persuasive value only. No evidence in that regard has been discovered.

Ms. Murphy contacted the National Center for State Courts and was advised that the Center was unaware of any research done directly on that point. She located through the Center a report regarding the Wisconsin experience. She followed up and was able to obtain a final report from a Committee formed by the Wisconsin Supreme Court to evaluate whether the court's having previously adopted a similar proposal had resulted in any adverse consequences. The Wisconsin Committee, appointed by the Wisconsin Supreme Court to study experience with the rule, issued its final report in March, 2012. The Committee did not report that any problems had been found, and recommended that there was no need for further study of application of the rule. (The

Wisconsin experience was made more complicated because the rule was adopted before Wisconsin had universal citation.)

Tim Eaton very recently interviewed Professor Cleveland, the author of the article cited above in the Journal of Appellate Practice and Process. Professor Cleveland related that he was unaware of any studies as to the experience of those jurisdictions which allow citation to unpublished orders. He expressed his opinion that the Federal Rule, now in effect for almost ten years, has been used uneventfully without any adverse consequences being reported. He further reported that parties who were originally opposed to that rule now admit that dire results have not followed. He confirmed that the national trend was in the direction of permitting citation. Professor Cleveland stated he was unaware of any jurisdiction which first permitted citation and then later rescinded that change.

The Special Committee respectfully suggests that the absence of legal literature suggesting that any problem has been encountered with a rule permitting citation, either in the numerous states with this rule or in the Circuit Courts of Appeal, is some evidence of the lack of controversy or problems following the adoption of the rule.

Although the prohibition against citing unpublished orders is a topic of widespread and ongoing discussion, there is no evidence suggesting that there will be a wholesale abuse of the requested privilege of citing these cases for persuasive purposes only. To the contrary, important legal principles would be well-served by this proposal, including additional transparency concerning the work of the Courts, candor at both the circuit and appellate levels as to the considerations at work upon judicial decisions, and the removal of any implication that the judgment arrived at in unpublished orders is of diminished quality.

It is a certainty that cases involving controversy at the appellate level as to the correct decision are being disposed of in unpublished orders.[2] In every term of this Court, a measurable number of Petitions for Leave to Appeal are granted from Rule 23 orders. Those are favorable actions by this Court in that they serve to negate the perception that having an unpublished order diminishes the chance of further discretionary review. But, considering the Supreme Court Rule 315 criteria for the grant of a Petition for Leave to Appeal, the question of whether those cases should have been published in the first instance is open to legitimate debate. And, if such cases are worthy of a grant of a Petition for Leave to Appeal by this Court, it would seem to follow that the case would have been worthy of discussion by citation in the appellate and circuit courts.

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[2] The 2014 letter to this Court expands on this factor.

The Special Committee, on behalf of Chicago Bar Association, Illinois State Bar Association, the Appellate Lawyers Association, and the Executive Committee of the Illinois Judges Association, respectfully requests this Court's consideration of this proposal.

Respectfully submitted,

J. Timothy Eaton
Co-Chair
Special Comm. on Supreme Court Rule 23

Michael T. Reagan
Co-Chair
Special Comm. on Supreme Court Rule 23