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# Assessing the Nonpublication Practice of the Minnesota Court of Appeals

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## ASSESSING THE NONPUBLICATION PRACTICE OF THE MINNESOTA COURT OF APPEALS

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### I. INTRODUCTION

In 1987, the Minnesota Legislature responded to the overwhelming number of opinions issued by the Minnesota Court of Appeals.<sup>1</sup> The Legislature amended section 480A.08 of the Minnesota Statutes to allow the court to limit the publication of its opinions.<sup>2</sup> Although the amendment passed with little debate, the nonpublication rule di-

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1. The Minnesota Court of Appeals consists of 16 judges. Generally, three-member panels of judges hear cases argued in front of the court. In 1991, the court of appeals "issued 1500 written decisions 'amounting to 125 per month, or two per week per judge.'" Arthur S. Hayes, *Minnesota Court Eliminates Case Backlog*, WALL ST. J., June 8, 1992, at B1 (quoting D.D. Wozniak, former Chief Judge of the Minnesota Court of Appeals).

2. MINN. STAT. § 480A.08(3) (1992) provides:

(a) A decision shall be rendered in every case within 90 days after oral argument or after the final submission of briefs or memoranda by the parties, whichever is later. The chief justice or the chief judge may waive the 90-day limitation for any proceeding before the court of appeals for good cause shown. In every case, the decision of the court, including any written opinion containing a summary of the case and a statement of the reasons for its decision, shall be indexed and made readily available.

(b) The decision of the court need not include a written opinion. A statement of the decision without a written opinion must not be officially published and must not be cited as precedent, except as law of the case, *res judicata*, or collateral estoppel.

rectly contradicted the recommendations of the legal community.<sup>3</sup> Despite its controversial beginning, the nonpublication rule has become a routine practice of the Minnesota Court of Appeals. Since 1987, more than half of the court's written opinions have been unpublished.<sup>4</sup>

The high incidence of unpublished opinions has created two problems. First, unpublished opinions are not easily accessible to the general public. Unpublished opinions are available only through WESTLAW and LEXIS or by requesting a copy from the court. As a result, only those lawyers who can afford computerized research systems have quick and easy access to unpublished opinions.

Second, unpublished opinions are not binding on the court.<sup>5</sup> As a result, Minnesota's nonpublication rule undermines the concept of *stare decisis*. Moreover, the fact that the statute allows citation to

(c) The court of appeals may publish only those decisions that:

- (1) establish a new rule of law;
- (2) overrule a previous court of appeals' decision not reviewed by the supreme court;
- (3) provide important procedural guidelines in interpreting statutes or administrative rules;
- (4) involve a significant legal issue; or
- (5) would significantly aid in the administration of justice.

Unpublished opinions of the court of appeals are not precedential. Unpublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond.

*Id.*

The legislative history of the 1987 amendment to MINN. STAT. § 480A.08(3) is scant. The applicable language first appeared in S.F. 1340 which was referred to the Senate Judiciary Committee on April 2, 1987. It was then sent to the Senate Finance Committee on April 13, 1987. Language was added when it came before the full Senate on May 4, 1987, and it was then sent back to the Finance Committee on May 18, 1987. *See generally* Minutes of the Senate Judiciary Committee (April-May 1987).

In the House of Representatives, the relevant language was included in H.F. 1315 § 182, an omnibus bill that originated in the House Committee on Governmental Operations. The language was first added to the bill in the fifth engrossment that was passed by the House of Representatives on May 5, 1987. (S.F. 1340 disappeared and S.F. 1528 became the companion bill that came out of the Senate Committee on Finance.) *See generally* Minutes of the House Judiciary Committee (May 1987). The House and Senate passed the final version on May 18, 1987. Governor Rudy Perpich signed the bill on June 12, 1987. STATE OF MINNESOTA, JOURNAL OF THE HOUSE, 75TH SESSION, vols. 1-3 (1987); STATE OF MINNESOTA, JOURNAL OF THE SENATE, 75TH LEGISLATURE, vol. 2 (1987). No written records were found concerning any debate on the amendment.

3. *Appeals Opinions: Publish All, But Shorten Some*, MSBA IN BRIEF, Apr. 1986, at 1.

4. From 1987 through September 1992, 3015 opinions have been published and 3925 have been unpublished. Search of WESTLAW, Minnesota cases database (March 6, 1993).

5. MINN. STAT. § 480A.08(3).

unpublished decisions which have no precedential value is contradictory.

This Comment examines the history of nonpublication in the United States and Minnesota and discusses issues surrounding the nonpublication of court decisions. Minnesota's current nonpublication rule must be changed to enhance the fairness of its application and to clarify which cases constitute precedent in Minnesota. The most promising solution includes two changes to the rule. First, the statute's provision allowing citation to unpublished decisions must be repealed because the provision contradicts the nonprecedential nature of unpublished decisions. Second, the current presumption against nonpublication must be changed to favor publication. Such a change would reduce the possibility of an important decision remaining unpublished.

## II. BACKGROUND

### A. *The Federal Courts*

In 1964, the Judicial Conference of the United States suggested that federal courts limit their number of published opinions to increase efficiency.<sup>6</sup> Similarly concerned with the high number of published appellate decisions, the Federal Judicial Center requested that the Judicial Conference obtain information from each circuit regarding publication practices.<sup>7</sup>

The Judicial Conference's solution to the overwhelming number of appellate court opinions required the publication of opinions that have "general precedential value."<sup>8</sup> Not surprisingly, each of the circuits formulated different procedures for limiting publication.<sup>9</sup> Nev-

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6. DONNA STIENSTRA, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 6 (Federal Judicial Center 1985).

7. *Id.*

8. *Id.*

9. In 1973, the Eighth Circuit issued the following *Plan for Publication*:

The Judicial Council of the Eighth Circuit, pursuant to a resolution of the Judicial Conference of the United States, hereby adopts the following plan for the preparation and publication of opinions of the United States Court of Appeals for the Eighth Circuit.

1. It is unnecessary for the Court to write an opinion in every case or to publish every opinion written. The disposition without opinion or the nonpublication of an opinion does not mean that the case is considered unimportant. It does mean that an opinion in the case will not add to the body of law and will not have value as precedent.

2. An opinion will not be written in cases disposed of under Local Rule 14.

3. The Court or a panel will determine which of its opinions are to be published, except that a judge may make any of his opinions available for publication. The decision on publication of an opinion will ordinarily be made prior to its preparation. The direction as to publication will appear on the face of the opinion. Unpublished opinions, since they are unreported and not uniformly available to all parties, may not be cited or otherwise used in

ertheless, the Judicial Conference accepted all of the proposals, hoping that that experience would lead to the best uniform standard.<sup>10</sup>

The most important advancement toward a rule governing non-publication, however, occurred in 1973, when the Advisory Council on Appellate Justice—a group of judges, lawyers, and law professors brought together by the Judicial Center—conducted its own study.<sup>11</sup> The Advisory Council's final report, *Standards for Publication of Judicial Opinions*,<sup>12</sup> became the model for the majority of federal and state appellate courts.<sup>13</sup> The report is considered the "seminal document

any proceedings before this "court or any district court in this circuit" except when the cases are related by virtue of an identity between the parties or the causes of action.

4. An opinion should be published when the case or opinion:

- (a) establishes a new rule of law or question or changes an existing rule of law in this Circuit,
- (b) is a new interpretation of or conflicts with a decision of a federal or state appellate court,
- (c) applies an established rule of law to a factual situation significantly different from that in published opinions,
- (d) involves a legal or factual issue of continuing or unusual public or legal interest,
- (e) does not accept the rationale of a previously published opinion in that case, or
- (f) is a significant contribution to legal literature through historical review or resolution of an apparent conflict.

8TH CIR. R. app. I.

In addition to this Plan, the court's current rule on publication procedures provides, in relevant part, that "[n]o party may cite a federal or state court opinion not intended for publication, except when the cases are related by identity between the parties or the causes of action." 8TH CIR. R. 28A(k).

10. JUDICIAL CONFERENCE OF THE UNITED STATES REP. 12 (1974), quoted in William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1172 n.29 (1978) [hereinafter *Non-precedential Precedent*].

While the plans of each circuit generally follow the basic recommendations of the report of the Federal Judicial Center to the April 1972 meeting of the Judicial Conference, each circuit, to a limited extent, is experimenting with respect to some phases of its plan. There are in effect 11 legal laboratories accumulating experience and amending their publication plans on the basis of that experience. Because the possible rewards of such experimentation are so rich, the Conference agreed that it should not be discontinued until there is considerably more experience under the diverse circuit plans.

*Id.*

11. *Non-precedential Precedent*, *supra* note 10, at 1170-71.

12. Advisory Council of Appellate Justice, Report of the Committee on Use of Appellate Court Energies, *Standards for Publication of Judicial Opinions* (FJC Research Series No. 73-2, 1973) [hereinafter *Advisory Council*].

13. Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 LAW LIB. J. 21 (1991).

About one-third of the states have rules similar to [the Advisory Council's standard] either for the courts of last resort or the intermediate appellate courts or both. These states are: Arizona, California, Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Ohio, Oklahoma, Tennessee, Texas, and Wisconsin.

in the movement toward an official policy of limiting publication.”<sup>14</sup> The report includes four criteria that determine an opinion’s publication status:

1. The opinion establishes a new rule of law, or alters or modifies an existing rule;
2. The opinion involves a legal issue of continuing public interest;
3. The opinion criticizes existing law;
4. The opinion resolves an apparent conflict of authority.<sup>15</sup>

The Advisory Council’s criteria are narrowly drawn and significantly limit judicial discretion in making the publication decision.<sup>16</sup> In addition, the Advisory Council’s report makes a presumption against publication.<sup>17</sup> In other words, if none of the criteria are met, the opinion will not be published.

The report also limits the use of unpublished opinions by prohibiting citation of these opinions “as precedent by any court or in any brief or other materials presented to the court.”<sup>18</sup> The Council noted the necessity of the rule was

- 1) to prevent litigants with special knowledge of an unpublished opinion from having an unfair advantage;
- 2) to reduce costs since the unpublished opinions will not be researched as extensively as the published opinions;
- 3) to discourage judges from including unnecessary facts and elements of their reasoning because they know the unpublished opinion will not be read;
- 4) to prevent cases that are at odds with unpublished decisions from being appealed as often; and
- 5) to avoid the difficulty of determining when an unpublished decision was overruled.<sup>19</sup>

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*Id.* at 22 n.8.

14. Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405, 406 (1981). The report has also been called “the template for many of the rules subsequently promulgated by the United States courts of appeals.” *Non-Precedential Precedent*, *supra* note 10, at 1171.

15. Advisory Council, *supra* note 12, at 15-17.

16. Other courts use criteria that allow more published cases. For example, in California, Illinois, Kansas, Oklahoma, and Wisconsin, the appellate court allows publication if the opinion provides “a significant contribution to legal literature.” Williams, *supra* note 13, at 25, 29, 31, 42, 49. In Louisiana and Mississippi, one factor determining publication is whether the opinion is “a useful reference.” Nebraska courts may publish an opinion “deemed to be of interest or importance.” *Id.* at 32, 36, 37.

17. *Non-Precedential Precedent*, *supra* note 10, at 1177-78; STIENSTRA, *supra* note 6, at 29. For a discussion of the effects of this presumption on actual publication practices, see William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 590-91, Table 4 (1981) [hereinafter *Limited Publication*].

18. Advisory Council, *supra* note 12, at 18.

19. *Id.* at 19.

The Advisory Council also stated that a majority of the panel should determine whether opinions would be published. A dissenting opinion should only be published if it meets one of the four determining criteria.<sup>20</sup> In addition, the higher court may order publication of the deciding court's opinion if publication would lead to a better understanding of the higher court's opinion and would avert repetition of matters already covered in the deciding court.<sup>21</sup>

To avoid wasted effort, the Advisory Council suggested that the court make a tentative publication decision at the time a case is assigned to advise the opinion's author of the amount of effort to devote to writing the opinion.<sup>22</sup> The final decision to publish, however, should be made after the opinion is written because the opinion may change during the writing process.<sup>23</sup>

Although the Advisory Council's rule is considered the model for many federal circuit courts, some courts have deviated from the model substantially.<sup>24</sup> For example, in all but two of the circuits, the court's opinion is automatically published if there is a split decision.<sup>25</sup> Four circuits have provisions that allow the parties to request publication.<sup>26</sup> While no express rule exists in the other circuits, in practice, an attorney can move that the publication status of an opinion be changed.<sup>27</sup> Although most of the federal circuit courts follow criteria similar to the determining criteria of the Advisory Council, many have found their own methods to determine nonpublication of opinions through experimentation.<sup>28</sup>

### B. *The Minnesota Court of Appeals*

In response to the growing caseload of the supreme court, the Minnesota Legislature, by constitutional amendment, created the Minnesota Court of Appeals in 1982.<sup>29</sup> As the court of appeals'

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20. *Id.* at 10-11. The Advisory Council added that "[u]ndoubtedly the majority opinion will meet standards of publication in any case in which a dissent is published." *Id.* at 11.

21. *Id.* at 10-11.

22. *Id.* at 11-12.

23. Advisory Council, *supra* note 12, at 12.

24. For a comparison of the circuit courts' publication procedures and policies, see STIENSTRA, *supra* note 6, at 66-75.

25. *Id.* at 66-67 (excepting the First and Tenth Circuit Courts of Appeal from automatic publication in cases of split decisions).

26. These include the Fourth, Fifth, Seventh, and Ninth Circuits. *Id.* at 68-71.

27. STIENSTRA, *supra* note 6, at 29.

28. The Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have criteria similar to what the Advisory Council recommended. STIENSTRA, *supra* note 6, at 68-71. The First, Second and Third Circuits have more general criteria. For example, the First Circuit bases its publication decision on whether the court or litigants would benefit from being able to cite to the opinion. *Id.* at 68.

29. PETER S. POPOVICH, BEGINNING A JUDICIAL TRADITION: FORMATIVE YEARS OF

caseload increased, the supreme court's caseload decreased, allowing it to spend more time on the cases it reviewed.

As the court of appeals' caseload grew, however, so did the number of cases disposed of by written opinions.<sup>30</sup> Written opinions increased from 19% of total cases heard in 1983 to 65% of cases heard in 1986.<sup>31</sup> In 1985, Judge Popovich, then Chief Judge of the Minnesota Court of Appeals, asked the Minnesota State Bar Association (MSBA) to examine the publication practice of the court of appeals.<sup>32</sup> Judge Popovich specifically asked that the MSBA consider the following questions:

1. Should the practice of publishing all opinions continue?
2. If so, should memoranda or "shorter" opinions be utilized more frequently? Should summary dispositions be utilized?
3. If not, what should be the criteria to determine whether an opinion should be published or not?
4. If not, who should determine whether an opinion should be published?<sup>33</sup>

In 1986, the Judicial Administration Committee of the MSBA held meetings and took testimony regarding these questions.<sup>34</sup> At the February 22, 1986 meeting, a number of attorneys and law professors, as well as Judge Popovich, were present to give testimony.<sup>35</sup> Judge Popovich reminded the committee that Minnesota law requires the court to give reasons for all of its decisions.<sup>36</sup> Although most who testified agreed that the reasons for the decision should be

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THE MINNESOTA COURT OF APPEALS 1983-87 11-12 (1987). The idea of an intermediate court began in 1942 when the Minnesota Judicial Council recommended its creation. No action was taken, however, until the 1960's, when the topic was renewed. The Minnesota Citizens Conference to Improve the Administration of Justice and the Minnesota State Bar Association joined the Judicial Council in its recommendation. In response, the Minnesota Legislature added two seats to the supreme court in 1973 to help it meet its increasing caseload. Two additional seats did not alleviate the situation. In 1982, the issue was put before the public in the general election and approved by 77%. *Id.* On November 2, 1983, formal operations of the Minnesota Court of Appeals began. *Id.* at 15.

30. *Id.*

31. *Id.* at 47. The court of appeals disposed of cases by written opinions in the following manner: 22 in 1983, 1052 in 1984, 1299 in 1985, 1355 in 1986, and 986 during the first nine months of 1987. *Id.*

32. *Publication of Appeals Opinions Reexamined*, MSBA IN BRIEF, Nov. 1985, at 2.

33. *Id.*

34. In two December 1985 issues of FINANCE & COMMERCE, the MSBA published notice regarding meetings in January and February 1986 during which testimony would be taken "from anyone interested in offering an opinion on the issue." *Id.*

35. Minutes from the Meeting of the Judicial Administration Committee of the MSBA, Files 1 & 2 (February 22, 1986) (on file at MSBA).

36. *Id.* Minnesota law states that all written opinions shall include "a summary of the case and a statement of the reasons for its decision . . . ." MINN. STAT. § 480A.08(3)(a) (1992).



included in the court's opinion, different proposals were made to reduce the number of written opinions.<sup>37</sup> A "fast track"<sup>38</sup> system was discussed as well as the use of shorter opinions. However, the majority of those present opposed the nonpublication of appellate court opinions.<sup>39</sup>

At the March 8, 1986 meeting, the MSBA Subcommittee on Appellate Court Opinions distributed a summary of the written testimony received from various sources.<sup>40</sup> The testimony favored maintaining publication of all written appellate opinions and increasing the use of memorandum decisions or summary dispositions.<sup>41</sup>

At the April 5, 1986 meeting, the Judicial Administration Committee passed the recommendation to maintain the current publication practice.<sup>42</sup> The committee also recommended by a two-to-one ma-

37. Minutes from the Meeting of the Judicial Administration Committee of the MSBA, Files 1 & 2 (February 22, 1986) (on file at MSBA).

38. Under a fast track system, the parties would agree to have two weeks for informal briefs; the oral argument would be two weeks after the informal briefs, and the panel would rule without an opinion. *Id.*

39. *Id.*

40. The subcommittee received written testimony from eight bar associations, one judges' association, one lawyers' association, the state public defender's office, two judges, twelve lawyers, two law professors, and a supreme court commissioner. Minutes from the Meeting of the Judicial Administration Committee of the MSBA, Files 1 & 2 (March 8, 1986) (on file at MSBA).

41. Summary of Written Testimony from the MSBA Subcommittee on Appellate Court Opinions, Files 1 & 2 (March 8, 1986) (on file at MSBA). The summary is as follows:

1. Should the practice of publishing all opinions continue?  
Yes: 37            No: 16
2. If so, should memoranda or "shorter" opinions be utilized more frequently?  
Yes: 35            No: 9
3. Should summary dispositions be utilized?  
Yes: 27            No: 15
4. If a decision is made not to publish all opinions, what should be the criteria to determine whether an opinion should be published? [No tallied response recorded].
5. Who should determine whether an opinion should be published?  
Full court: 8  
Majority of the court: 1  
Majority of 3-judge panel hearing the case, subject to review by the Chief Judge: 1  
The panel which hears the case: 2  
A standing committee of the court: 1  
Standing committee: 8  
Judge writing opinion: 3  
Panel of law clerks: 1  
Bar association committee: 2

*Id.*

42. *Committee and Section Reports 1985-86: Judicial Administration*, BENCH & BAR OF MINN., May/June 1986, at 32.

jority<sup>43</sup> that the court use memorandum decisions whenever feasible.<sup>44</sup> The committee presented several arguments against limited publication. First, nonpublication allows judges making the publication decisions to shape the body of substantive law.<sup>45</sup> Second, nonpublication reduces judicial accountability because a judge is under less pressure to fit unpublished cases into the stream of published decisions.<sup>46</sup> Third, nonpublication undermines stare decisis because all opinions should have precedential value.<sup>47</sup>

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43. *Appeals Opinions: Publish All, But Shorten Some*, MSBA IN BRIEF, Apr. 1986, at 1.

44. The full recommendation of the MSBA is as follows:

1. The committee does not recommend that the Court of Appeals change the present practice of publishing all opinions.
2. The Court should issue shorter opinions whenever possible.
3. In utilization of shorter opinions, the Court should consider the following:

- a. The Court should not feel it is necessary to address every issue in their opinions.

- b. Where appropriate, the Court should use memorandum decisions defined as containing at least these three elements: (1) the identity of the case, (2) the ultimate disposition, (3) the reasons (not the reasoning process). When appropriate, the Court should set out the appellant's contentions or issues. In deciding whether to write a full opinion or a memorandum decision, the Court should consider using the following standards.

- 1) a full opinion is appropriate when:

- a) in deciding the case, the court enunciates a new rule of law or modifies an existing rule;

- b) an apparent conflict of authority exists;

- c) the court is not unanimous in its disposition of the case; or

- d) the decision is of substantial public interest;

- 2) a memorandum opinion is appropriate when:

- a) the issues involve no more than the application of well-settled rules of law to a recurring fact situation;

- b) the issue is whether the evidence is sufficient and it clearly is; or

- c) the case is clearly controlled by existing case law and there is no reason to modify or deviate from that law.

- c. The Court should continue its practice of not issuing decisions without written opinions unless waived by all parties.

- d. The author or authors of every Court of Appeals opinion should be identified.

- e. In the rare complex or controversial case in which the Court of Appeals needs additional time, the committee encourages the Court to use its procedures presently contained in its own rules.

- f. The Court of Appeals should study and consider implementation of a fast track procedure when requested by all parties, which includes accelerated briefing schedules, accelerated hearings, followed by an immediate oral decision.

Motions from the MSBA Judicial Administration Subcommittee, Files 1 & 2 (March 8, 1986) (on file at MSBA).

45. Minutes from the Meeting of the Judicial Administration Committee of the MSBA, Files 1 & 2 (March 8, 1986) (on file at MSBA).

46. *Id.*

47. *Id.*

### C. Nonpublication Rule of the Minnesota Court of Appeals

Despite the MSBA's recommendation to maintain publication of all opinions, the legislature amended section 480A.08 of the Minnesota Statutes to allow for nonpublication under certain circumstances.<sup>48</sup>

The court of appeals supplemented section 480A.08 by adopting its own rules governing the nonpublication of decisions. The first set of Minnesota Court of Appeals Internal Rules (Internal Rules) became effective on September 25, 1987.<sup>49</sup> These Internal Rules were repealed by a court order on October 25, 1991 and were replaced with the Special Rules of Practice for the Minnesota Court of Appeals (Special Rules).<sup>50</sup>

#### 1. Minnesota Court of Appeals Internal Rules<sup>51</sup>

After summarizing the limited publication practice set forth in the Minnesota Statutes,<sup>52</sup> the Internal Rules went beyond the statutory provisions and provided a means for other members of the court to recommend publication<sup>53</sup> but also stated that the panel majority shall make publication decisions.<sup>54</sup>

48. MINN. STAT. § 480A.08(3) (1992).

49. MINN. CT. APP. INTERNAL R. (repealed 1991).

50. See generally SPECIAL R. OF PRAC. FOR THE MINN. CT. APP., reprinted in MINNESOTA RULES OF COURT 423-27 (West 1993).

51. MINN. CT. APP. INTERNAL R. (repealed 1991).

52. Rule 10.1 of the Internal Rules covered decisions "in addition to [those] of the court not published in accordance with MINN. R. CIV. APP. P. 136 . . . ." MINN. R. CIV. APP. P. 136 states:

(a) Each Court of Appeals disposition shall be in the form of a statement of the decision, accompanied by an opinion containing a summary of the case and the reasons for the decision; however if the appeal is dismissed for failure to comply with these rules or if the court determines that the contents of the statement of the decision sufficiently explain the disposition made, no written opinion need be prepared.

(b) A statement of the decision without a written opinion shall not be officially published and shall not be cited as precedent, except as law of the case, res judicata or collateral estoppel.

*Id.*

53. MINN. CT. APP. INTERNAL R. (repealed 1991). Rule 10.3 stated:

If a panel majority has not decided whether to publish an opinion, the proposed opinion shall still be circulated to other members of the court. The circulation form may provide that other members of the court may recommend whether the proposed opinion should be published or not. The recommendations of other members of the court shall be advisory only.

*Id.*

54. MINN. CT. APP. INTERNAL R. (repealed 1991). Rule 10.2 stated:

The determination whether to publish shall be made by the panel majority at the conference where the preliminary decision on the matter is decided and the case is assigned. When the opinion is circulated to other members of the court for their information, the circulation form shall indicate the panel's decision on publication. Other members of the court, responding to

Additionally, the Internal Rules required that all unpublished decisions state the following: "This opinion will be unpublished and may not be cited except as provided by Minn. Stat. Sec. 480A.08, subd. 3."<sup>55</sup> In addition, the rule noted that opinions would be released weekly by the clerk of the appellate courts to those who subscribe to receive opinions and that the opinion would still be considered a public document.<sup>56</sup>

The Internal Rules also dictated circumstances where a memorandum opinion should be written rather than a full opinion. If the law was clear and the panel agreed on the analysis, the Internal Rules stated that the court should issue a memorandum opinion.<sup>57</sup>

On the other hand, cases involving an undecided issue of law, applying a decided issue of law to a new fact situation, or presenting an issue of unusual public concern should have full, written opinions.<sup>58</sup>

From 1983 to 1989, the Minnesota Court of Appeals only issued 143 memorandum opinions.<sup>59</sup> Although the Internal Rules provided this means to dispose of cases, to reduce the judicial workload, and to save time, the court did not use this method to its full capacity.<sup>60</sup>

## 2. *Special Rules of Practice for the Minnesota Court of Appeals*

The new Special Rules of Practice for the Minnesota Court of Appeals (Special Rules) differ significantly from the Internal Rules. The Special Rules are far less comprehensive than the Internal Rules and leave open several issues that the Internal Rules covered regarding nonpublication. For example, the Special Rules simply summarize section 480A.08 without providing specific procedures for situations

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the circulated opinion, may indicate on the form whether the opinion should be published or not. Final decision shall rest with the panel majority.

*Id.*

55. *Id.* at Rule 10.4.

56. *Id.*

57. MINN. CT. APP. INTERNAL R. (repealed 1991). Rule 3.5 stated:

When the panel agrees on the analysis and the law is clear and an opinion would have no precedential value but that it would be desirable to identify the ground for decision, the judge may decide a case by memorandum opinion. That opinion may be a condensed, short statement of the facts, the question involved and decision and citation of the statute, case or other authority. Separate opinions may also be filed.

*Id.*

58. *Id.* at Rule 3.6.

59. Search of WESTLAW, Minnesota cases database (March 6, 1993).

60. Unpublished opinions, on the other hand, have been used extensively. Since 1987, 6940 written opinions have been issued by the court of appeals. The court has published 3925 opinions. Search of WESTLAW, Minnesota Cases database (through September 9, 1992).

where the panel is undecided.<sup>61</sup>

Further, the Special Rules do not expressly permit memorandum opinions. Instead, the Special Rules state that “[p]ursuant to Minn. R. Civ. App. P. 136.01, subd. 1(a), the panel may decide to issue an order opinion.”<sup>62</sup> Order opinions are shorter than memorandum decisions, providing only a very short statement of the facts and the reasons for the court’s decision. Order opinions are a compromise between the one-word decisions criticized by many commentators and fully-written opinions.<sup>63</sup> Minnesota courts do not use order opinions as often as unpublished decisions.<sup>64</sup>

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61. SPECIAL R. OF PRAC. FOR THE MINN. CT. APP. 4, reprinted in MINNESOTA RULES OF COURT 424 (West 1993). Rule 4 states:

Opinions state the nature of the case and the reasons for the decision. The panel will decide at its conference whether to publish an opinion. The publication decision is guided by Minn. Stat. § 480A.08, subd. 3, which provides for publication of opinions which establish a new rule of law, overrule a previous Court of Appeals decision not reviewed by the Minnesota Supreme Court, provide important procedural guidelines in interpreting statutes or administrative rules, involve a significant legal issue, or significantly aid in the administration of justice. All other opinions are unpublished. Unpublished opinions are not precedential and may not be cited unless copies are provided to other counsel at least 48 hours before their use at any pretrial conference, hearing, or trial. If an unpublished opinion is cited in a brief or memorandum, copies must be provided to all other counsel at the time the brief or memorandum is served. Pursuant to Minn. App. P. 136.01, subd. 1(a), the panel may decide to issue an order opinion.

*Id.*

62. *Id.*

63. See, e.g., *Limited Publication*, supra note 17, at 600-01. “A decision without articulated reasons might as well be a decision without reasons or one with inadequate or impermissible reasons . . . . [A]n opinion that does not disclose its reasoning is unsatisfactory. Justice must not only be done, it must appear to be done.” *Id.* at 603. See also *Non-Precedential Precedent*, supra note 10, at 1173-76.

A key characteristic of decisions without opinions is their failure to provide the parties or the court below with any hint as to the court’s reasoning. Accordingly, the practice under these rules has been uniformly condemned by commentators, lawyers, and judges . . . . Furthermore, a court, if so minded, might use this abbreviated judgment procedure to duck issues, avoid making troublesome decisions, or conceal divisions within the court or the panel.

*Id.* at 1174-75.

64. In Minnesota, 251 order opinions were issued in 1991. Search of WESTLAW, Minnesota cases database (March 6, 1993). One explanation for the court’s infrequent use of order opinions versus unpublished decisions is the court’s concern with providing adequate reasons for all of its decisions. See MINN. STAT. § 480A.08(3) (1992). “In every case, the decision of the court, including any written opinion containing a summary of the case and a statement of the reasons for its decision, shall be indexed and made readily available.” *Id.* See also MINN. R. CIV. APP. P. 136.01(1). “Each Court of Appeals disposition shall be in the form of a statement of the decision, accompanied by an opinion containing a summary of the case and the reasons for the decision . . . .” *Id.*

One judge described the court’s concern with doing “a workmanlike job” so that anyone later reading the unpublished opinion would understand the court’s position

### III. DISCUSSION

Limited publication has raised much controversy in the legal community, especially at the federal level.<sup>65</sup> Discussion has concentrated not only on the procedures for using the rules but also on the nature of the rules themselves and their direct conflict with the concept of stare decisis.<sup>66</sup>

#### A. *The Precedential Value of Unpublished Opinions*

Written opinions serve two basic purposes: to settle the dispute before the court, and to establish a rule of law for future cases.<sup>67</sup> Under the doctrine of stare decisis, decisions become a binding precedent for subsequent cases.<sup>68</sup>

Proponents of limited publication argue that unpublished opinions serve only the first purpose. Proponents maintain that unpublished opinions fall in line with earlier cases, and, therefore, their addition to the body of law would be redundant.<sup>69</sup>

Even accepting the validity of this argument, an unpublished opinion's absence from the precedential body of law still causes problems. An attorney advising his client whether to pursue an appeal could be misled by the current body of law as declared only in published opinions.

For example, assume that in a particular type of case, the plaintiff has won on appeal 75% of the time according to the 18 published opinions on point. However, assume further that 20 unpublished opinions exist where the plaintiff lost 80% of the time. To get a true picture of the situation, the attorney must look at the unpublished opinions.<sup>70</sup> Since attorneys must consider both the unpublished and

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and reasoning. Interview with Judge Harold W. Schultz, retired Judge of the Minnesota Court of Appeals, in Saint Paul, Minnesota (Oct. 10, 1992).

65. See, e.g., Leah F. Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 LAW LIBR. J. 362 (1974); Hoffman, *supra* note 14; Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); *Limited Publication*, *supra* note 17; *Non-Precedential Precedent*, *supra* note 10; STIENSTRA, *supra* note 6.

66. See Black's Law Dictionary 1406 (6th ed. 1990) (defining stare decisis as a "[p]olicy of courts to stand by precedent and not to disturb settled point").

67. *Limited Publication*, *supra* note 17, at 579; George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 481 (1988).

68. Weaver, *supra* note 67, at 483.

69. See *Limited Publication*, *supra* note 17, at 579. Proponents of limited publication also believe that "full publication will result in a 'threat to a cohesive body of law.' Apparently the fear is that as volume increases, so does prolixity and confusion. Central principles may no longer be discernable amidst the crush of decisions." *Non-Precedential Precedent*, *supra* note 10, at 1184-85.

70. See Robel, *supra* note 65, at 947-48. Robel states that "[t]he information might be as simple as knowing the odds." *Id.* at 947. See also Burton M. Atkins, *Selective Reporting and the Communication of Legal Rights in England*, 76 JUDICATURE 58, 66

published decisions, the working body of law is not being decreased. Obtaining unpublished cases complicates an attorney's job because unpublished opinions are not as accessible as published opinions.<sup>71</sup>

The preceding discussion assumes that the addition of the unpublished opinions to the body of law would be redundant. If unpublished opinions were redundant, then the opinions would never be cited by attorneys and no specific statutory authority should allow the citation of unpublished opinions.<sup>72</sup> Stating that unpublished opinions are nonprecedential contradicts the fact that unpublished opinions can be cited for purposes other than *res judicata* and collateral estoppel. In Minnesota, unpublished decisions are cited not only by attorneys but by the court of appeals itself.<sup>73</sup> Thus, the court appears to give them precedential value.

In most state courts, unpublished decisions may only be cited for the purposes of *res judicata* and collateral estoppel<sup>74</sup> since "[a] noncitation rule follows as a logical consequence of a nonpublication rule."<sup>75</sup> Similarly, the Eighth Circuit's rules do not allow citation to unpublished opinions stating, "[n]o party may cite a federal or state court opinion not intended for publication except when the cases are related by identity between the parties or the causes of action."<sup>76</sup>

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(Aug.-Sept. 1992). Atkins suggests that "selective publication may affect the ability of actual and potential litigants to estimate the relative advantages and disadvantages of resorting to litigation." *Id.*

71. Currently in Minnesota, WESTLAW and LEXIS carry the unpublished opinions of the Minnesota Court of Appeals. FINANCE & COMMERCE WEEKLY and FINANCE & COMMERCE SUMMARY REPORTER also publish written selections of these opinions.

Although the Minnesota Court of Appeals does issue a weekly listing of unpublished and published decisions for an annual fee of \$50, the copies are not well-organized and the user must create an index. The court of appeals itself does not have an index of the unpublished opinions that is available to the public.

72. See MINN. STAT. § 480A.08(3) (1992). "Unpublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial." *Id.*

73. For examples of cases where the court of appeals has cited its own unpublished opinions, see *Parnell v. River Bend Carriers, Inc.*, 484 N.W.2d 442, 445 (Minn. Ct. App. 1992); *Zumberge v. Northern States Power Co.*, 481 N.W.2d 103, 106 n.1 (Minn. Ct. App. 1992); *Meehan v. Lull Corp.*, 466 N.W.2d 14, 17 n.1 (Minn. Ct. App. 1991); *Cohen v. Appert*, 463 N.W.2d 787, 791 n.2 (Minn. Ct. App. 1990); *Imlay v. City of Lake Crystal*, 444 N.W.2d 594, 600 (Minn. Ct. App. 1989).

74. State appellate courts that do not allow citation except for *res judicata* or collateral estoppel are Arizona, Arkansas, California, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, New Jersey, New Mexico, North Carolina, Oklahoma, South Dakota, Texas, Utah, and Wisconsin. Williams, *supra* note 13.

75. David M. Gunn, "Unpublished Opinions Shall Not Be Cited As Authority": *The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L. J. 115, 130 (1992).

76. 8TH CIR. R. 28A(K).

This rule is strictly enforced. In *United States v. Kinsley*,<sup>77</sup> the Eighth Circuit stated:

The government relies upon our unpublished opinion in *Willie J. Vaughan v. United States of America*, No. 74-1920, filed March 20, 1975. The plan for publication of opinions adopted by this circuit, provides: "Unpublished opinions . . . may not be cited or otherwise used in any proceeding before this or any other court . . ." We therefore decline to consider *Vaughan*, or demonstrate how it is plainly distinguishable from these appeals.<sup>78</sup>

In Minnesota, however, unpublished opinions may be cited as long as copies of the opinion are provided to opposing counsel 48 hours prior to the pretrial conference, trial, or hearing.<sup>79</sup> According to Minnesota law, unpublished decisions do not possess precedential value, but, in practice, courts frequently rely upon these decisions.<sup>80</sup> Statutorily providing a means to cite unpublished opinions presents an incongruous result where the statute clearly states that unpublished opinions have no precedential value.<sup>81</sup>

Traditionally, an opinion's precedential value was determined by its publication status. Unpublished meant unprecedential.<sup>82</sup> Yet, with the advent of computerized research systems, the term "unpublished" is not so definite. One commentator argued that, when a case appears in the WESTLAW or LEXIS computer systems, it has been published.<sup>83</sup> However, accessibility to on-line services is not uniform. Only those attorneys who subscribe to the services receive the opinion as "published."

The 48-hour notice requirement most likely was designed to make access to unpublished decisions more uniform and fair. But allowing use of unpublished opinions can cause much unfairness where an attorney, who has had weeks of access to unpublished opinions through WESTLAW or LEXIS, incorporates unpublished decisions into his brief and then serves copies of these unpublished decisions on opposing counsel 48 hours before the proceeding.<sup>84</sup> In such situ-

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77. 518 F.2d 665 (8th Cir. 1975).

78. *Id.* at 670 n.10.

79. MINN. STAT. § 480A.08(3) (1992).

80. *See supra* note 73.

81. For a general discussion of this issue, see Gunn, *supra* note 75.

82. SUSAN W. BRENNER, PRECEDENT INFLATION 89 (1992).

83. *Id.* at 266. "The issue then becomes whether putting decisions on-line in LEXIS and/or WESTLAW makes them generally available, so they can be said to have been published in this sense." *Id.* "[I]f wider dissemination and retrieval measures are undertaken to make unpublished opinions more accessible, their status as unpublished opinions will accordingly be compromised." Weaver, *supra* note 67, at 489.

84. *See also Non-Precedential Precedent, supra* note 10, at 1187. "[A notice provision does] not entirely eliminate the problem, however, for the litigant with special knowledge of the unpublished opinions in an area would still be able to use an opinion if it



ations, opposing counsel may be at a disadvantage due to the short time to review the unpublished decisions.

### B. *Judicial Accountability*

Unpublished opinions also reduce judicial accountability. If unpublished opinions are not precedential, judges who write these opinions are under less pressure to fit them into the body of published decisions.<sup>85</sup> A published decision makes judges accountable to the members of the legal community who read the decision, but an unpublished decision has no such audience. "If 'sunlight is said to be the best of disinfectants' then limited publication may permit sores to fester."<sup>86</sup>

A number of courts have implemented procedures in which the presiding judge does not make the publication decision. For example, in Delaware,<sup>87</sup> New York,<sup>88</sup> and Wisconsin,<sup>89</sup> an independent committee makes the publication decision.<sup>90</sup> In Kentucky<sup>91</sup> and Oklahoma,<sup>92</sup> the state supreme court makes the publication decision, and, in Michigan<sup>93</sup> and Oklahoma,<sup>94</sup> an interested party may request publication.

In Minnesota, under the repealed Internal Rules, the decision to publish required only a majority vote from the panel.<sup>95</sup> The Special Rules do not specify if a majority must decide to publish, rather the Special Rules simply state, "the panel will decide at its conference whether to publish an opinion."<sup>96</sup> In practice, however, a majority of the panel has continued to make the publication decision.<sup>97</sup>

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avored him and withhold it if it did not, thereby retaining considerable advantage over his opponent." *Id.*

85. Minutes from the Meeting of the Judicial Administration Committee of the MSBA, Files 1 & 2 (March 8, 1986) (on file at MSBA).

86. *Limited Publication*, *supra* note 17, at 581 (citation omitted).

87. Williams, *supra* note 13, at 26-27.

88. *Id.* at 39. "The reporter, with the approval of the Court of Appeals, decides which opinions of the other courts are to be reported. If the judge disagrees with the reporter's publication decision, the matter is referred to the Committee on Opinions." *Id.*

89. *Id.* at 48-49.

90. In England, "barristers employed by law reporting firms ascertain which decisions are sufficiently important to warrant publication." Atkins, *supra* note 70, at 59.

91. Williams, *supra* note 13, at 32.

92. *Id.* at 42.

93. *Id.* at 35.

94. *Id.* at 42.

95. MINN. CT. APP. INTERNAL R. (repealed 1991).

96. SPECIAL R. OF PRAC. FOR MINN. CT. APP. 4, *reprinted in* MINNESOTA RULES OF COURT 424 (West 1993).

97. Interview with Judge Schultz, *supra* note 64.

### C. *The Determining Criteria*

In determining publication, Minnesota law has established criteria that closely resemble the criteria used in the Advisory Council's standard.<sup>98</sup> Even though these criteria are specific compared to some state courts,<sup>99</sup> Minnesota's criteria are still preferable to broader, more subjective standards.<sup>100</sup>

Even so, problems still exist. For example, many commentators have noted the importance of publishing an opinion when a separate concurring or dissenting opinion is issued. "Cases that contain dissents or concurrences are, by definition, controversial."<sup>101</sup> The concurring or dissenting judge either disagrees with the majority's reasoning or with the majority's result.<sup>102</sup> "Accordingly, few decisions with separate opinions should go unpublished."<sup>103</sup> Some courts expressly treat the existence of a separate opinion as dispositive. In other words, if a separate opinion exists, the opinion must be published.<sup>104</sup> Even where no express rule requires publication in the event of a separate opinion, some courts follow this rule in

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98. Advisory Council, *supra* note 12, at 15-17, 22. "About one-third of the states have rules similar to [the Advisory Council's standard] either for the courts of last resort or the intermediate appellate courts or both. These states are Arizona, California, Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Ohio, Oklahoma, Tennessee, Texas, and Wisconsin." Williams, *supra* note 13, at 22 n.8.

99. The First, Third, and Federal Circuits "make only a general statement, to the effect that the court should weigh the precedential value of a disposition before publishing it." STIENSTRA, *supra* note 6, at 30.

100. *Non-Precedential Precedent*, *supra* note 10, at 1177.

If there are to be unpublished opinions, plans with specific criteria are preferable to broad, generally worded plans . . . . If the consumers of the court's product must trust the judges to make correct and consistent decisions in cases that are unreported and thus subject to minimal scrutiny, they should at least be assured that the judges look to standards as definite as possible. . . .

*Id.* (citation omitted).

101. *Limited Publication*, *supra* note 17, at 612. The authors also describe the special role that separate opinions play in the judicial system.

Separate opinions serve to restrain judicial advocacy. Like all advocates, the judicial advocate can lose sight of the other side. The separate opinion restricts the judicial advocate because it assures him of a public airing of a contrary view of the same facts and law. The separate opinion also performs an important corrective function, for it criticizes the result and reasoning of the majority, appealing for correction by a higher court, a future court, or a legislature.

*Id.* (citation omitted).

102. *Id.*

103. *Id.*

104. STIENSTRA, *supra* note 6, at 34-35. In the federal system, the Second, Fifth, Sixth, Ninth, and D.C. Circuit Courts have a provision requiring publication if a separate opinion is issued. *Id.*

practice.<sup>105</sup>

Still other courts view the existence of a separate opinion as merely a factor in considering an opinion for publication.<sup>106</sup> In the Minnesota Court of Appeals, no provision requires decisions containing separate opinions to be published.<sup>107</sup> Decisions containing separate opinions, like all other opinions, must satisfy the determining criteria.

Another important determining criteria is when the lower court's decision is reversed. Reversals often occur where the trial court has erred, where there is uncertainty about the governing law,<sup>108</sup> or where there is uncertainty about the applicable legal standard.<sup>109</sup> One court reversing another indicates an inconsistency of opinion within the system.<sup>110</sup> A reversal by an appellate court almost assuredly indicates enough interest to warrant publication.<sup>111</sup> In addition, "reversals are quite likely to create law . . . . That observation should come as no surprise; where the reversal does not turn on correction of plain error, it is likely that the court below could not possibly have known the 'true' state of the law, because it had never been declared."<sup>112</sup>

However, reversals are not accorded the same weight as a separate opinion. Five federal circuit courts require publication if the lower court's decision is reversed, but only if the lower court's decision was also published or other additional criteria are met.<sup>113</sup> The Minnesota Court of Appeals does not require publication of opinions that reverse lower courts.

A number of courts have moved beyond the determining criteria

105. *Id.* at 35. The Third, Fourth, Seventh, Eighth, and Eleventh Circuits are examples of courts that enforce this dispositive criterion. *Id.* The procedure among state appellate courts is difficult to determine. Only four states expressly mention separate opinions. Williams, *supra* note 13.

In Indiana and Texas, the author of a separate opinion may designate it for publication if the separate opinion meets the determining criteria. *Id.* at 29-30, 47. In Texas, the majority opinion will then also be published. *Id.* In Kansas, memorandum opinions are not published unless there is a separate opinion. *Id.* at 31.

Further, some states' criteria could be construed to imply publication whenever a separate opinion issues, even if the separate opinion merely states the case issues are without merit or the case issues are determined by application of well-settled rules of law. *Id.* at 30, 33, 38-40, 49.

106. Williams, *supra* note 13, at 41.

107. *See supra* note 2.

108. *Limited Publication*, *supra* note 17, at 618.

109. *Id.* at 619.

110. *Id.* at 618.

111. *Id.*

112. *Id.*

113. STIENSTRA, *supra* note 6, at 34 (stating that the First, Fifth, Sixth, Seventh and Eighth Circuits require that a lower court's decision be published if reversed and if other criteria are present).

adopted by the Advisory Council. For example, the nonpublication rules in Illinois, Kansas, Oklahoma, and Wisconsin allow publication if the opinion would be a significant contribution to legal literature.<sup>114</sup> The Eighth Circuit also employs this determining criterion.<sup>115</sup> Even though this determining criterion is vague in comparison to the standards of the Advisory Council, some subjective standards allow flexibility for the court to publish an opinion that does not neatly fall into the other determining standards.

#### D. *The Implementation of Nonpublication Rules*

The procedures used to implement the limited publication rules are also important.<sup>116</sup> Two key issues regarding the implementation of the nonpublication rules must be considered: the time when the court makes the publication decision and the status of the opinion once it is published. The time when a publication decision is made is similar in most courts. According to the Advisory Council, "a tentative decision not to publish should be made by the panel at the earliest feasible point. This will be at the conference on the case before the opinion is assigned, or at the time of assignment."<sup>117</sup> The decision, however, is tentative since through the process of writing, the opinion may change considerably.<sup>118</sup>

Reaching a publication decision too early may affect the reasoning or even the result of the decision.<sup>119</sup> Some commentators question whether "judges can, and in good faith will, predict early in the game whether the opinion in a case will merit publication."<sup>120</sup> As in most states, the Minnesota nonpublication rule<sup>121</sup> does not mention when

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114. Williams, *supra* note 13, at 29-49.

115. See *supra* note 9, at 4(f).

116. See Advisory Council, *supra* note 12, at 10-11; *Limited Publication*, *supra* note 17, at 592-93, 621-25; *Non-Precedential Precedent*, *supra* note 10, at 1178-79; STIENSTRA, *supra* note 6, at 32.

117. Advisory Council, *supra* note 12, at 11.

118. *Id.* at 12; see Robel, *supra* note 65, at 954. "[M]any judges have noted how frequently a case's complexities are revealed through the process of writing an opinion. It seems likely, therefore, that an opinion's ultimate information value would be hard to predict at the time when the publication decisions are usually made." Robel, *supra* at 954 (citation omitted).

119. *Limited Publication*, *supra* note 17, at 581. "The major danger we see is that the early decision not to publish an opinion means that not enough care will go into its preparation to stimulate the thought necessary to an adequate consideration of whether precedent should be created." *Id.* at 611.

120. *Non-Precedential Precedent*, *supra* note 10, at 1191-92.

121. According to Rule 4 of the Special Rules of Practice for the Minnesota Court of Appeals, "[t]he panel will decide at its conference whether to publish an opinion." SPECIAL R. OF PRAC. FOR THE MINN. CT. APP. 4, reprinted in MINNESOTA RULES OF COURT 424 (West 1993). In practice, this decision is tentative. Interview with Judge Harold W. Schultz, *supra* note 64.

the court must make its decision to publish.<sup>122</sup>

The second consideration relating to the implementation of the nonpublication rule is the status of the opinion once it is published. Depending on the jurisdiction, the publication status of an opinion may change. The Advisory Council does not discuss this possibility, but all of the federal circuit courts allow a party to request a change in an opinion's publication status.<sup>123</sup> In addition, a number of state appellate courts have provisions allowing an unpublished decision to be published at a later date.<sup>124</sup> For example, in Colorado, when an unpublished decision is heard before the supreme court, the appellate decision is automatically published unless the supreme court designates otherwise.<sup>125</sup> In the District of Columbia, the court may publish an unpublished opinion *sua sponte*.<sup>126</sup>

The related California practice of "depublication" has caused much controversy.<sup>127</sup> In California, the supreme court can order that an opinion, designated to be published, not be published.<sup>128</sup> Also, an opinion of a California appellate court, superseded by a grant of review or rehearing, will not be published.<sup>129</sup> These provisions have caused confusion because it is no longer clear if a published decision will remain so, and if not, what the result will be if someone cites to a published opinion subsequently "depublished."<sup>130</sup>

In Minnesota, once an opinion is designated as unpublished it remains unpublished.<sup>131</sup> Although Minnesota's practice avoids the confusion of unpublished decisions suddenly being published as precedent, Minnesota's rule causes other problems. For example, if an unpublished decision is appealed and heard by the supreme court, the supreme court opinion will automatically be published.<sup>132</sup> The

122. An exception is Delaware, where a committee determines the publication status after the opinion has been written. Williams, *supra* note 13, at 26-27.

123. The First, Second, Third, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits allow the publication status of an opinion to be changed in practice. The other circuits have a specific provision expressly allowing it. STIENSTRA, *supra* note 6, at 68-71. However, time limitations may restrict some parties, as in the Ninth Circuit, where the motion must be made within 60 days of the issuance of the opinion. *Id.* at 70.

124. See Williams, *supra* note 13.

125. *Id.* at 26.

126. *Id.* at 27.

127. Elliot L. Bien, *Recoiling From Advance Sheets*, CAL. LAW., Feb. 1987, 40-43.

128. Williams, *supra* note 13, at 25 n.35 (citing CAL. R. CT. 976(c)).

129. *Id.* at 25 n.36 (citing CAL. R. CT. 976(d)).

130. Bien, *supra* note 128, at 40.

131. Telephone Interview with Cynthia Lehr, Chief Staff Attorney of the Minnesota Court of Appeals (Oct. 7, 1992).

132. MINN. STAT. § 480.06 (1992) states, "[i]n all cases decided by the [supreme] court, [the court] shall give its decision in writing, and file the same with the clerk . . . ."

appellate decision, however, will remain unpublished. Even though only 27 unpublished cases have been reviewed by the supreme court, the court's nonpublication policy will continue to create this situation.<sup>133</sup>

#### IV. PROPOSAL

Although various alternatives are available to make Minnesota's limited publication practice more fair<sup>134</sup> and to ensure judicial accountability,<sup>135</sup> one rule stands out as the most feasible. By eliminating the 48-hour provision allowing citation to unpublished cases and adding a presumption in favor of publication, the rule would enhance the clarity of what cases weigh as precedent and would eradicate much of the unfairness the present rule has created.

The Minnesota nonpublication rule, based on the standard developed by the Advisory Council, is well-designed. Yet, the rule falls short by allowing citation to unpublished opinions.<sup>136</sup> The Advisory Council does not favor this practice, a practice also not allowed by many other state courts.<sup>137</sup> Allowing citation to unpublished opinions destroys the nonprecedential nature of the opinion and puts the opposing party in an unfair position.

Repealing the 48-hour provision would result in a rule very similar to the Eighth Circuit's rule on nonpublication. In the Eighth Circuit's Plan for Publication of Opinions,<sup>138</sup> the court stated that un-

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133. Search of WESTLAW Minnesota Cases database (through September 9, 1992).

134. Other possible alternatives have questionable results or may be too burdensome to implement. For example, the publication status could require a unanimous decision by the panel. This alternative offers no guarantee that all necessary cases are consequently published. Another alternative is the implementation of a provision that would allow an outside party to move for publication. This would primarily benefit frequently litigating parties. These parties would always request publication of a favorable decision so they could cite to it in future litigation.

A change in the determining criteria is another possibility. For example, it could be required that all opinions containing a dissenting and/or concurring opinion be published. Yet this alternative only applies to the limited number of cases containing a separate opinion.

The most radical alternative is unlimited publication. This was the recommendation made by the MSBA in 1986 based upon testimony of the local legal community. As to date, no court that has implemented a limited publication plan has rescinded it in favor of unlimited publication. Not only would this alternative be costly, but it would raise the issue of what to do with the unpublished decisions of the past five years.

135. *Limited Publication*, *supra* note 17, at 581.

136. See MINN. STAT. § 480A.08(3) (1992).

137. Williams, *supra* note 13, at 40-43, 46. Ohio, Pennsylvania and Tennessee allow unpublished opinions to be cited for purposes other than res judicata or collateral estoppel. In each of these states the opinion has only persuasive authority. *Id.*

138. See *supra* note 9.

published opinions have no precedential value.<sup>139</sup> Unpublished opinions may not be cited in any proceeding except where the cases are related by the identity of a party or cause of action. The Eighth Circuit has strictly enforced this provision throughout the last twenty years.<sup>140</sup>

However, the Eighth Circuit also acknowledges that the unpublished opinions are not unimportant.<sup>141</sup> Through this rule, the court maintains its integrity and, in addition, preserves fairness to those who appear before it. None of the court's opinions are without value. Yet, because unpublished opinions are not uniformly accessible, rules must be designed and enforced to ensure the greatest amount of fairness.

The presumption of publication would further ensure that important cases do not slip through the determining criteria and remain unpublished. "The strongest safeguard a court could erect, aside from publishing all dispositions, would be to couple a general presumption for publication with a set of specific criteria . . ." <sup>142</sup> Currently, section 480A.08 of the Minnesota Statutes contains not only a presumption against publication but also makes the decision discretionary.<sup>143</sup> The word used is "may," not "must,"<sup>144</sup> and, therefore, even the cases that fall under the specific criteria are not guaranteed publication.

Adding the presumption of publication would also increase judicial accountability. The presiding judges would have the burden of determining why an opinion should not be published rather than why an opinion should be published.

## V. CONCLUSION

The Minnesota nonpublication rule allows citation to unpublished opinions that have no precedential value and are not uniformly available to all litigants. The rule has resulted in confusion over what kind of precedential weight these unpublished opinions have when

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139. *Id.*

140. *See, e.g., In re Leimer*, 724 F.2d 744, 745-46 (8th Cir. 1984); *Obin v. District No. 9, Int'l Ass'n of Machinists*, 651 F.2d 574, 583 (8th Cir. 1981); *Clarence LaBelle Post No. 217 v. United States*, 580 F.2d 270, 274 n.9 (8th Cir. 1978); *Biebel Bros. v. United States Fidelity & Guar. Co.*, 522 F.2d 1207, 1212 (8th Cir. 1975); *United States v. Kinsley*, 518 F.2d 665, 670 n.10 (8th Cir. 1975); *Richard H. v. Clay County*, 639 F. Supp. 578, 579 (D. Minn. 1986).

141. *See supra* note 9.

142. STIENSTRA, *supra* note 6, at 31.

143. MINN. STAT. § 480A.08(3)(c) (1992) states, "[t]he court of appeals *may* publish *only* those decisions that . . ." (emphasis added). For a list of the criteria applied in making the publication decision, see *supra* note 2.

144. *Id.*

cited. The rule has also created unfairness among members of the legal community.

By repealing the 48-hour provision of section 480A.08, the Legislature could ensure that all unpublished decisions would not be cited except for res judicata or collateral estoppel purposes. This would remove the unfair advantage that lawyers with vast resources have over lawyers with very limited budgets. This alteration would also add the presumption that all appellate opinions have merit and should be published until proven otherwise.



