ILLINOIS STATE
BAR ASSOCIATION

Charles J. Northrup
General Counsel

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June 17, 2020

Committee Secretary
Supreme Court Rules Committee
222 N. LaSalle Street
13th Floor
Chicago, IL. 60601

Re: Proposal 19-11 (P.R. 0276)
Proposal 20-04 (P.R. 0283)

Dear Committee Secretary:

On behalf of its more than 28,000 lawyer members, the Illinois State Bar Association ("ISBA") is pleased to provide its comments on the above referenced Proposals that will be the subject of the Committee's June 24, 2020 virtual public hearing.

1. Proposal 19-11 (Rule 23)

As the Committee may recall, in 2016 a Special Committee on Supreme Court Rule 23 submitted research and a recommendation to the Court on amending Rule 23. That Special Committee was a joint effort of the ISBA, CBA, Appellate Lawyers Association, and the Executive Committee of the Illinois Judges Association. The ISBA continues to support the recommendations contained in that proposal. A copy of those recommendations is attached.

2. Proposal 20-04 (Rule 705)

The ISBA supports Proposal 20-04.

The ISBA appreciates the opportunity to provide its comments on the above proposals. If you require any additional information or have questions about the comments, please do not hesitate to contact me.

Very truly yours,

/s/ Charles J. Northrup

Charles J. Northrup
General Counsel

Cc: Amy Bowne (via email abowne@illinoiscourts.gov)

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

January 10, 2014

VIA FEDEX OVERNIGHT DELIVERY

The Honorable Rita B. Garman
Chief Justice of the Illinois Supreme Court
421 East Capitol Avenue
Springfield, Illinois 62701

Re: Joint Bar Association Proposal for Amendment to Supreme Court Rule 23

Dear Chief Justice Garman:

On behalf of the Appellate Lawyers Association, the Chicago Bar Association and the Illinois State Bar Association, we write to propose the amendment to Illinois Supreme Court Rule 23 discussed below, which would permit the citation of Rule 23 orders as persuasive authority. We believe that this amendment would benefit the Illinois bar, bench and public. Accordingly, we respectfully request that the Illinois Supreme Court consider and approve this proposal.

We are submitting this proposal directly to Your Honor because we understand that the Supreme Court Rules Committee has previously considered this proposal. Of course, we understand that the Court has the prerogative to refer this proposal to the Supreme Court Rules Committee, and if the Court chooses to exercise that prerogative, we will gladly participate in hearings concerning this proposal before the Supreme Court Rules Committee.

Text of Proposed Amendment

The proposed amendment would create a new Rule 23(e)(3), which would provide:

Notwithstanding the foregoing, an order entered under subpart (b) or (c) of this rule may be cited as persuasive authority if that order was filed on or after January 1, 2011.

Explanation of the Proposal

The Illinois Supreme Court and the Illinois Appellate Court frequently consider various sources that are not legally binding but nevertheless have persuasive force. By way of example, Illinois courts consider, and litigants are permitted to cite, such non-binding sources as: decisions rendered by the courts of other states (*Zaabel v. Konetski*, 209 Ill.2d 127, 134 (2004)); decisions rendered by federal courts on issues of Illinois law (*Mashal v. City of Chicago*, 2012 IL 112341, ¶27); Illinois Appellate Court decisions that predate 1935 (*Reichert v. Court of Claims*, 203 Ill.2d 257, 262 n.1 (2003)); legal treatises and restatements of the law (*Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill.2d 45, 61-70 (2007)); and law review articles (*People v. Austin M.*, 2012 IL

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111194, ¶77 n.6). The citation of such sources for their persuasive value is generally not controversial, even though none of them are binding sources of Illinois law. Indeed, the availability of such sources and litigants' ability to cite and discuss them may benefit a court's analysis of a complex or novel legal issue. A more complete analysis of a legal issue, in turn, provides litigants with a fuller explanation of the basis of a court's decision and thus serves the goal of transparency. In short, the ability of litigants to cite these non-binding sources is not only uncontroversial, but benefits the bench, bar and public.

Yet, in all but the rarest of circumstances, Illinois litigants are prohibited from citing a valuable and often very informative source for its persuasive value: Rule 23 orders of the Appellate Court. *See* Ill. Sup. Ct. R. 23(e). This prohibition should be lifted. In the words of one commentator, one may wonder why it is "permissible to cite an article in the local newspaper, the Bible, a learned treatise, or a novel by Stephen King, but absolutely prohibited to cite certain words of the justices of the appellate court." *See* Helen W. Gunnarsson, "Lifting the Veil on Rule 23 Orders," *Illinois Bar Journal*, Vol. 98, No. 100 (Nov. 2010), p. 558.

Rule 23 orders frequently contain detailed analyses of novel or complex legal issues, and as such they may provide helpful guidance to courts in subsequent cases and may also aid litigants in their arguments. In fact, it is not uncommon for unpublished Rule 23 orders to expressly address issues of first impression in Illinois. *See People v. 1998 Chevrolet Malibu*, 2013 IL App (3d) 120961-U, ¶9 (issue decided was "a matter of first impression in Illinois"); *Pogue v. Gurnee 41 Citgo, Inc.*, 2012 IL App (2d) 101176-U, ¶40 (issue was "a matter of first impression"); *1840 Maple Ave., LLC v. West*, 2012 IL App (1st) 103120-U, ¶21 ("The issue presented in the case at bar appears to be one of first impression as no previously reported decision in Illinois appears to have addressed the issue"); *Boyle v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago*, 1–09–3373, 2011 WL 10068737, *4 (1st Dist. Mar. 31, 2011) ("the question of statutory interpretation presented in this appeal is one of first impression"); *In re Estate of Jump*, 2011 IL App (5th) 100466-U, ¶6 ("This case is one of first impression"). If litigants were permitted to cite and discuss those Rule 23 orders, then circuit courts and reviewing courts would benefit from the analysis of novel or complex issues that those orders often contain.

Moreover, litigants' inability to cite Rule 23 orders sometimes appears to produce unfortunate blind spots in Illinois jurisprudence. For example, in one recent Rule 23 order, the First District of the Appellate Court held that section 13–214.3 of the Code of Civil Procedure applies only "where a client brings suit against his or her attorney arising out of an attorney-client relationship." *See Evanston Ins. Co. v. Riseborough*, 2011 IL App (1st) 102660-U, ¶28. The Illinois Supreme Court allowed leave to appeal in *Riseborough* and heard oral argument in that case on May 16, 2013. On August 22, 2013, however, before the Illinois Supreme Court had ruled in *Riseborough*, another division of the First District of the Appellate Court released a published opinion that addressed exactly the same legal issue and reached the opposite conclusion: namely, that section 13-214.3 applies "not just [to] legal malpractice claims or

claims brought against an attorney by a client." *See 800 S. Wells Commercial, LLC v. Horwood Marcus & Berk Chd.*, 2013 IL App (1st) 123660, ¶13, *rehearing denied* (Sept. 25, 2013). Despite having reached the opposite conclusion on precisely the same legal issue, the published opinion in *Horwood Marcus* did not mention, let alone distinguish or overrule, the previous Rule 23 order in *Riseborough.*[1]

In addition, as noted appellate practitioner Michael T. Reagan argued more than a decade ago, litigants' inability to cite Rule 23 orders as persuasive authority may place serious and unnecessary strains on the bench and bar, and may also generate serious inefficiency. *See* Michael T. Reagan, "Supreme Court Rule 23: The Terrain of the Debate and a Proposed Revision," *Illinois Bar Journal*, Vol. 90, No. 4 (April 2002), p. 180. As Mr. Reagan explained:

> In the view of this author, the most serious problem is presented by an on-point unpublished decision known to a trial court or appellate panel taking up the same issue. Under Supreme Court Rule 23 as it currently reads, the parties, the trial court, and even the reviewing appellate panel may not consider in any manner the prior decision of the same issue by the same appellate court. And yet, if, as Judge Learned Hand stated, the duty of a trial court "is to divine, as best it can, what would be the event of an appeal in the case," then the most powerful influence upon the trial court would be the unpublished opinion – which neither the court nor the litigants are permitted to cite, and therefore to even disclose. . . .
>
> In a judicial system so thoroughly structured in favor of disclosure of all possible influences, it is difficult to reconcile a rule that strictly prohibits the discussion by bench or bar of what could well be the single most determinative factor in the case. Further, when the fundamental reason for unpublished decisions in the first instance is the conservation of judicial time, it makes little sense to ignore that the answer may have already been arrived at in a prior, albeit unpublished, case.

Id. at 185 (footnotes omitted).

While parties to an appeal may move for the publication of a Rule 23 order as an opinion (*see* Ill. Sup. Ct. R. 23(f)), litigants often choose not to do so for a variety of reasons, and in those instances litigants in future cases are foreclosed from the opportunity to cite such orders as persuasive authority, no matter how thorough and significant the legal analysis in them may be.

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[1] It is our understanding that no petition for leave to appeal has been filed in *Horwood Marcus.*

In addition, Rule 23(b) orders currently are available on the internet. *See* Ill. Sup. Ct. R. 23(g). The ready availability of such orders significantly reduces any concerns about unfairness to litigants who lack access to the most sophisticated legal research tools.

As things currently stand, a wealth of valuable legal analysis cannot be utilized by litigants, lawyers and judges, simply because that analysis appears in Rule 23 orders as opposed to published opinions. The bench, bar and public can only benefit from increasing the body of legal analysis that can be drawn upon to develop legal arguments and inform judicial decisions, and former considerations relating to the hardcopy publication of opinions and orders can no longer be said to apply.

The proposed amendment would not transform Rule 23 orders into binding authority, nor would it erase the distinction between unpublished Rule 23 orders and published opinions. Accordingly, under the proposed amendment, the Appellate Court would retain its discretion to issue decisions that will not bind litigants or courts in the future, and to signal that a certain decision perhaps does not deserve the full benefit of *stare decisis*.

We note that our proposal has been consistently advocated by leaders of the Illinois bench and bar for many years. In fact, a nearly identical proposal was recommended by the Illinois Supreme Court's Special Committee to study Supreme Court Rule 23 over a decade ago. In the past decade, the case for allowing citation of Rule 23 orders as persuasive authority has only grown stronger. The past decade has witnessed the adoption, in 2006, of Federal Rule of Appellate Procedure 32.1, which bars federal courts of appeal from prohibiting or restricting the citation of unpublished federal judicial opinions that were issued on or after January 1, 2007. Our proposal, therefore, would promote greater consistency between Illinois and federal appellate practice. Such consistency would benefit members of the appellate bar, who typically practice before both Illinois and federal reviewing courts. For that matter, our proposal would also promote greater consistency with appellate procedure in other states which permit the citation of unpublished appellate orders as persuasive authority in at least some circumstances. Moreover, there is no indication of any abuse of Federal Rule of Appellate Procedure 32.1 since its adoption in 2006.

This past decade has also witnessed the posting of Rule 23 orders on the website of the Illinois court system. (*See* http://www.state.il.us/court/R23_ Orders/recent_R23_appellate.asp.) The ready availability of Rule 23 orders on the internet is an overwhelmingly positive development, but it exacerbates the problem posed by the "on-point unpublished decision known to a trial court or appellate panel taking up the same issue," which Michael Reagan first identified over a decade ago (*supra*). This problem was relatively less severe when Rule 23 orders were difficult to find. Now those orders are available on the internet and on legal research tools such as Westlaw and Lexis. Accordingly, more often than before, the lawyers for all parties to a lawsuit may be aware of a seemingly dispositive Rule 23 order, and the circuit court

may be aware of that order as well, yet no one has any opportunity to cite, discuss or attempt to distinguish it.

Finally, we wish to add a word about transparency. We know how highly the Illinois Supreme Court values the goal of transparency, and we appreciate the Court's exemplary efforts to make the functioning of Illinois courts transparent to attorneys, litigants and the general public. We believe that the goal of transparency is served not only by making information about judicial decisions available to the public, but also by allowing attorneys and litigants to discuss and analyze previous judicial decisions in the course of judicial proceedings, and to explain to a court why a previous decision may or may not be applicable to the facts of the case at hand. We therefore respectfully submit that our proposed amendment to Supreme Court Rule 23 serves the goal of transparency and should be adopted for this additional reason.

On behalf of our members, we wish to thank the Illinois Supreme Court and its members for their consideration of the proposal discussed above. We will gladly provide any additional information about this proposal that may be of assistance.

Respectfully submitted,

Brad A. Elward President Appellate Lawyers Association	J. Timothy Eaton President Chicago Bar Association	Paula Hudson Holderman President Illinois State Bar Association

cc: Hon. Charles E. Freeman, Justice of the Illinois Supreme Court
Hon. Robert R. Thomas, Justice of the Illinois Supreme Court
Hon. Thomas L. Kilbride, Justice of the Illinois Supreme Court
Hon. Lloyd A. Karmeier, Justice of the Illinois Supreme Court
Hon. Anne M. Burke, Justice of the Illinois Supreme Court
Hon. Mary Jane Theis, Justice of the Illinois Supreme Court
Brett K. Gorman, Chairman of the Illinois Supreme Court Rules Committee
Administrative Office of the Illinois Courts

Supreme Court of Illinois
ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS

Michael J. Tardy
Director

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April 21, 2014

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Re: Joint Bar Association Proposal for Amendment to Supreme Court Rule 23

Dear Presidents Elward, Eaton and Holderman:

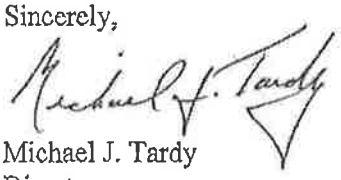
On behalf of the Supreme Court, I am writing in response to your joint proposal to amend Supreme Court Rule 23 to permit the citation of Rule 23 orders as persuasive authority. The Court considered this proposal during its March 2014 Term. The Court deferred adoption of the proposal at this time and determined to maintain the current distinctions among published opinions, written orders ("Rule 23 orders"), and summary orders with respect to citation as precedential authority.

Notwithstanding, 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. Among other things, the Associations may wish to consider whether there is continued value to distinguishing between published and nonpublished dispositions since they are all available electronically and no longer bound in paper form.

During your review of Rule 23, please feel free to contact Ms. Katherine Murphy, an attorney with the Administrative Office in Chicago, who is available as a legal resource on these matters. Again, on behalf of the Court, I thank you for submitting the joint proposal and for your continued leadership in addressing these important issues.

EXHIBIT B

Sincerely,



Michael J. Tardy
Director

c: Hon. Rita B. Garman, Chief Justice, Supreme Court of Illinois
Katherine Murphy, Attorney, AOIC

MEMORANDUM

To: Michael Reagan, Chairman of the Joint Committee on Supreme Court Rule 23

From: John M. Fitzgerald and Uri Abt

Date: June 28, 2016

Re: **Summary of Jurisdictional Survey of Rules Governing Issuance and Precedential Value of Unpublished Opinions**

The purpose of this memorandum is to provide a summary and overview of the rules regarding the issuance and precedential value of unpublished opinions in the fifty states and the District of Columbia. The information below is distilled largely from *Appellate Court Rules Governing Publication, Citation, and Precedential Value of Opinions: An Update*, David R. Cleveland, JOURNAL OF APPELLATE PRACTICE AND PROCESS Vol. 16, No. 2 (Fall 2015). There are unique variations in the treatment of unpublished opinions in virtually every jurisdiction. It is hoped that this distillation helps to illuminate generally how many jurisdictions permit appellate courts to issues reasoned, written decisions that cannot be cited by litigants.

A. Definitions and Assumptions

Among the surveyed jurisdictions, there are a variety of forms of written decisions courts are empowered to issue, and a variety terms used to describe them. As used in this memorandum "unpublished opinion" means any reasoned, written decision of a court that is not officially published. Additionally, throughout this memorandum, "court" means an appellate or supreme court. Rules concerning the persuasive value of unpublished trial court decisions are not addressed in this memorandum.

Three additional caveats should be also noted at the outset. First, most, if not all, jurisdictions allow citation of unpublished opinions where they are pertinent for issues of res judicata, collateral estoppel, or similar litigant- or suit-specific purposes. This survey is concerned with whether unpublished opinions can be cited by litigants outside of that context. Second, this survey focuses on the statutes propounded by each jurisdiction's rule-making body. It does not consider whether the rules are subject to a judicial gloss. Third, due to a recent trend away from non-precedential written decisions, some jurisdictions now allow citation of unpublished opinions that were written after the effective date of a new rule, but not unpublished opinions written before that date. At least 8 jurisdictions fall into this category. These jurisdictions are categorized according to their rules governing decision written after the effective date of their current rules.

B. Summary of Survey

30 of the 51 jurisdictions surveyed, or about 59%, permit the citation of unpublished opinions or prohibit the issuance of unpublished opinions. 16 of the 51 jurisdictions surveyed, or

EXHIBIT C

about 31%, both allow the issuance of unpublished opinions and prohibit their citation. The remaining 5 jurisdictions have rules that vary the treatment of unpublished opinions based on what level of appellate court is issuing the decision or whether the matter is civil or criminal.

5 jurisdictions do not allow courts to issue unpublished opinions. Additionally, Texas requires that all written decisions in civil cases be published and California requires that all written decisions of its supreme court be published.

Of the 25 jurisdictions that allow citation to unpublished opinions, 8 deem such opinions binding precedent while the remaining 17 give unpublished opinions persuasive value. In addition, Tennessee gives unpublished opinions persuasive value in the criminal context and when the opinion was issued by its supreme court, but unpublished opinions issued by its intermediate appellate court cannot be cited. North Carolina allows citation to unpublished opinions only where "there is no published opinion that would serve as well." Similarly, Oklahoma allows citations of unpublished opinions in the criminal context where "no published case would serve as well," but disallows citation to unpublished cases in the civil context.

C. Overview of Each Jurisdiction

The following table gives an overview of how each jurisdiction treats unpublished opinions:

Precedential value of unpublished opinion	Persuasive	Binding	All written decisions are published	Treatment is context specific	No value/cannot be cited
Jurisdiction	AK, AZ, FL, GA, HI, IA, KS, MA, MI, MN, NV, NH, NJ, NM, VT, VA, WI	CT, DE, KY, LA, ND, OH, UT, WV	AR, MS, NY, OR, WY	CA, NC, OK, TN, TX	AL, CO, DC, ID, IL, IN, ME, MD, MO, MT, NE, PA, RI, SC, SD, WA
Total:	17	8	5	5	16