Unpublished opinions –

New rule governing their use could become effective end of the year

*By William J. Miller**

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Six years ago, with *Anastasoff v. United States,* 223 F.3d 898 (8th Cir. 2000), a panel of the United States Court of Appeals for the Eighth Circuit thrust the arcane topic of "unpublished opinions" into public discourse, particularly between judges and practitioners. Even *The New York Times* took notice. Indeed, Anastasoff turned a spotlight on a dark (or at least dim) corner of the legal system where judicial decision making, rules of court, precedent, constitutional law and the legal publishing industry all coincide.

But, just as quickly as the topic crept off the pages of law reviews and into our "newspaper of record," it seemingly disappeared back into the scholarly underground.

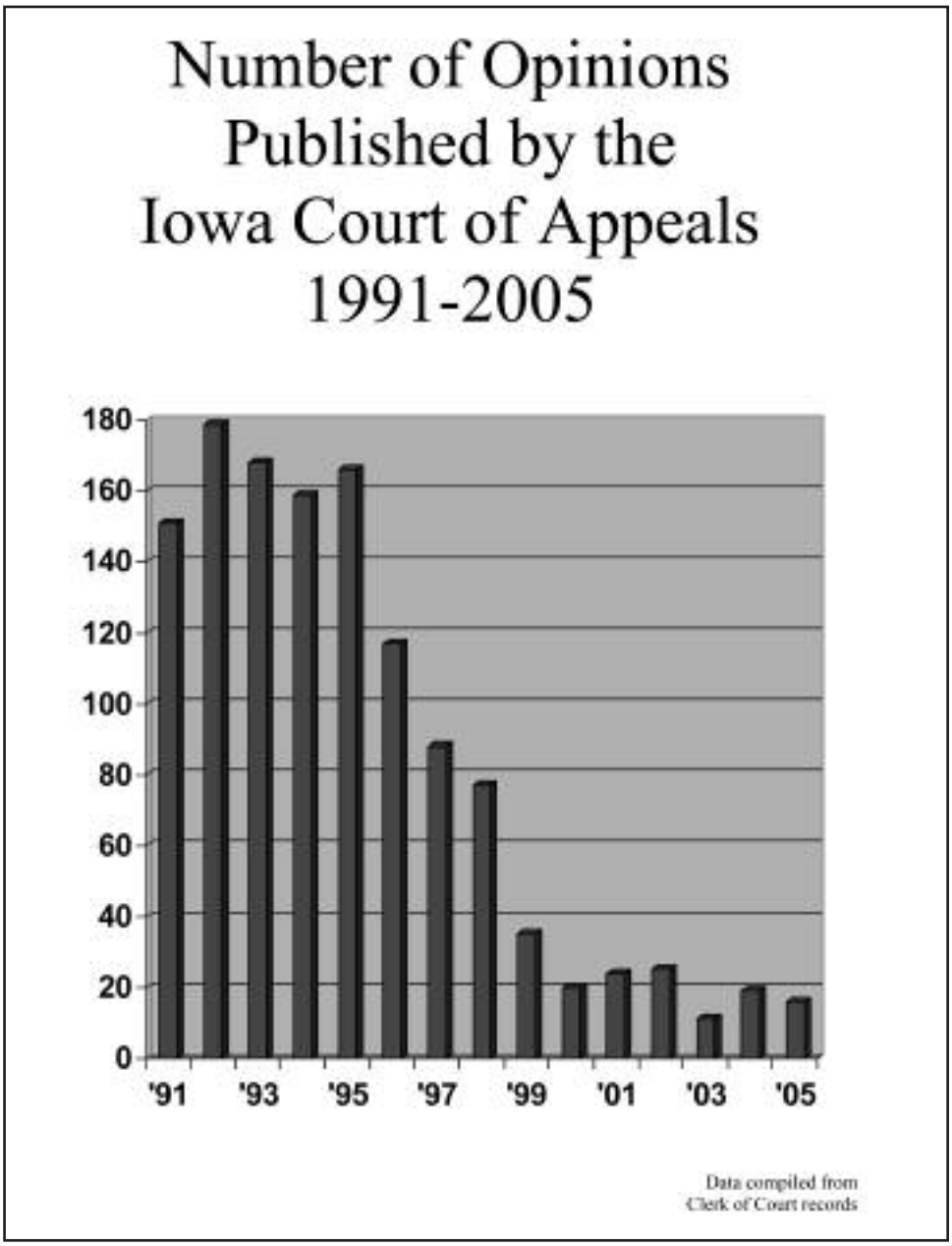
Recent developments on both the federal and state levels make it apparent the topic of unpublished opinions warrants renewed attention from Iowa practitioners. This article provides a limited discussion of the background of unpublished opinions and the debate over their propriety while also addressing recent developments that are bringing the topic back into the limelight.

Brief history

An appropriate starting point for our overview is to establish a suitable definition for "unpublished opinion." In truth, the term is a misnomer. While most unpublished opinions are not included in the National Reporter System (except in the Federal Appendix, the paradoxical reporter for some unpublished opinions), nearly all opinions issued by courts are published in some form, whether in hard copy provided to the parties, online or otherwise.

Thus, the terminology "unpublished opinion" is better understood as a term of art denoting an opinion that is purposefully labeled by the issuing court as "unpublished" based on its assessment of the ongoing merit of the opinion. Indeed, more important than the unpublished designation itself is its impact on future use of the opinion.

Most jurisdictions purposefully minimize the precedential effect of unpublished opinions. More specifically, while most courts permit citation of the opinion, most also deem it nonprecedential by court rule. This is the case under Iowa court rules, as well as those of the Eighth Circuit. Iowa R. App. P. 6.14(5); 8th Cir. R. 28A(i). As one might expect,



this designation has a great impact on the body of precedent available. For example, of the 27,438 opinions on the merits issued by the United States Courts of Appeals in 2004, only 19 percent were published.

Not surprisingly, unpublished opinions have prompted a fair amount of attention from scholars and others. In fact, the debate over the amount of opinions published by courts and the concomitant impact on the body of precedent is not new.

The first hint of an issue arose in the United Kingdom in the eighteenth century when the issuance of a 30th volume of published opinions prompted alarm. It took a little longer for concerns to arise on this side of the pond as judicial opinions were not formally reported in the United States until 1894 when the Federal Reporter began to accumulate decisions in an organized form.

By 1964 the growing crush of federal judicial opinions prompted the Judicial Conference of the United States to suggest a tempering in the production of published opinions. A similar call was issued by the Federal Judicial Center in the early 1970s.

Soon, new rules of appellate procedure relating to unpublished opinions took shape. Each jurisdiction promulgated rules reflecting its individual character.

Two general types of rules came into being. One imposed internal considerations for courts regarding whether a decision should be "published." The other imposed external limitations on when or how an opinion could be used or, more specifically, cited.

Of course, the number of opinions issued has only increased in the past few decades. Nevertheless, the topic of unpublished opinions seemed largely settled until *Anastasoff*. In *Anastasoff*, the court ruled Eighth Circuit Rule 28(A)(i) was unconstitutional because it violated Article III of the United States Constitution by purporting to confer extra-judicial power on the court. In analyzing the issue, the court focused on the historical roots of precedent and noted adherence to it was a principle implicitly codified in Article III by the constitutional framers. Thus, precluding use of those opinions in subsequent cases was essentially an exercise of legislative power by the judiciary in violation of Article III.

The *Anastasoff* panel opinion was subject to almost immediate attention by the Bench and Bar. The case was later considered en banc, but developments subsequent to the panel opinion had rendered the underlying controversy moot. In a fitting bit of irony, the panel opinion analysis of unpublished opinions was dispatched in a published opinion of the en banc court. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

Proposed federal rule

Although it has been six years since *Anastasoff*, developments continue to occur in the unpublished opinions field. Perhaps the most important is proposed Federal Rule of Appellate Procedure 32.1, which the United States Supreme Court will consider for final approval this spring pursuant to its rulemaking authority. Barring contrary action by the Court or Congress, Rule 32.1 will become effective on Dec. 1, 2006. It provides as follows:

Rule 32.1 Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of 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 or after Jan. 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Rule 32.1 was first proposed shortly after Anastasoff. Through the course of the rulemaking process, it elicited more than 500 comments, the vast majority of which were in opposition to the rule and apparently inspired by Judge Alex Kozinski of the Ninth Circuit, one of the strongest proponents of rules limiting the use of unpublished opinions. The judges of the Eighth Circuit also opposed the rule, adopting the views articulated by the judges of the Second and Federal Circuits.

The Committee Note to Rule 32.1 reflects a sensitivity to the comments made. Most notably it cautions (assures?) that the rule is "extremely limited" in its application.

Indeed, Rule 32.1 does not require the issuance of unpublished opinions, forbid their issuance, dictate the circumstances under which an opinion is designated unpublished, or require a court to give precedential effect to an unpublished opinion. Instead, Rule 32.1 is intended only to bring uniformity to circuit rules related to the occasions when an unpublished opinion may be cited for persuasive value. For instance, Eighth Circuit Rule 28A(i) generally discourages citation of unpublished opinions but permits it for purposes of establishing res judicata, collateral estoppel, or the law of the case or when the opinion has persuasive value on a point not addressed in a published opinion.

Not every circuit rule is the same and some explicitly forbid citation of unpublished opinions. Thus, some

measure of uniformity and, presumably, ease of application of the rules should be created by the new rule and in turn inure to the benefit of practitioners in Iowa and elsewhere.

As noted, despite a large number of opposing comments, Rule 32.1 stands ready for adoption. Interestingly, some of the justices about to consider the rule have previously had occasion to consider the issue of unpublished opinions generally. Chief Justice John Roberts was a vocal supporter of Rule 32.1 while a judge on the D.C. Circuit. Justice Samuel Alito led the committee considering the change immediately prior to his appointment to the Court. Justice John Paul Stevens has previously railed against unpublished opinions in a published dissent. County of Los Angeles v. Kling, 474 U.S. 936, 938 n.1 (1985) (Stevens, J., dissenting). Finally, Justice Ruth Bader Ginsburg also had an opportunity to comment generally on the issue in a law review article published while she was still a circuit court judge. Ruth Bader Ginsburg, The Obligation to Reason Why, 37 U. Fla. L. Rev. 205, 221 (1985). All things considered, while Rule 32.1 is not yet formally promulgated, it appears well on its way to being so.

Unpublished opinions in Iowa.

Closer to home, the unpublished opinion issue is increasingly relevant, particularly given a clear trend away from opinion publication by the Iowa Court of Appeals. As is clearly seen in the accompanying chart, the number of opinions published by the court of appeals has been in steep decline since the mid-1990s.

The causes of this trend are varied, disputable, and ripe for further development and discussion at a future point. Yet, the outcome is clear: systemic changes coupled with other factors affecting Iowa courts have resulted in a considerable reduction in the number of published – and thus precedential – rulings of our appellate courts during the past decade.

Although one may argue over the causes and effects of this reduced body of precedent, it is clear it has myriad impacts on the practice of law. Areas of critical importance for Iowa practitioners may escape development in published opinions despite rules intended to avoid this result. The entire published/unpublished rubric creates costs for our legal system that may not appear significant on a case-by-case basis but drag on the system as a whole.

Anastasoff hit on one of the many constitutional issues implicated and there are many more, including some related to equal access to justice. All of these issues and others reflect the importance of the unpublished opinion issue and indicate why the topic is sure to maintain our attention into the foreseeable future.

**Bill Miller is an associate at Bradshaw, Fowler, Proctor & Fairgrave, P.C., in Des Moines. Prior to joining the Bradshaw firm, he served as a law clerk for the Honorable Mark Cady of the Iowa Supreme Court. Bill is an active participant in several bar association and community activities. His fascination with unpublished opinions has brought several dinner parties to a screeching halt.*

Iowa State Bar Association President-elect Marion Beatty (second from left) and ISBA Executive Director Dwight Dinkla (third from left) pause for a photo with ABA President Michael S. Greco (left) and ABA President-elect Karen J. Mathis, at a Thursday reception during the annual ABA Bar Leadership Institute in Chicago in mid March. Beatty will assume the reins of the ISBA presidency during the 2006 annual meeting June 21-23. The Bar Leadership Institute is designed to acquaint incoming state leaders with issues they will face during their time in office.