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Supreme Court Rule 23: The Terrain of the Debate and a Proposed Revision

By [Michael T. Reagan*](#)

The dispute over Rule 23 – which provides for unpublished opinions and forbids citing them in unrelated cases – creates unfortunate tensions between bench and bar. The author puts the debate in context and suggests fine-tuning Rule 23 to allow citation to unpublished opinions as persuasive, not precedential, authority.

Illinois Supreme Court Rule 23 describes the circumstances in which an appellate court should express its ruling in a full opinion, an unpublished written order, or a summary order. The rule further provides that unpublished orders may not be cited, except for reasons directly related to that particular case, such as double jeopardy and res judicata.

Few court rules have generated as much fervent debate and commentary as Rule 23. The rule, in its various versions, has been the subject of Illinois State Bar Association activity on several occasions over the years. Most recently, at the request of the ISBA, the Special Committee on Appellate Practice appointed by ISBA President Tim Eaton is undertaking a review of Rule 23 in conjunction with its other work.

This article will set out the high points of the debate in the legal literature on unpublished opinions, posit the particular problem that occurs when the existence of an unpublished order bearing upon a contested issue is known to either the trial or appellate court, demonstrate a recent trend in the federal circuit courts of appeal toward permitting citation of unpublished opinions, and propose revisions to Supreme Court Rule 23. Those suggested revisions would hopefully both lower the volume of the controversy in Illinois and draw upon the useful experience of the "laboratories" of the federal courts of appeal.

I. An Overview

A focus on Supreme Court Rule 23 alone is misplaced, because the Illinois debate is remarkably similar to a national one taking place in both state and federal appellate courts on various aspects of the rules surrounding unpublished opinions. Ninth circuit judges Alex Kozinski and Stephen Reinhardt have recently written that "[f]ew procedural rules have generated as much controversy as the rule prohibiting citation of [non-precedential dispositions]."¹ The debate intensified when the now-moot opinion in *Anastasoff v United States*² held unconstitutional the eighth circuit rule that unpublished opinions were nonprecedential.

However, the constitutionality of the rules is only a small part of the discussion. "The opinion brings into sharp focus a debate that has gathered momentum over the last decade, as courts and the bar struggle over the meaning of the rule of law and how best to confront the demands of an ever-growing caseload."³ The ABA House of Delegates passed a resolution in August 2001 expressing opposition to the federal courts of appeal prohibiting citation to unpublished opinions, and requesting that the federal courts make their unpublished decisions available through electronic media, and permit citation to relevant unpublished opinions.⁴

This debate has a certain corrosive effect on relations between the bench and bar. Equally important, the opinion is commonly offered that a strict no-publication/no-citation rule undermines the respect in which the courts should rightly be held. Reciting the details of those criticisms here would not advance the examination of the rule. It is sufficient to note that reference has been made to "the unseemly spectacle of appellate courts claiming that they cannot consider cases they previously decided."⁵

Early in the movement toward unpublished opinions, concern was expressed about the cost of publishing and storing the expanding number of opinions, and over the unfairness of allowing citation to unpublished opinions given their relative unavailability. It was thought that institutional litigants, which are better equipped to obtain and manage the body of unpublished opinions, would have a great advantage.

Other factors supplied impetus toward unpublished opinions, including the demands upon the judiciary of a burgeoning caseload, the burden on the bar of wading through a flood tide of opinions, and concerns for the integrity of the body of case law occasioned by the opinion glut. Now, however, changes in information technology have vastly altered the landscape of legal research, the cost of publication and storage of work product of appellate courts, and the availability of that entire body of work to almost any litigant.

But the problem of the volume of appeals to be handled by a finite number of judges, and researched by litigants, remains. "In the face of these policy considerations is the stark truth that our courts are beleaguered by a colossal caseload."⁶ "Only improvements in indexing, and the availability of computer-aided research, keep courts and litigants from drowning in precedent. Even so, the waters rise uncomfortably high."⁷

A particularly acute set of problems exists when the decision not to publish later appears improvident. When a trial court poised to decide an issue learns of an unpublished opinion on point, or when the appellate court that handed down the unpublished opinion is later confronted with the same issue, the unspoken but known existence of the prior opinion puts unfortunate strain on what should be a transparently open system. The prior unpublished opinion is not simply a piece of "evidence," but instead is tantamount to the pre-ordained answer to the matter.

Review of Supreme Court Rule 23 is appropriate now in light of the *Anastasoff* debate, the recent trend in a majority of federal circuits to permit citation of unpublished opinions, and the onrushing digital revolution that has increased the velocity and breadth of the dissemination of such opinions. The continued debate can, and should, take place without attribution to any side of a motive other than one driven by good faith and the need to deal with these practical problems.

Chief among the changes suggested here is to permit citation of unpublished opinions as persuasive, not necessarily precedential, authority. Adopting that revision to Supreme Court Rule 23 would align Illinois with the emerging trend.

II. Supreme Court Rule 23

Supreme Court Rule 23 is not a monolith, but rather is composed of discrete parts. It must be read in conjunction with Administrative Order MR No 10343, which was adopted in 1994, at the same time that substantial changes were made to the rule itself.

The rule provides that an opinion may be published only when a majority of the panel decides that the "decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or...resolves, creates, or avoids an apparent conflict of authority within the Appellate Court."⁸ An unpublished order of the court "is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case."⁹ If an appeal is "disposed of by order, any party may move to have the order published as an opinion...within 21 days of [its] entry."¹⁰

The administrative order limits the number of opinions that each district may file annually to 750 in the first district, 250 in the second district, and 150 in the third, fourth, and fifth districts. Majority opinions are limited to 20 pages, and concurring and dissenting opinions to five pages each. To comply with those page limitations, courts may designate "nonprecedential issues raised by an appeal...as nonpublishable material within the disposition."

Three comments were written by the justices in support of, and dissent to, the administrative order. The justices writing in support of the changes noted that the great majority of states with intermediate courts of appeal, and all federal courts of appeal, provide for some form of summary disposition. They wrote that many appellate opinions were too long, that legal researchers must read through too much to locate the essence of a point of law, that the changes were necessary "to curtail the publication of unnecessary opinions and to render those opinions that are published to be of readable length," and that the changes would "elevate the significance of both the appellate court as an institution and its opinions as precedential authority."¹¹

Justice Miller, with Justice McMorrow joining, dissented from the imposition of limits on the number of opinions and the length of each opinion. They expressed the opinion that those limits were "demeaning to the appellate court, and to the public it serves." On a broader note, they observed that "in [the court's] zeal to reduce the volume of published cases and to promote brevity over verbosity, the majority has lost sight of the purposes of our courts, and of the nature of the judicial process."¹²

When the 1994 changes to the rule and the administrative order were issued, many appellate justices understood the clear intent, as well as the express direction, of the supreme court to be that the number of opinions be greatly reduced and "when in doubt, don't publish." The appellate court has taken that direction to heart. In the aggregate, for the period 1998 through 2000, the number of published opinions represents 15 percent of the total decisions in the appellate court. Over the same period, the court has published only 62 percent of its allowed limit of published opinions. There is, however, discernable variation among the districts in the ratio of published opinions to the allowed limit.

True to the prediction of Justices Miller and McMorrow, anecdotal reports indicate that members of the appellate court find the page limit demeaning and chafe under the restriction. Further, many opinions are interrupted by a lacuna for "material unpublished pursuant to Supreme Rule 23" to permit them to fit within the 20-page limitation.

Rule 23 orders and the unpublished excerpts from otherwise-published opinions circulate through the state like

samizdat. The unpublished portions of opinions sometimes appear briefly on-line, only to disappear from the final version of the opinion. Rule 23 orders characterized as "unique" but "nonprecedential" are sometimes reported in the *Illinois Bar Journal*,¹³ and Rule 23 orders are frequently discussed in the *Chicago Daily Law Bulletin*.¹⁴

The published opinions of the appellate court become available on the Internet shortly after their release.¹⁵ Although budgetary restraints and other problems may exist in the short term, there appears to be no technological barrier to similar posting of unpublished orders. Movement in that direction might come as a collateral effect of the national drive toward alternative citation and distribution systems.

In a curious combination of a new trend and old technology, in 2001 the West Group began publishing "unpublished" federal appellate opinions in the new reporter *Federal Appendix*. With the introduction of that service, West now offers the unpublished federal opinions with full editorial enhancement, including headnotes and key numbers, in print, on CD-ROM, and on Westlaw.¹⁶

Although commentators at the national level express concern that a decision not to publish an appellate disposition reduces the chances of further appellate review,¹⁷ the Illinois Supreme Court has been willing to grant petitions for leave to appeal for both unpublished orders and published opinions, to the great relief of Illinois practitioners. Given, however, the requirements of Supreme Court Rule 315(a) that "the general importance of the question" and the "existence of a conflict" control the grant of a petition for leave to appeal, one might ask whether the order should have been published in the first instance.

III. The Factors Underlying Unpublished Opinions and the Linkage to No-Citation Rules

Much like Fermat's marginalia while stating his theorem, the full arguments for and against unpublished opinions require more space than is available here. There appears to be general agreement that the rule was prompted by the crisis of volume. The sheer number of appeals brings with it its toll on the workload of the court and a corresponding burden upon counsel to remain current with a large number of opinions. Judges have rightfully expressed their desire to devote time to the careful crafting of opinions that they expect to be precedential in nature and not to have that time diluted by spending an equal amount of time on cases that raise only settled issues.

Opponents, on the other hand, object that the "courts do not adequately determine which opinions are appropriate for publication," that unpublished opinions are not given the same care and judicial – as opposed to staff – attention, that unpublished decisions may unwittingly foster "inconsistent jurisprudence," that they lead to a reduced public regard for the judiciary, and that institutional litigants are in a better position than others to collect, monitor, and use strategies gained from unpublished opinions.¹⁸

For appreciation of the arguments for and against unpublished opinions compare "Judges on Judging: In Defense of Unpublished Opinions,"¹⁹ with "The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?"²⁰

Historically, and still in Illinois, an "unpublished opinion" rule has been accompanied by a "no citation" rule. Those twin features were linked to preserve the advantages of cost-savings, reduced judicial time, and fairness to litigants that prompted the adoption of "unpublished opinion" rules in the first instance.²¹ Early reasons for linking the two rules were that not everyone would have equal access to the opinions and that many unpublished opinions would not disclose the facts or rationale of the panel's decision.²²

Now that the courts have had experience with "no publication" rules, precisely that linkage between "no publication" and "no citation" is being called into question and is the focus of the ongoing debate. "Apart from the constitutional issue raised in *Anastasoff*, citation is the most significant open question in this continuing debate nationally...."²³

Even institutional proponents of the continuation of strong "no publication" rules recognize that the goal is "to find a way, without overburdening the court, to strengthen public confidence in the consistency and fairness of all of the court's decisions."²⁴ Resolution of the controversies in this area involves comparing many factors, which proponents of any position must agree do not admit of only one conclusion. It has been stated that "[u]ltimately, the analysis becomes a 'balance of harms' test."²⁵

On the question of whether citation of unpublished opinions should be permitted, the impact of technology is felt most sharply. Because of the increasingly widespread dissemination of unpublished opinions, the debate must be premised on the understanding that the phrase "'unpublished opinion' is almost a term of art, because all federal appeals court opinions may be published in some way...[that phrase] has become a fine, almost meaningless, distinction in a world of electronic legal research."²⁶ The phrase is now a "misnomer."²⁷

A new nomenclature is necessary. To that end, note that the real question in distinguishing between these classes of opinions is whether the issuing court wrote the opinion in sufficient depth that it will serve into the future as firm ground for precedent.

As long ago as 1990 the Federal Courts Study Committee appointed by Chief Justice Rehnquist, at the direction of Congress, recommended that the Judicial Conference "review policy on unpublished court opinions in light of increasing ease and decreasing cost of database access."²⁸ Since then, of course, developments in technology have exceeded all expectations. Because the term "unpublished" can no longer be applied with accuracy to the increasingly available opinions, if any distinction is to be honored under these rules, it is more descriptive to refer to these opinions as "nonprecedential."

IV. The Trend Among Federal Circuit Courts to Permit Limited Citation of Unpublished Opinions as Persuasive Authority

Each of the 13 federal circuit courts of appeal has a rule providing for unpublished dispositions. Disposition of a case by a published opinion is now a distinctly minority event. Approximately 79 percent of federal circuit court dispositions are unpublished.²⁹

In 1964, the Judicial Conference resolved that courts should authorize publication of only those opinions that were of general precedential value. In 1971, the Federal Judicial Center suggested both that published opinions be curtailed and that nonpublished opinions not be cited. The Judicial Conference asked the individual circuits to devise plans. In 1974, the Conference noted that the individual plans in effect in each of the circuits resulted in "legal laboratories accumulating experience," and concluded that "because the possible rewards of such experimentation are so rich" that the development of each of the individual plans should be allowed to continue without interference.³⁰

In 1978, the Judicial Conference concluded that no one opinion publication plan was clearly preferable to another and that there was not enough consensus on the legal and policy matters to recommend a model rule. The Conference recommended "continued experimentation under a variety of plans."³¹ As noted earlier in this article, in 1990 the Federal Courts Study Committee recommended that the Judicial Conference again review policy on unpublished court opinions in light of the increasing ease and decreasing cost of database access.

The model rule promulgated by the Federal Judicial Center in 1973 stated that unpublished opinions "shall not be cited as precedent."³²

At one time, the majority of the federal circuit courts barred the citation of unpublished dispositions.³³ But no

longer. In 1994, two federal circuits permitted citation.³⁴ Now, in 2002, a majority of the federal circuits permit the citation of unpublished opinions as "persuasive" authority in unrelated cases, with certain limiting conditions.³⁵

Call for that modification also finds support in the writing upon the subject. Judge Tatel, of the D.C. circuit, has written that allowing citation of unpublished opinions "would send a strong signal that the court has confidence in these decisions, eliminating any basis for believing that the court is dispensing second-class justice to some parties."³⁶ That development is said to "strike the right balance" and "avoid the unseemly spectacle of appellate courts claiming that they cannot consider cases they previously decided."³⁷ "The present system of designating some opinions as 'unpublished' and yet allowing for their citation is both efficient and appropriate," and permitting citation for "persuasive" value has been proposed within several model rules.³⁸

V. The Problem of the Valuable Unpublished Opinion Known to the Trial or Appellate Court

If the criteria for nonpublication were strictly adhered to, with all doubts resolved in favor of publication, or if times and legal doctrines did not change, then the existence of unpublished opinions would be a relatively benign matter. However, there is a perception nationwide that unpublished opinions are employed in circumstances other than the application of settled law to common facts.³⁹ Further, it is not certain that the authoring panel can determine, for all time, whether the opinion at hand will have precedential value or not:

As a practical matter, the concept of precedential value is a fluid concept – what may not have precedential value on a given day may assume great significance in light of developments in the law. Judges are not capable of anticipating the facts of future disputes or the effect of a published decision in an area of law.⁴⁰

It has been recognized that "a 'violation' in the direction of not publishing is perhaps more serious than publication of a disposition that seems not to meet the criteria for publication."⁴¹ When appellate courts err in deciding whether to publish or not, "confidence in the work of the appellate bench is undermined," and the parties, with access to that opinion through an online service, are unable to rely upon it "in predicting outcomes or fashioning appellate arguments."⁴² Conversely, Judge Tatel notes that "any risk of harm from citing [unpublished opinions] is minimal so long as the court abides by [the publication standards]."⁴³

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.⁴⁴ 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,"⁴⁵ 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.

As for the appellate court that knows of unpublished decisions, they may remain "locked away in the institutional memories of the courts that produce them, where they often wield a silent but powerful influence over future decisions."⁴⁶

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.

VI. Suggested Revisions to Supreme Court Rule 23

Illinois, in keeping with all of the federal circuits and most of the states, now has a base of experience with unpublished opinions. Consistent with some views of that experience, and with developments in the federal circuits, it is respectfully suggested that Supreme Court Rule 23 be modified in the following ways:

- (1) Citation to unpublished opinions should be permitted for their persuasive value. Counsel should clearly indicate the unpublished status of the opinion and provide a copy to court and counsel. A possible corollary to this change might ultimately be to arrange for an electronic bank of "unpublished" orders. However, the change suggested here need not wait for that.
- (2) The page length limit on published opinions should be eliminated. The desirable goal of brevity can be fostered in other ways.
- (3) The limit on the number of opinions publishable by each district should be removed. As noted above, any error in deciding whether to publish should fall on the side of publishing too much rather than too little. Little harm comes from the former. Public confidence is eroded by the latter. Even though the appellate court as a whole does not approach the current limit on the number of opinions, the fact of the limit exerts implicit pressure to not publish.
- (4) If the internal procedures of the court permit, the deadline for making a motion to publish an unpublished order should be lengthened from the current 21 days from entry of the order to the pre-1994 limit of 30 days after the time to file a petition for leave to appeal to the supreme court expires. The current rule places some parties in the position of wishing to express a view about whether an order should be published, yet being faced with ramifications of that position in the petition-for-leave-to-appeal process.

VII. Conclusion

Even an articulate judicial opponent of the citation of unpublished opinions frankly states that his circuit's decade of experience with permitting such citations "has not opened the floodgates."⁴⁷ Permitting such limited citations would do much to reduce the criticism of the rule as it is currently applied.

Just as the court is trusted to make the publication decision accurately and in good faith, counsel before the court should also be trusted to make a good faith judgment as to whether to cite an unpublished order. Defusing the tension surrounding unpublished opinions would make measurable progress towards a sense of shared enterprise within the conjoined worlds of the appellate bench and the practicing bar.

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1. Quoted in Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate over Publication and Citation of Appellate Opinions*, 84 *Judicature* 90 (September-October 2000) ("*Braun*").
2. 223 F3d 898 (8th Cir 2000), *dism'd as moot*, 235 F3d 1054 (8th Cir en banc 2000).
3. John P. Borger and Chad M. Oldfather, *Anastasoff v United States and the Debate over Unpublished Opinions*, 36 *Tort & Ins L J* 899 (Summer 2001) ("*Borger and Oldfather*").
4. *Resolution of the House of Delegates*, American Bar Association (August 6-7, 2001).

5. Richard L. Neumeier, *Why No-Citation Rules are Unworkable, Unwise, and Unconstitutional, and How They Should be Changed*, App Practice J, ABA Litigation Section, Vol 19, No 3, p 13 (Summer 2001) ("Neumeier").
6. Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal L Rev 541, 574 (1997) ("Shuldberg").
7. *Braun* at 91 (cited in note 1).
8. SCR 23(a).
9. SCR 23(e).
10. SCR 23(f).
11. Comments from supporting memoranda to Administrative Order MR No 10343.
12. Dissenting comments of Justice Miller to Administrative Order MR No 10343.
13. 89 Ill Bar J 113 (March 2001).
14. e.g., Chicago Daily Law Bulletin, Vol 148, No 7 (January 10, 2002).
15. <http://www.state.il.us/court/AppellatCourt/default.htm>.
16. West Group brochure on file with the author.
17. Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 SC L Rev 235, 247 (Fall 1998) ("Carpenter").
18. *Borger and Oldfather* at 903 (cited in note 3) .
19. Hon. Boyce F. Martin, Jr., *Judges on Judging: In Defense of Unpublished Opinions*, 66 Ohio St L J 177 (1999) ("Martin").
20. *Carpenter* at 235 (cited in note 17).
21. *Id* at 250.
22. *Neumeier* at 7 (cited in note 5).
23. *Braun* at 93 (cited in note 1).
24. Hon. David S. Tatel, *The D.C. Circuit Review: September 1994-August 1995: Some Thoughts on Unpublished Decisions*, 64 Geo Wash L Rev 815, 818 (June/August 1996) ("Tatel").
25. *Shuldberg* at 574 (cited in note 6).
26. *Martin* at 185-86 (cited in note 19).

27. K. K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J App Prac & Process 397, 398 (Spring 2001) ("*DuVivier*").
28. Quoted in Salem Katsh and Alex Chachkes, *Constitutionality of "No Citation" Rules*, 3 J App Prac & Process 287, 294 (Spring 2001) ("*Katsh and Chachkes*").
29. Michael Hannen, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J App Prac & Process 199, 201 (Spring 2001).
30. *Braun* at 93 (cited in note 1).
31. *Katsh and Chachkes* at 293-94 (cited in note 28).
32. *DuVivier* at 409 (cited in note 27).
33. *Id* at 403.
34. *Neumeier* at 13 (cited in note 5).
35. *DuVivier* at 404 (cited in note 27). For the relevant citation rules, see 4th Cir R 36(c), 5th Cir R 47.5.4, 6th Cir R 28g, 8th Cir R 28A(i), 9th Cir R 36-3 (limited to demonstrating the existence of a conflict), 10th Cir R 36.3, 11th Cir R 36-2.
36. *Tatel* at 818 (cited in note 24).
37. *Neumeier* at 13 (cited in note 5).
38. *DuVivier* at 418 (cited in note 27). For further support of a model rule permitting unlimited citation see *Braun* at 94 (cited in note 1), *Carpenter* at 259 (cited in note 17), and *Shuldberg* at 574 (cited in note 6).
39. *Katsh and Chachkes* at 311 (cited in note 28).
40. Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?:* 3 J App Prac & Process 175, 185 (Spring 2001).
41. Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J App Prac & Process 325, 339 (Spring 2001).
42. J. Thomas Sullivan, *Concluding Thoughts on the Practical and Collateral Consequences of Anastasoff*, 3 J App Prac & Process 425, 431-32 (Spring 2001).
43. *Tatel* at 817 (cited in note 24).
44. *People v Petty*, 311 Ill App 3d 301, 724 NE2d 1059 (2d D 2000).
45. *Spector Motor Service v Walsh*, 139 F2d 809, 823 (2d Cir 1943) (Hand, J., dissenting), quoted in *Neumeier* at 10 (cited in note 5).

46. *Carpenter* at 250 (cited in note 17).

47. *Martin* at 195 (cited in note 19).

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