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Suggestions from the Practicing Bar: Things Practitioners Wish the Court of Appeals Would Do Differently

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SUGGESTIONS FROM THE PRACTICING BAR: THINGS PRACTITIONERS WISH THE COURT OF APPEALS WOULD DO DIFFERENTLY

David F. Herr and Haley N. Schaffer[†]

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I. INTRODUCTION

Over its years, the Minnesota Court of Appeals has accomplished an enviable record of deciding cases fairly and promptly. The time it takes to decide cases in Minnesota is regularly only an aspirational goal for appellate courts in other states.¹ The court decides cases quickly, hears cases throughout Minnesota, allows oral argument in all cases with represented parties (unless waived), and issues written opinions in every case.² By any measure, the Minnesota Court of Appeals earns its reputation as being a model appellate court in many ways.

Undoubtedly one part of the court's success has been its devotion to some form of the quality-control practice of "constant improvement." This is appropriate, and we hope this survey and article will be received in that spirit in order to help address areas where the court might, from the standpoint of the lawyers who appear before it, further improve its practices.

As part of the celebration of the court's twenty-fifth anniversary, the authors asked the more than 190 members of the Minnesota State Bar Association's Appellate Practice Section if they had any suggestions to pass on to the court. To encourage candor, the individual respondents were promised anonymity. The information gleaned from this process included many of the suggestions offered here. The respondents also made suggestions for rule changes that were more appropriately taken up by the Minnesota Supreme Court Advisory Committee on Rules of Civil Appellate Procedure. The advisory committee studied these suggestions and recommended several amendments to the court in October 2008, which were adopted and took effect on January 1, 2009.³ Additionally, the advisory committee met in January and

1. See, e.g., W. Warren H. Binford et al., *Seeking Best Practices Among Intermediate Courts of Appeal: A Nascent Journey*, 9 J. APP. PRAC. & PROCESS 38, 60 (2007) (ranking Minnesota Court of Appeals as highest in "overall court efficiency" based on case disposition times from filing to decision) [hereinafter Binford, *Seeking Best Practices*].

2. MINNESOTA COURT OF APPEALS, WHAT YOU SHOULD KNOW ABOUT THE STATE'S INTERMEDIATE COURT 1 (2008), <http://www.mncourts.gov/?page=551> (follow "Minnesota Court of Appeals: Learn more about the Court of Appeals, its judges, and how they do their work" hyperlink).

3. See Order Promulgating Amendments to Rules of Civil Appellate Procedure, No. C4-84-2133 (Minn. Dec. 11, 2008) (amending various rules at the suggestion of the bar, including changes to clarify the role of motions for reconsideration, to clarify that service "by mail" requires use of the U.S. Mail, to add a requirement for an addendum to briefs, and to permit preparation of an

February 2009, and is considering additional issues flowing from this process.⁴

II. THE COURT SHOULD PUBLISH MORE OF ITS DECISIONS

The court of appeals is constrained by statute on the publication of decisions.⁵ The effect of designation is not immediately apparent—unpublished decisions are readily available on the court's website⁶ and are included in LEXIS⁷ and Westlaw.⁸ Under Minnesota law, even though unpublished, these decisions may be cited to courts if a copy is provided to opposing counsel in accordance with statute.⁹

Notwithstanding these provisions, or possibly in derogation of them, the court does not designate many of its decisions for publication. One recent survey suggested that out of the 1,484

appendix on both sides of a page).

4. These additional issues include creating a uniform procedure for filing a cross-appeal in any circumstance in which a party other than the initial appellant seeks review of a trial court order and a complete revamping of Rule 108 concerning stays and superseding of trial court orders and judgments on appeal.

5. MINN. STAT. § 480A.08 subdiv. 3(c) (2008) provides:

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.

6. Minnesota Court of Appeals Homepage, <http://www.mncourts.gov/?page=551> (last visited Feb. 22, 2009).

7. LexisNexis Homepage, <http://www.lexisnexis.com> (last visited Feb. 22, 2009).

8. Westlaw Homepage, <http://www.westlaw.com> (last visited Feb. 22, 2009).

9. MINN. STAT. § 480A.08 subdiv. 3(c); MINN. R. CIV. APP. P. 136.01 subdiv. 1(b) (2008). Curiously, the statute does not require that a copy of an unpublished case be provided to the court, only to opposing counsel. In practice, attorneys citing unpublished cases would routinely provide a copy to the court as well as opposing counsel.

authored opinions the court issued in 2005, 1,286 of them were unpublished.¹⁰ While the authors recognize that the court is actively trying to decrease the overall number of published opinions in favor of unpublished opinions,¹¹ there is a fairly widespread view that the court probably designates too many of its decisions as unpublished, thereby depriving future litigants of the use of potentially valuable precedent. One example of this might be the court's decision in *Diversified Water Diversion, Inc. v. Standard Water Control Systems, Inc.*¹² In *Diversified Water*, the court confronted a challenge to an award of punitive damages and attorney's fees.¹³ The punitive damage discussion necessarily addressed recent United States Supreme Court decisions on punitive damages, including a case decided only months before the *Diversified Water* decision, *Exxon Shipping Co. v. Baker*.¹⁴ *Exxon* imposed an unprecedented one-to-one limit on the ratio of punitive damages to compensatory damages in a case decided under federal maritime law.¹⁵ When *Diversified Water* was decided, it was the only Minnesota appellate case addressing this important Supreme Court case. Therefore, while the *Diversified Water* opinion may not technically establish a new rule of law, it is likely to be useful and cited as such authority at least until the court of appeals or Minnesota Supreme Court decides "precedentially" what effect the *Exxon Shipping* decision has outside of federal maritime cases.

Another example is a twenty-nine page unpublished decision authored by Judge David Minge in which he comprehensively analyzes the grounds for obtaining a new trial in a civil case.¹⁶ While this decision, like *Diversified Water*, may not establish a new rule of law, it is certainly helpful to lawyers because it incorporates such a thorough analysis in one case.

It is important to understand that the view that decisions should be published comes not from the litigants in the particular cases, but from lawyers reading them in *Minnesota Lawyer* as the

10. Binford, *Seeking Best Practices*, *supra* note 1, at 58.

11. *Id.* at 84–85 (explaining that "[t]he Minnesota Court of Appeals is one of the courts actively trying to decrease the overall number of published opinions in favor of unpublished opinions.").

12. No. A07-1828, 2008 WL 4300258 (Minn. Ct. App. Sept. 23, 2008).

13. *Id.* at *1.

14. 128 S. Ct. 2605 (2008).

15. *Id.* at 2624–26, 2632–34.

16. *See* Aboud v. Dyab, No. A06-1937, 2008 WL 313624 (Minn. Ct. App. Feb. 5, 2008).

decisions are issued. Thus, this is not a concern of disappointed litigants who would, for some reason, like to see “their” opinions in print.

While respondents may desire that the court issue more decisions that would be of precedential value to future litigants, deciding whether an opinion would be of precedential value to future litigants at the time the court decides a case is inherently speculative. The only complete solution to this problem is probably a wholesale revisiting of the publication rules for the court. In the meantime, however, perhaps the court could exercise its discretion under the statute more expansively, even to the point of erring on the side of publication, when considering whether to publish a case.

III. THE COURT SHOULD ISSUE MORE OF ITS SPECIAL TERM OPINIONS IN PUBLISHED FORM

The court of appeals issues opinions for important procedural clarification by a Special Term panel.¹⁷ The opinions are public documents in the sense they are available in the clerk’s office, but the majority of the decisions are not otherwise made available. These opinions comprise a unique body of precedent. The court does publish some of its Special Term decisions.¹⁸ It also “publishes” its Special Term Opinion Index, which is available on the Internet in the same manner as unpublished opinions.¹⁹ These tools are helpful to and appreciated by the bar. The suggestion from the bar is simply that more of these helpful decisions be published.

The Special Term Opinion Index offers some support for the view that the court might consider publishing more of its decisions.

17. SPECIAL RULES OF PRACTICE FOR THE MINN. CT. APP. 8 (2008).

18. See, e.g., *Mingen v. Mingen*, 662 N.W.2d 926, 928–30 (Minn. Ct. App. 2003) (holding that the appeal time available under MINN. R. CIV. APP. P. 104.01 subdiv. 2 can be extended if a proper post-decision motion is made before the time to appeal the underlying judgment expires), *aff’d*, 679 N.W.2d 724 (Minn. 2004); *Kowler Assocs. v. Ross*, 544 N.W.2d 800, 801 (Minn. Ct. App. 1996) (holding that an order vacating an arbitration award and directing a rehearing is not reviewable on appeal from a judgment confirming the second award); *Duluth Ready-Mix Concrete, Inc. v. City of Duluth*, 520 N.W.2d 775, 777–78 (Minn. Ct. App. 1994) (holding that there must be a notice of filing accompanying service of a copy of the order or judgment to limit the time to appeal effectively).

19. See MINNESOTA COURT OF APPEALS, SPECIAL TERM OPINION SUBJECT MATTER INDEX (Aug. 15, 2007), <http://www.lawlibrary.state.mn.us/stsmi.pdf>.

Looking only at the civil decisions included at pages one through thirty-two, the Index includes fifteen decisions from the first five years of its existence (1983–1987), 128 during the next five years (1988–1992), and then markedly decreased numbers since then (thirty-eight, twelve, and eleven in the succeeding five-year periods, respectively). One might speculate that the more than two hundred decisions included in the Index provide guidance on the issues likely to arise in the future, but the experience of Minnesota appellate lawyers is to the contrary.

IV. THE COURT SHOULD FEEL FREE TO TREAT CASES DIFFERENTIALLY

The court of appeals should recognize that appellate cases are not uniform in complexity and case-processing needs. It may well be that some cases should not be expected to be decided within ninety days after submission.²⁰ Many cases could be decided in thirty days, but some would be better if the court were allowed 120 or even 180 days to issue a decision.

The court should also issue decisions that are truly commensurate with the needs of the case. At present, the only apparent differentiation in the court's handling of cases is the decision to publish or not to publish the decision. The statute authorizing the court of appeals expressly frees the court to issue decisions that do not include a written opinion.²¹ The court is thus not required to issue written decisions, but there is a strong and lingering sentiment in the bar that it is necessary that the court do so. That sentiment is borne of the experience of "summary affirmance" used by an overburdened Minnesota Supreme Court prior to the creation of the court of appeals in November 1983. In those days, a majority of the court's caseload would be fully briefed, and then after months of silence, a one-line opinion affirming the trial court would issue, with no intervening oral argument. No one advocates for the return to those "good old days," but one wonders if the court could write shorter opinions in many cases—opinions that cite the controlling law that is being applied and deciding the questions raised—without requiring pages of opinion or consuming months to create.

In some ways, if the controlling law is settled, citation to a

20. MINN. STAT. § 480A.08 subd. 3(a) (2008).

21. *Id.* at subd. 3(b).

single state supreme court decision may suffice to state the rule, and a discussion of the record on that issue. This approach would also allow a “non-precedential” opinion to be inherently so, rather than non-precedential only by label. Where the issues are not settled, or the factual analysis and application of the law to the facts is more complex, a lengthier, more complex opinion can issue. It would intrinsically have greater precedential value. The byproduct of this process may be that simpler cases involving settled questions might be decided even more quickly, leaving more time for the cases that really require more attention.

V. TRANSCRIPTS OF ORAL ARGUMENT SHOULD BE AVAILABLE TO THE LITIGANTS

Arguments in the court of appeals are recorded, but the copies are not made part of the record of the court and are not available to litigants. Several Minnesota lawyers expressed interest in being given an opportunity to obtain transcripts of the hearings before the court.

There are several legitimate potential uses for a hearing transcript. Courts sometimes decide cases on the basis of “admissions” made at argument. Conversely, courts may decide a case without acknowledging an unambiguous admission made at oral argument. In that circumstance, the concession or admission may be relevant to a request for further review (or rehearing, were it allowed).²² Such a concession or admission also may be helpful to the parties in a case where the court issues a remand order.

VI. THE COURT’S OPINIONS SHOULD ADDRESS THE ISSUES RAISED BY THE PARTIES

This suggestion is probably expressed more often by disappointed appellate litigants, but even victors sometimes express frustration that the court did not decide or discuss all the issues briefed and argued by the parties. This is a difficult issue to assess from outside the context of a particular case. The only judges likely to be in a position to catch the problem are the judges on a panel—the other judges who read the decision when circulated to the court cannot be expected to spot an omission error, even upon careful reading.

22. See *infra* Part VII.

This suggestion should probably remain as just that: a suggestion for the court's judges to be aware of and sensitive to the frustration litigants feel when issues are ignored or omitted. Indeed, in the vast majority of appeals this does not appear to be an issue.

VII. THE COURT SHOULD ENSURE THAT ORDERS ON MOTIONS ARE
NOT ISSUED BEFORE A PARTY HAS HAD A CHANCE TO RESPOND

Occasionally, the court of appeals decides a motion without waiting for a response from the non-moving parties to the appeal. Rule 127 allows the parties five days to respond to a motion.²³ Commentators have advised litigants to notify the court of an intention to oppose "an apparently-routine motion."²⁴ The problem arises from the difficulty in predicting what is routine—the situation is probably amplified by the fact that if the motion is in fact opposed, it is unlikely to be thought of as routine.

The issue here is as much one of perception as reality—a decision from the court arriving the same day the opposition is mailed is deflating to the lawyer and suggests to the client that drafting the opposition is simply a waste of time. Presumably, the court concludes, before entering relief without waiting for a response, that no conceivable legal or factual showing would prompt the court to rule differently than intended. This is a difficult standard to support. It might be worthwhile for the court to identify in its rules the types of motions where it will consider entering an order without response so as to give the responding party notice it should either alert the court to the intended opposition or decide to forgo filing one.

VIII. THE COURT SHOULD DEVISE A WAY TO ENTERTAIN MOTIONS
FOR RECONSIDERATION IN RARE CASES

The Minnesota Rules of Civil Appellate Procedure do not allow motions for reconsideration in the court of appeals.²⁵ The court of appeals applies this rule with some vigor. Where allowed,

23. MINN. R. CIV. APP. P. 127 (2008).

24. See 3 ERIC J. MAGNUSON & DAVID F. HERR, MINNESOTA PRACTICE: APPELLATE RULES ANNOTATED § 127.3, at 602 (2008) ("It may be prudent to let the appellate court, especially the court of appeals, know if an apparently-routine motion will be opposed.").

25. MINN. R. CIV. APP. P. 140.01 (2008).

motions for reconsideration are rarely successful and undoubtedly consume large amounts of time and energy. Nonetheless, there are decisions that clearly have a crucial fact wrong, misstate the record in some way, or may include a particularly troublesome *obiter dictum* that one assumes the court does not really mean to say. The current rules do not provide an obvious means of relief.

Although some errors might render a decision so flawed as to warrant further review by the Minnesota Supreme Court, the criteria for further review are specific, and certainly do not cover many appellate decisions.²⁶ This disjunction between the universe of potential court of appeal error and the categories for which supreme court review might be possible creates a large category of cases in which there is no mechanism even to ask that the error be corrected.

The court does occasionally correct minor mistakes in opinions on its own initiative.²⁷ The variety of circumstances that might warrant reconsideration is reflected in Minnesota Supreme Court decisions modifying its own decisions. Amendment of an applicable statute has resulted in reconsideration in the supreme court.²⁸ More obviously, reconsideration has been allowed to correct a “typographical” error in a supreme court decision.²⁹

IX. ORAL ARGUMENT

Perhaps surprisingly, Minnesota lawyers did not have suggestions for how the court should conduct oral arguments. This probably reflects the generally favorable experience we have with argument before the court. The court is prepared for argument and invariably courteous and respectful of advocates. Although it is not a hard-and-fast rule, and even less so for respondent’s argument, where questions abound, the court makes some effort to let the oral advocate have a minute or two of uninterrupted discourse before the questions begin. Certainly an unusually

26. See MINN. R. CIV. APP. P. 117 subdiv. 2 (2008) (limiting further review to specific and limited circumstances).

27. See, e.g., *Waste Recovery Coop. of Minn. v. County of Hennepin*, No. C0-93-158 (Minn. Ct. App. Aug. 19, 1993), *order modifying* 504 N.W.2d 220, 223 (Minn. Ct. App. 1993). In *Waste Recovery*, the court ordered modification of a footnote in a decision, but declined reconsideration of the merits. *Id.*

28. See *Loftis v. Legionville Sch. Safety Patrol Training Ctr., Inc.*, 297 N.W.2d 237, 238–39 (Minn. 1980).

29. See, e.g., *Roepke v. W. Nat’l Mut. Ins. Co.*, 302 N.W.2d 350, 351 (Minn. 1981).

provocative opening sentence may provoke a question, and a particularly pointless opening that wanders around in the factual background with no obvious reason may engender a “we’re familiar with the facts; why don’t you present your first argument” from the court. But ordinarily, one can get out a paragraph or two before the questions start, and attorneys find that helpful.

One form of oral argument is not as well received: argument by video conference. Improving video argument may be limited by the current technology—or by the budget available to deploy that technology—but the consensus of appellate lawyers is that the current experience is deficient. Listening to an argument of opposing counsel without being able to see the judges’ reactions is unsatisfying and undesirable. Standing in a room by oneself to argue a case also is an odd experience for appellate advocates—sort of like arguing in a sensory deprivation chamber. In some ways, this technology is reminiscent of the ill-fated exercise of using videotape technology to prepare trial court “transcripts.” That experiment was, thankfully, short-lived.³⁰ This issue might be addressed by deploying this second-best approach to oral argument only with the consent of the parties.

X. CONCLUSION

The Minnesota Court of Appeals has been an important contributor to the Minnesota court system’s status as leader in the fair and efficient administration of justice. Many of its practices deserve to be recognized as “best practices.” The authors hope that the suggestions offered here might contribute to the system being even better.

It may be that the criticisms of the court are actually acknowledgements of the court’s inherent limitations as an intermediate court of appeals. In many ways, the limitations recognized on the twenty-fifth anniversary of the court echo those made when it turned ten. In an article on that anniversary, the authors identified non-publication of decisions as questionable, but

30. See generally Frederick K. Grittner, *The Recording on Appeal: Minnesota’s Experience with Videotaped Proceedings*, 19 WM. MITCHELL L. REV. 593 (1993); MINNESOTA VIDEO/CIC EVALUATION COMMITTEE, VIDEO RECORDING AND THE COMPUTER-INTEGRATED COURTROOM: AN EVALUATION OF TWO COURT REPORTING TECHNOLOGIES (Jan. 1992), <http://www.mncourts.gov/Documents/0/Public/administration/AdministrationFiles/Videotape-CIC%20Project%20C4-89-2099/1992-01-30%20Videotape-CIC%20Evaluation%20Rpt.pdf>.

not specifically problematic.³¹ They found that “[t]he combined effect of limited review in the supreme court and no rehearing in the court of appeals is probably the most pervasive problem in the courts’ current rules.”³² That observation remains true in 2008.

31. David F. Herr & Mary R. Vasaly, *Appellate Practice in Minnesota: A Decade of Experience with the Court of Appeals*, 19 WM. MITCHELL L. REV. 614, 657 (1993).

32. *Id.*