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# Significant Weight: The Impact of the Minnesota Court of Appeals upon Civil Litigation

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## **SIGNIFICANT WEIGHT: THE IMPACT OF THE MINNESOTA COURT OF APPEALS UPON CIVIL LITIGATION**

Richard L. Pemberton<sup>†</sup> and Paul S. Almen<sup>††</sup>

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“The impact of the existence and performance of the Minnesota Court of Appeals upon civil litigation during the first quarter century of its existence has been to add significant weight to administration of justice in the State of Minnesota.” —The Authors

## I. INTRODUCTION

“Concepts of justice must have hands and feet to carry out justice in every case in the shortest possible time and the lowest possible cost. This is the challenge to every lawyer and judge in America.”<sup>1</sup>

Imagine a world where litigants are allowed to appeal the decisions of a district court, the decisions of state agencies and local governments, followed by an appellate court decision within a few months of the oral argument. This world would be familiar to most Minnesota legal practitioners. Now imagine that same world, but the appellate court decisions take twenty to twenty-five months to be issued, and when the decision is finally issued it is a one word opinion—affirmed—plain and simple with no explanation and no rationale. Worse yet, imagine that the one-word opinion is the last word; there are no further appeals. Members of the Minnesota Bar, especially those who have joined in the past two decades, might believe this world to be in some far-off third-world country. In fact, this was the judicial reality in Minnesota prior to the

1. The Honorable Chief Justice Warren Burger, U.S. Supreme Court, Address to the American Bar Association (Feb. 12, 1978).

November 1983 birth date of the Minnesota Court of Appeals.

The Minnesota Court of Appeals recently celebrated its twenty-fifth anniversary. The court of appeals has had a tremendous impact on the judiciary and the practice of law in Minnesota. As a court it has jurisdiction over most decisions from state district court, state agencies, and local governments. In fact, its jurisdiction is only exempted for matters concerning statewide election contests, first-degree murder cases, and appeals from the Minnesota Tax Court and Minnesota Workers' Compensation Court of Appeals, all of which go directly to the Minnesota Supreme Court. This broad jurisdiction results in over 2,300 appeal filings per year. Unlike many appellate courts, where review is discretionary, the Minnesota Court of Appeals is required by law to review and issue an opinion on every appeal that is properly filed with the court.<sup>2</sup> The court has been very successful, demonstrated by the fact that 95 to 97% of all filings receive their final disposition through the decisions of the Minnesota Court of Appeals.<sup>3</sup> Amazingly, the court of appeals issues every decision within ninety days of the close of oral arguments.<sup>4</sup>

This article will examine the impact and contribution that the Minnesota Court of Appeals has made to the Minnesota judiciary and to the practice of law in Minnesota. The first part of this article will include vignettes paraphrasing the comments made by people interviewed by the authors in preparing to write this article.<sup>5</sup> Next the article will briefly detail the history and growth of the court.<sup>6</sup> The article will then detail and analyze the impact and effect that the Minnesota Court of Appeals has had on the Minnesota judiciary and the practice of law in Minnesota.<sup>7</sup> Specifically this section of the article will examine (1) the direct impact of the court of appeals on other Minnesota courts, practitioners, and public at large;<sup>8</sup> (2) the impact of the creation of a college of judicial scholars that would not exist but for the

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

3. Hon. Harriet Lansing, *25 Years of Doing Minnesota Justice, Keynote Address at William Mitchell College of Law Symposium: Doing Minnesota Justice*, 35 WM. MITCHELL L. REV. 1244 (2009).

4. See MINN. STAT. § 480A.08(3)(a) (2008).

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

8. See *infra* Part IV.A.

creation of the Minnesota Court of Appeals;<sup>9</sup> (3) the precedential value of court of appeals decisions;<sup>10</sup> and (4) specific decisions which demonstrate the impact of the court on the Minnesota judiciary and the practice of law in Minnesota.<sup>11</sup> Finally, this article will conclude that the Minnesota Court of Appeals has had a positive impact and effect on the Minnesota judiciary and the practice of law in Minnesota and offer a proposal to ensure that the court continues to have a positive impact upon the State of Minnesota.<sup>12</sup>

## II. WHAT THEY SAY<sup>13</sup>

### A. *Minnesota Supreme Court Chief Justice Russell A. Anderson, Retired*<sup>14</sup>

I had the opportunity to practice law prior to the creation of the Minnesota Court of Appeals, to be a district court judge during the years from its beginning to its maturity, and then the opportunity to view the court from the vantage point of the Minnesota Supreme Court. The court of appeals was badly needed. I recall going to speak to a classic “old time” district court judge before whom I was practicing to tell him that after waiting more than two years for the supreme court to speak concerning an appeal from one of his decisions, the supreme court had finally spoken. It was remanded back to him after that long wait. His reaction was quite memorable. Such waits were, unfortunately, common. The court of appeals cured that backlog and waiting time in short order and has improved the quality of appellate justice greatly. District court decisions improved in anticipation of their prompt and meticulous review. The Minnesota Court of Appeals had a positive impact on the supreme court not only in relieving the nearly intolerable overload volume, but in providing the supreme court with a reasoned decision evaluating the renditions of the parties so that we were not the first to look objectively and neutrally at them. The Minnesota Supreme Court

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9. *See infra* Part IV.B.

10. *See infra* Part IV.C.

11. *See infra* Part IV.D.

12. *See infra* Part V.

13. Although the following vignettes are written in the first-person singular, they are in fact paraphrases rather than precise quotations of the comments made by those interviewed by the authors.

14. Interview with the Honorable Russell A. Anderson, Minn. Supreme Court, in Minneapolis, Minn. (Nov. 5, 2008).

further benefited by receiving as colleagues those court of appeals judges who were elevated to the supreme court and who came more finely honed as scholars and jurists because of their experience on the court of appeals. I salute the judges of the court of appeals, past and present, and the many fine law clerks who have both benefited by their position and have benefited the court as well, and, certainly, the professional legal staff of the court.

*B. Minnesota Court of Appeals Judge, Harriet Lansing*<sup>15</sup>

Looking back from the perspective of twenty-five years and 55,693 decided cases, I believe that the court's processes and its work-product have fared remarkably well. We started planning the internal processes and the day-to-day operating procedures in the summer of 1983. The six of us—Dan Foley, Sue Sedgwick, Ed Parker, Don Wozniak, Peter Popovich, and I—worked in the conference room of Peter's office that summer and hammered out the framework for the court's work structure.

We were lucky to have exceptional guidance and assistance. Even before the constitutional amendment had passed, Chief Justice Doug Amdahl had asked the Minnesota State Bar Association to provide the scaffolding that later became the statute governing our external procedures. Justice Jean Coyne, court commissioner Cindy Johnson, and a court-appointed committee of lawyers were carefully reworking the appellate rules to incorporate the court of appeals and provide for the interaction between the courts. Our new state court administrator, Sue Dosal, and her assistant Judy Rehak were our on-the-ground team to turn the ideas and policies into reality. Through it all, we had very direct feedback from the lawyers of Minnesota who were coming into the court daily to argue their cases and give us their advice. And, in April of 1984, our second group of six judges came on board to help complete the process.

The court's processes continued to be shaped by all of the

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15. Interview with the Honorable Harriet Lansing, Minn. Court of Appeals, in St. Paul, Minn. (Oct. 29, 2008). Judge Harriet Lansing has been on the court since its inception in 1983 and is the only member of the original court still serving. She was previously on the Ramsey County trial court and also served as the St. Paul City Attorney. She has chaired the court's administrative committee and been active in court initiatives. She also currently serves as the Vice President of the National Conference of Commissioners on Uniform State Law and is a member of the faculty of the New York University Appellate Judges Institute.

forty-three judges who have served on the court over these twenty-five years. Suffice it to say, we are proud to have maintained the fundamental structure that was envisioned at the outset: oral argument for those who request it, written opinions that explain the basis for our decision in every case, and issuance of an opinion within ninety days of the date of submission to the oral or non-oral panel.

It's harder to evaluate the quality of our opinions than to evaluate the quality of our processes. In the end, the opinions will have to speak for themselves. But we start from the position that if the process is a good one, the strength of the process should be reflected in the quality of the opinion. We have some indication of their quality from the fact that our opinions are frequently cited in published opinions in other states around the country and are commented on in law review articles and law journals. And perhaps an even more practical indicator—only a small percentage of our decisions are petitioned for review or taken for review by the supreme court. In 2007, review was granted on only 3% of our decisions.

Although our court has not specialized among the case types that each of us hears and decides, I am sure that each of us has had cases that particularly captured our interest. For me, it has been jurisdictional issues and business litigation—particularly closely held companies and corporations. But it is the process as much as the content and the complexity that captures my interest. And that is not only the daily process of reading, listening, analyzing, conferencing, and writing, but also the interactive process with Minnesota lawyers through our oral arguments and our briefing processes. Our court is the result of the people of Minnesota, the lawyers, and the judges coming together in the late 1970s and early 1980s to solve a structural problem of an overwhelming appellate caseload. And the court's success and vitality is sustained by our capacity to continue to work together to resolve legal disputes and their accompanying problems. It was exhilarating to be part of that process in 1983, and it has continued to be a gratifying experience for the ensuing quarter century.

*C. Wil Fluegel, Fluegel Law Office*<sup>16</sup>

As a trial practitioner, the ready availability of the court of appeals to serve as an error-correcting court whenever needed is a comfort that reassures litigants that they have had the chance to fairly present their case under the rule of law. At least as important, however, is the function of the court of appeals as a legal laboratory to test emerging concepts that the Minnesota Supreme Court, as precedent-setter and policy-maker, has not yet reached. The thorough analysis the intermediate court has historically afforded each dispute reaching it allows the supreme court to see how newly debated controversies have been resolved by its sister court and to judge the practical effect of those collective decisions on the practice of law by the trial bench and bar and then to speak with the benefit of the foundation that court of appeals' decisions afford it. Having had the privilege to brief and argue appeals in other states, I can appreciate the rare and precious gift that is the availability of oral argument in every appeal to the Minnesota Court of Appeals. While briefs are useful in conveying the substance of an argument, the privilege of standing before the court to answer questions that one's decision makers actually have on their minds after reading those briefs is something you come to appreciate when the opportunity is unavailable elsewhere. Truly impressive to me is the breadth of knowledge that the court of appeals has accumulated in addressing the wide diversity of cases it confronts and the willingness of its jurists to seek to master each field and resolve cases under the rule of law. We are privileged to have such a capable and hard-working court.

### III. HISTORY AND GROWTH OF THE MINNESOTA COURT OF APPEALS

Many people take for granted that in Minnesota one can directly appeal district court decisions to the Minnesota Court of Appeals. This, however, has not always been the case. Prior to 1983, Minnesota had, in effect, a single-tier judicial system.<sup>17</sup> The

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16. Interview with Wil Fluegel, Fluegel Law Office, in Minneapolis, Minn. (Nov. 5, 2008).

17. See The Honorable Peter S. Popovich, *Ten Years Later: Justice Delayed Is No More*, 19 WM. MITCHELL L. REV. 581, 581 (1993). "For 125 years, the Minnesota Supreme Court had been responsible for appellate review of trial court decisions. The supreme court was the court of last resort and had jurisdiction over all cases. In addition to reviewing trial decisions, the court also developed new law and policy." *Id.*



right to appeal existed, of course, but this right existed only in theory because of an extremely overburdened Minnesota Supreme Court.<sup>18</sup> In reality, the right to appeal proved to be “merely an empty promise.”<sup>19</sup> In the late 1970s, delays ranged between thirteen months for non-oral civil appeals to twenty-two months for an en banc criminal appeal.<sup>20</sup> Case loads, however, continued to grow and caused things to only get worse. These long delays were the cause of much consternation; but, this was nothing new.

In the 1940s, pressure began to build to add an intermediate appellate court to speed the time it took to issue an opinion after an appeal.<sup>21</sup> Throughout the next four decades the case load of the Minnesota courts continued to grow, resulting in even more pressure to add an intermediate appellate court.<sup>22</sup> Chief Justice Douglas K. Amdahl commented on the enormous supreme court backlog in his 1982 state of the judiciary address, “[c]onsequently, backlogs [have] become endemic and characteristic of our caseload. We are faced with the prospect of never becoming current. It is for this reason that we have become convinced that the only recourse available, the only satisfactory solution, is a court of appeals.”<sup>23</sup> Chief Justice Amdahl along with other bench/bar members and legislative leaders, however, needed to do some heavy lifting to convince a majority of the Minnesota bar, the Minnesota Legislature, and the public that an intermediate appellate court was the proper means to solve the problems plaguing the Minnesota judiciary.<sup>24</sup> Creation of the court of appeals needed to be accomplished through a constitutional amendment, but getting the amendment on the ballot had serious opposition. Some felt that creating an additional layer of

18. The Honorable D. D. Wozniak, *A True Success Story*, 19 WM. MITCHELL L. REV. 589, 589 (1993).

19. *Id.*

20. THE HONORABLE ROLAND C. AMUNDSON, *THE FIRST TEN: AN INFORMAL HISTORY OF THE FIRST TEN YEARS OF THE MINNESOTA COURT OF APPEALS* 10 (1993).

21. *Id.* at 7.

22. *Id.* at 9. “From 1957 to 1982, the number filings in the supreme court increased over 700%—from 213 to 1,682.” *Id.*

23. The Honorable Chief Justice Douglas K. Amdahl, *State of the Judiciary Message to the Minnesota State Bar Association* (June 19, 1982).

24. See AMUNDSON, *supra* note 20, at 11–29 (discussing Chief Justice Amdahl’s work to make the Minnesota Court of Appeals a reality); see also Laurence C. Harmon & Gregory A. Lang, *A Needs Analysis of an Intermediate Appellate Court*, 7 WM. MITCHELL L. REV. 51, 53 (1981) (stating that in 1966 the Minnesota Citizens’ Conference to Improve the Administration of Justice proposed the idea of an intermediate court, as did the State Judicial Council in 1968).

government would be costly and prove unnecessary because all appeals would eventually end up in the supreme court anyhow.<sup>25</sup> Others were reluctant to give the governor the authority to appoint a whole new court. The advocates' diligent efforts were rewarded, and the amendment was placed on the ballot.

The amendment received overwhelming support, passing with 77% of the vote, and on November 2, 1982, the Minnesota Constitution was amended to allow the legislature to create the Minnesota Court of Appeals.<sup>26</sup> The original six members of the court of appeals took the oath of office in November of 1983, and the second six took the oath of office in April 1984, thereby fully staffing the twelve-judge court.<sup>27</sup> The original court of appeals was led by Chief Judge Peter Popovich, who not only had to lead the court but needed to help define the role that it would play in the Minnesota judiciary.<sup>28</sup>

To begin with, the first chief judge had to establish the goals for the newly created court. One goal of the court was to decrease appellate case processing time and decrease the workload of the supreme court.<sup>29</sup> Another of the court's goals, due to its dissatisfaction with the supreme court's practice of issuing summary affirmances, was to provide reasons for all of its decisions in full-length written opinions.<sup>30</sup> As Judge Wozniak stated, "because the public and the bar came to the realization that justice delayed [is] justice denied," the ultimate goal of the court of appeals was to provide the citizens of Minnesota "with an efficient, inexpensive, and expeditious appeal process."<sup>31</sup> The Minnesota Court of Appeals officially stated purpose is "[t]o provide the

25. Barbara L. Jones, *The Court of Appeals Celebrates its Silver Anniversary*, at <http://www.minnlawyer.com/article.cfm/2008/10/20/The-Court-of-Appeals-celebrates-its-silver-anniversary-In-25-years-the-court-has-gone-from-the-new-k>. "Seven of the 21 members of the intermediate court ad hoc committee had dissented from the recommendation to create the court." *Id.*

26. AMUNDSON, *supra* note 20, at 29–30. *See also* 1982 Minn. Laws ch. 501 (stating that "[t]he legislature may establish a court of appeals and provide by law for the number of its judges, who shall not be judges of any other court, and its organization and for the review of its decisions by the supreme court. The court of appeals shall have appellate jurisdiction over all courts, except the supreme court, and other appellate jurisdictions as prescribed by law").

27. AMUNDSON, *supra* note 20, at 32.

28. *Id.* at 30, 36.

29. Popovich, *supra* note 17, at 584–85.

30. *Id.*

31. The Honorable D. D. Wozniak, Address to the Minnesota State Bar Association Board of Governors (Jan. 17, 1992).

people with impartial, clear, and timely appellate decisions made according to law.”<sup>32</sup>

As stated, after the constitution was amended, the legislature created the court by passing legislation and adopting Minnesota Statutes section 480A.<sup>33</sup> The Minnesota Court of Appeals is unique in that it must handle every case that is properly filed,<sup>34</sup> and it is required to submit each case to a panel of at least three judges.<sup>35</sup> Retired judges sit with the court for temporary terms substituting for judges on the panel when they are absent due to other judicial duties or for personal reasons. The decision of the court must be rendered in every case within ninety days after oral argument or after the final submission of briefs or memoranda by the parties.<sup>36</sup> This deadline is the shortest one imposed on any appellate court in the country.<sup>37</sup> Incredibly, from 1983 to 1987 every opinion of the Minnesota Court of Appeals was published, but this procedure proved to be time consuming and costly.<sup>38</sup> The court reluctantly agreed that publication would be limited to far-reaching and important cases affecting more than just fact-oriented decisions, and the legislature amended section 480A.08 of the Minnesota Statutes providing that the court need not publish every opinion and creating a standard to determine whether an opinion is worthy of publication.<sup>39</sup> It is said that only published opinions have any

32. Mission Statement of the Minnesota Court of Appeals, *available at* [http://archive.leg.state.mn.us/docs/2004/mandated/040620/budget/budget/www.budget.state.mn.us/budget/operating/200607/background2/court\\_appeals.pdf](http://archive.leg.state.mn.us/docs/2004/mandated/040620/budget/budget/www.budget.state.mn.us/budget/operating/200607/background2/court_appeals.pdf).

33. MINN. STAT. § 480A.01–.11 (1982).

34. Wozniak, *supra* note 18, at 589.

35. MINN. STAT. § 480A.08, subdiv. 1 (2008). This requires the 2,300-plus cases that are filed with the court to be heard by three of the nineteen judges. Thus each judge hears and decides approximately four hundred cases per year. Each judge, however, issues approximately 180 opinions per year.

36. *Id.* at subdiv. 3.

37. I’LL SEE YOU IN COURT: A CONSUMER GUIDE TO THE MINNESOTA JUDICIAL BRANCH 12, [http://www.mncourts.gov/Documents/0/Public/Court\\_Information\\_Office/Ill\\_See\\_You\\_in\\_Court\\_6.08.pdf](http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Ill_See_You_in_Court_6.08.pdf).

38. Popovich, *supra* note 17, at 585.

39. *Id.* See also MINN. STAT. § 480A.08, subdiv. 3(b)(c) (1987).

(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.

(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;

precedential value and today the number of unpublished opinions far exceeds the number of published opinions.<sup>40</sup>

The Minnesota Court of Appeals has been recognized as a national model of efficiency.<sup>41</sup> But that does not mean things are perfect. Recently, and for the first time in many years, due to budget constraints, the court of appeals failed to meet the ABA standards in clearance rates for timeliness from last brief to submission, and from last brief to disposition.<sup>42</sup> Since October 2006, parties to an appeal have had to wait approximately 180 days from the time briefing was complete to the time argument was scheduled. This is a significant increase from the court's historic average, which, prior to 2003, was thirty to forty-five days. In 2005, the court of appeals backlog reached 506 cases. Amazingly, this was a 52% increase over the backlog in 2004 and a 283% increase over 2003. Due to these delays and the foreseeability of increased case filings, the Minnesota Court of Appeals was given funding to add three judges and staff to help reduce the backlog and meet future needs.<sup>43</sup> In 2008, the court consists of nineteen judges, seven staff attorneys, fifty law clerks, and twenty-three administrative staff. At the time of publication of this article the state budget forecasts look grim.<sup>44</sup> How budget deficits and reduced state spending will affect the court of appeals remains to be seen.

#### IV. IMPACT OF THE MINNESOTA COURT OF APPEALS ON THE MINNESOTA JUDICIARY AND THE PRACTICE OF LAW

##### A. *Impact of the Creation of the Minnesota Court of Appeals*

Generally speaking, the scope of review of an appellate court is

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(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.

40. MINN. STAT. § 480A.08, subdiv. 3. The abundance of unpublished opinions and paucity of published opinions is discussed in greater detail below. See *infra* Part IV.C.

41. See Minnesota Court of Appeals Budget Request <http://www.mmb.state.mn.us/doc/budget/req-non-exec/court-appeals.pdf>.

42. *Id.*

43. Jones, *supra* note 25. "Since September 2007, the Court of Appeals has decreased the number of cases awaiting scheduling by about 200." *Id.*

44. Recent state budget forecasts predict a \$ 5 billion shortfall. See Patricia Lopez, *Minnesota is \$5.2 Billion in the Hole*, STAR TRIB. (Minneapolis), Dec. 4, 2008 at <http://www.startribune.com/politics/state/35539039.html?elr=KArksUUUU>.

narrowly defined and typically allows only review of a lower court's decision rather than determining facts. The function of the Minnesota Court of Appeals is theoretically limited to identifying errors and then correcting them.<sup>45</sup> In this role the Minnesota Court of Appeals has been very effective.<sup>46</sup> The introduction to the Minnesota Court of Appeals Internal Rules states:

The Court of Appeals is an intermediate appellate court. It is primarily decisional and error correcting rather than a legislative or doctrinal court. Its primary function is the correction of error by application of legal principles. Its task is to find the law, to state it and to apply it to the facts. Only when there are no statutory or judicial precedents to follow will the Court of Appeals make new law.<sup>47</sup>

On numerous occasions the court itself has stated that its role is not to make new law, rather "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."<sup>48</sup> This does not mean that the court is incapable of making or, at the very least, influencing what the law is. The court of appeals is a high-volume court, and it has issued over fifty thousand decisions during its twenty-five-year existence.<sup>49</sup> The impact of the court of appeals can be felt far and wide throughout the Minnesota judiciary, the practice of law in Minnesota, and the state in general. Some of these impacts can be quite obvious.

### 1. Other Courts

#### a. Minnesota Supreme Court

Take for instance the impact that the Minnesota Court of Appeals has had on the Minnesota Supreme Court. One would be hard pressed to picture what the Minnesota judiciary would look

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45. See Introduction, Minnesota Court of Appeals, Internal Rules, Introduction (1983); see also P. Popovich & D. Niles, *A Practitioner's Guide to Bringing an Appeal in the Minnesota Court of Appeals*, 11 WM. MITCHELL L. REV. 627, 630 (1985).

46. The Honorable Paul H. Anderson, *Reflections on the Future of the Minnesota Court of Appeals*, 19 WM. MITCHELL L. REV. 569, 569 (1993).

47. *Id.*

48. *St. Aubin v. Burke*, 434 N.W.2d 282, 283 (Minn. Ct. App. 1989), *review denied* (Minn., Mar. 17 1989).

49. Lansing, *supra* note 3, see also MINNESOTA COURT OF APPEALS CELEBRATES 25 YEARS OF DOING JUSTICE at <http://www.mncourts.gov/district/0/?page=NewsItemDisplay&item=43500> (stating that the court has issued over fifty-five thousand opinions since its creation).

like today without the court of appeals. Some suggest that the supreme court would never have been able to handle the amount of appeals that exist today without serious and significant changes. Indeed, some commentators suggest that the supreme court would have quite likely imploded under the weight of such caseloads. Some things are certain. Without the creation of the court of appeals, opinions would take a year or more to be issued. Oral arguments would be rare while summary decisions would be commonplace. The days of one-word affirmances are, so far, behind us, thanks in large part to the Minnesota Court of Appeals.

The supreme court no longer needs to and does not take every case. Because 95 to 97% of direct appeals end with the Minnesota Court of Appeals, the Minnesota Supreme Court is afforded the luxury of granting certiorari or petitions for further review.<sup>50</sup> The reduced case load allows the supreme court to be selective and choose the cases that it feels are ready for a “supreme court” ruling. The creation of the Minnesota Court of Appeals has freed the Minnesota Supreme Court to tackle the in-depth issues involving constitutional challenges and devote the proper amount of time to decide difficult issues. The Minnesota Supreme Court once again is able to issue opinions on all of the cases that it chooses to review with detail and thought appropriate for a supreme court. The Minnesota Supreme Court is also afforded the benefit of an additional appellate review in the form of a thought out and detailed opinion from the court of appeals. The court of appeals’ opinion may not provide any precedential value, but, at the very least, it suggests how one court chose to approach the law and analyze the issues.

*b. District Courts*

The court of appeals has also had a fairly obvious and direct impact on the district courts in Minnesota. Some commentators suggest that district court judges are more cognizant of the possibility of remand and reversal and as a result have issued better-reasoned decisions. The volume of opinions from the court of appeals has also assisted the district courts in understanding how an appellate court will apply the law to varied factual situations. It is true that different panels of the court of appeals have not always agreed on the same or very similar issues, no doubt causing some

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50. *Id.*

strife between the court of appeals and the district courts.<sup>51</sup> The panel disagreements have also caused lawyers consternation as to what “the law” is when dealing with similar situations and we will discuss this further below.<sup>52</sup> Yet, the court of appeals continues to issue thousands of opinions a year and district courts must adhere to those decisions. Another way the court of appeals has affected the district courts is that the sheer number of opinions available has allowed practitioners to be better prepared and more focused as to what the law is and how it should be applied to given set of facts. Better prepared attorneys help the district courts move through the court calendar more efficiently because the litigants are more focused. All in all, the district courts have benefited from the creation of the court of appeals.

## 2. *Legal Practitioners*

The Minnesota Court of Appeals has also had an obvious and dramatic impact on the practice of law in Minnesota. The massive volume of opinions has necessitated that practitioners must read more opinions, published and unpublished, to keep up with the state of the law. In this regard some suggest that the creation of the court of appeals has dramatically increased the time attorneys spend in the practice of law. Others suggest that the volume of case law created by the court of appeals has helped breed specialization in practice areas and specialization has created better attorneys. What appears to be true is, because there is more law on any given subject, attorneys are able to focus on a particular practice area to the exclusion of others. Without question, however, the creation of court of appeals definitely helped spawn the creation of a specialized appellate practice in Minnesota. Prior to the creation of the court of appeals very few practitioners would have been considered appellate specialists. In fact, most Minnesota attorneys could name only a couple attorneys who specialized in appellate practice prior to 1983.<sup>53</sup> With the creation of the court of appeals<sup>54</sup> came the automatic right to appeal and the right to be

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51. See *infra* notes 70–71 and accompanying text.

52. See *infra* notes 71–72 and accompanying text.

53. Among the names recalled through interviews with many practitioners and judges were O. C. Adamson II (Ocky), Mary Jean Coyne, John French, and James Simonson.

54. MINN. STAT. § 480A.01 (1982) (creating the Minnesota Court of Appeals).

granted an oral argument,<sup>55</sup> so long as it is requested.<sup>56</sup> These rights are very unique. In fact, very few states offer what Minnesota does when it comes to the opportunity to appeal, and this access has necessitated the evolution of the specialized appellate practice. Today, most practitioners are comfortable with the fact that some of their colleagues spend their whole careers arguing cases at the appellate level.

### 3. *The Public*

The creation of the Minnesota Court of Appeals has also impacted the public at large. Along with the courts and practitioners, the Minnesota citizenry is one of the court of appeals' constituents, and certainly one of its customers. The public has benefited from the creation of the court in numerous ways. First, the court of appeals has allowed the public greater access to appellate courts. As previously discussed, every person who would like to take an appeal has the ability to get a hearing and have an opinion rendered by the court. Second, because of the legislatively mandated requirements, the court of appeals has allowed the public to receive a thoughtful written opinion in a much shorter time. Third, the court has instituted and used a consistent opinion format that is easy to read and understand, thereby allowing the public to determine the law and understand the reasoning that the court used in making its decision.<sup>57</sup> Parties might not always like the outcomes, but at least they are able to appreciate the court's logic. Fourth, the Minnesota Court of Appeals has made justice more accessible to the public. Because three-judge panels travel to locations throughout the state to hear oral arguments, outstate residents are not burdened by the necessity of traveling to the court's home on the state capitol complex in Saint Paul. In addition, the court of appeals has invested in technology allowing outstate parties to participate in oral argument through the use of interactive video. This also allows parties to be heard without having to travel the many hours to and from Saint Paul. Finally, the creation of the court of appeals

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55. *Id.* § 480A.09 (2008) (listing place of hearing, right to appeal, and right to an oral argument).

56. 3 MINN. R. APP. P. 134.01 (2008) (stating that the court of appeals will grant oral argument, with exception, so long as the parties request it).

57. Internal Court of Appeals Judicial Law Clerk Training Manual, on file with authors.



necessitated creating a place to house the new court. As a result, the Minnesota Judicial Center was built. Prior to building the Judicial Center, the supreme court had been located in the Minnesota State Capitol. Now, however, both the Minnesota Supreme Court and Minnesota Court of Appeals are housed in one building, while the ceremonial Supreme Court Chamber is preserved in the state capitol.

*B. College of Judicial Scholars*

Some of the impacts from the creation of the court of appeals are much more subtle than reduced caseloads for the Minnesota Supreme Court and the stone and mortar of the Judicial Center. Take for instance, the creation of a college of judicial scholars who may not have had the opportunity to serve and grow as judges without the court of appeals. Since the creation of the Minnesota Court of Appeals forty-three judges have served or continue to serve the court. The current make up of the court includes nineteen judges. The collegial environment of the court of appeals has allowed these judges to grow in a manner that has benefited and impacted the state of Minnesota in a variety of ways. This group of judges has had the opportunity, on a daily basis, to think about what the law is and how the law should be applied without the burden of having to be an advocate. They have listened to hundreds, perhaps thousands, of oral arguments and read thousands of appellate briefs. They have had the opportunity to draft and issue opinions and dissents. These judges have mentored and educated other judges and practitioners. They have taught at our area law schools and been active in numerous organizations. Additionally, six judges from the court of appeals have advanced to become justices of the Minnesota Supreme Court.<sup>58</sup> These impacts have positively benefited the state and the Minnesota judiciary.

Another subtle impact should be mentioned lest it be deemed inconsequential. One cannot quantify the impact of approximately a thousand judicial law clerks, who spent a year or more working for a judge at the court of appeals, have had on the practice of law in Minnesota. Unlike many of their counterparts, who go right into practice, the judicial law clerks focus on analyzing the legal

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58. The six who became Minnesota Supreme Court Justices are Peter S. Popovich, Sandra S. Gardebring, Paul H. Anderson, Sam Hanson, G. Barry Anderson, and Christopher Dietzen.

issues in conflicting appellate briefs, conducting in-depth legal research, as well as spending many hours a day writing and editing. In addition, they have an open door to a judge's chamber to talk through the difficult or unique issues. These clerks assist the judges in preparing for the oral arguments and in editing opinions and dissents. This exposure to the judicial thought process helps these legal scholars grow in a way that cannot be duplicated in private practice. In addition to becoming practitioners, some of the alumni clerks have gone on to be mayors of major Minnesota cities, or state legislators.<sup>59</sup> Most former court of appeals law clerks remember fondly their time with the court and suggest that is unfortunate that every attorney cannot have the same experience.<sup>60</sup> In fact, many suggest that it is the best job that they ever had.

### C. *Precedential Value of Court of Appeal Decisions*

There has been great debate over the precedential value of Minnesota Court of Appeals decisions.<sup>61</sup> Precedent is established when an appellate court's opinion is binding on lower courts within its jurisdiction thereby creating predictability in the judicial system.<sup>62</sup> The concept of precedent encourages similar treatment of similarly situated individuals because courts can rely upon prior decisions to define what permissible conduct is under the law.<sup>63</sup> Precedent, however, is not set in stone. Rather, precedent will ultimately "depend . . . on the continued validity of its underlying policies and the validity of its logic."<sup>64</sup> In other words, the laws which act to govern society evolve as the society does. The Minnesota Supreme Court reviews approximately 3 to 5% of the 2,400 cases filed with the Minnesota Court of Appeals. Of those cases reviewed about half are reversed or remanded, meaning that

59. Mayor Chris Coleman of St. Paul served as a law clerk to the Honorable Doris Huspeni from 1985 to 1986. State Representative Jean Wagenius served as a law clerk to the Honorable Harriet Lansing from 1983 to 1984.

60. Interview with M. Gregory Simpson, in Minneapolis, Minn. (Jan. 22, 2008). Mr. Simpson served as a judicial law clerk for the Honorable Marianne D. Short in 1989–90.

61. See Jennifer K. Anderson, *The Minnesota Court of Appeals: A Court Without Precedent?*, 19 WM. MITCHELL L.REV. 743 (1993).

62. See *id.* at 743–45 (citing MARSHALL HOUTS ET AL., ART OF ADVOCACY—APPEALS (MB) § 6.04, at 6–16 (Oct. 3, 1992)); Theodore M. Benditt, *The Rule of Precedent*, in PRECEDENT IN LAW 89, 91 (Laurence Goldstein ed., 1987).

63. *Id.* at 745 (citing Benditt, *supra* note 62, at 90–91).

64. *Id.* (quoting HOUTS, *supra* note 62, § 6.04 at 6–16).

nearly 97% of cases filed with the court of appeals are final and binding on the district courts.

The model of precedent becomes somewhat imprecise when applied to decisions of intermediate appellate courts.<sup>65</sup> It is true that an appellate court decision binds all courts subordinate to it. But an appellate court decision does not have any precedential value outside its own jurisdiction. Instead, other jurisdictions view appellate court decisions as persuasive, and, as such, the decisions of the state's highest court hold the most persuasive value outside the jurisdiction.<sup>66</sup> Thus, even though the Minnesota Court of Appeals is often cited by other jurisdictions, these jurisdictions are only identifying the persuasive value of the opinions and these jurisdictions will generally look to the state's supreme court decisions first.

In Minnesota, decisions by the supreme court are unquestionably binding on the court of appeals and state's district courts. But there is some debate regarding the binding effect that decisions of the court of appeals have on the district courts.<sup>67</sup> The district courts have occasionally been forced to wade through numerous Minnesota Court of Appeals opinions that conflict on similar issues of law causing the district court to look to the Minnesota Supreme Court for guidance.<sup>68</sup> This may be, in part, due to the fact that the court of appeals hears cases in three-judge panels, which occasionally have issued conflicting opinions on very similar subject matter, sometimes even on the same day. For example, in *Gray v. Commissioner of Public Safety* and *Ascher v. Commissioner of Public Safety*, two different panels of the court of appeals issued opinions on the same date, reaching diametrically opposite conclusions regarding the constitutionality of sobriety check points.<sup>69</sup> It appears that each panel was aware of and distinguished the decision of the other and neither acted as if the other panel's decision was controlling. These conflicting decisions place the district courts in the difficult position of trying to

65. Taylor Mattis & Kenneth G. Yalowitz, *Stare Decisis Among the Appellate Courts of Illinois*, 28 DEPAUL L.REV. 571, 572 (1979).

66. Anderson, *supra* note 61 at 745.

67. *Id.* at 757.

68. Anderson, *supra* note 46 at 578.

69. Compare *Gray v. Comm'r of Pub. Safety*, 505 N.W.2d 357 (Minn. Ct. App. 1993), with *Ascher v. Comm'r of Pub. Safety*, 505 N.W.2d 362 (Minn. Ct. App. 1993). See also Anderson, *supra* note 46 at 578. "Heightened awareness will minimize both the real and perceived problem [of inconsistent opinions]." *Id.*

determine which panel's opinion is the law and thus should be followed. In addition, the court of appeals is also responsible for some of the confusion in the district courts because at times the court of appeals has not even found its own decisions precedential. In *In re Rodriguez*,<sup>70</sup> a panel of the court of appeals expressly rejected a prior panel's decision on a nearly identical issue with regard to mental health commitment, "preferring to follow instead the views expressed" by the dissenting judge in the earlier case.<sup>71</sup> The court of appeals is aware of the resulting confusion caused by having conflicting opinions released and through the implementation of technology and procedure has worked diligently to ensure that each panel knows what other panels are working on in an effort to thereby eliminate issuing conflicting opinions in the future.<sup>72</sup>

Another question of precedential value arises when district courts attempt to discern what weight to place on the fact that a case was denied review by the Minnesota Supreme Court.<sup>73</sup> The Minnesota Supreme Court expressly addressed this issue in *Murphy v. Milbank Mutual Insurance Co.*,<sup>74</sup> where the court of appeals followed *Boroos v. Roseau Agency, Inc.*<sup>75</sup> Because the supreme court had denied a petition for review, *Boroos* appeared to have additional precedential authority.<sup>76</sup> Despite the fact that the issues in *Murphy* and *Boroos* were identical, the supreme court granted a petition for review in *Murphy*.<sup>77</sup>

Review of any decision of the Court of Appeals is discretionary with the Supreme Court . . . . Consequently, denial of a petition for further review means no more than that the supreme court has declined, at that time and for whatever undisclosed reasons, to consider the matter. Our discretionary review is not unlike the

70. 506 N.W.2d 660 (Minn. Ct. App. 1993).

71. 506 N.W.2d at 66. *But see* *Morgan v. Illinois Farmers Ins. Co.*, 392 N.W.2d 37, 40 (Minn. Ct. App. 1986) (declaring that the panel was bound by a different panel's decision on the same issue in *Skarsten v. Dairyland Ins. Co.*, 381 N.W.2d 16 (Minn. Ct. App. 1986)).

72. Internal Court of Appeals Judicial Law Clerk Training Manual, on file with authors. *See also* Anderson, *supra* note 46 at 578. "I have also put a top priority on internal review of opinions to minimize inconsistencies." *Id.*

73. Minn. R. Civ. App. P. 117 (2006).

74. 388 N.W.2d 732 (Minn. 1986).

75. *Murphy*, 388 N.W.2d 732.

76. *Boroos v. Roseau Agency, Inc.*, 345 N.W.2d 788 (Minn. Ct. App. 1984), *review denied* (Dec. 24, 1984).

77. *Murphy*, 388 N.W.2d at 739.

certiorari jurisdiction of the United States Supreme Court, where that court has often said that a denial of certiorari cannot be interpreted as an adjudication or expression of opinion on the merits of the case.<sup>78</sup>

The court went on to warn that “[t]he temptation to read significance into a denial of a petition for further review is best resisted. The denial does not give the court of appeals’ decision any more or less precedential weight than a court of appeals’ decision from which no review is sought.”<sup>79</sup> Notwithstanding this statement to the contrary, practitioners, rightly or wrongly, place some significance on the fact that a decision was denied review. Thus, district courts must, at the very least, speculate as to why review was denied in basing their own opinions on the court of appeals’ decisions.

The idea of the precedential value of Minnesota Court of Appeals decisions has been blurred even further by the Minnesota Legislature’s 1987 adoption of Minnesota Statutes section 480A.08, allowing the court of appeals to issue unpublished decisions.<sup>80</sup> As previously mentioned, for the first five years of the court of appeals existence every case received a published opinion, which had a full recitation of the facts. Since then only a small percentage of the court’s decisions are published each year. The legislature provided specific criteria for determining whether the court should publish a decision and thus create precedent.<sup>81</sup> The Minnesota Supreme

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78. *Id.*

79. *Id.*

80. MINN. STAT. § 480A.08, subdiv. 3(b)(c) (2006).

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.

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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.*

81. 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.

Court has addressed this issue as well stating that the district court erred “both as a matter of law and as a matter of practice” by relying on an unpublished opinion of the court of appeals, “stress[ing] that unpublished opinions of the court of appeals are not precedential,” and noting that “[t]he danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts” and “[u]npublished opinions should not be cited by the district court as binding precedent.”<sup>82</sup> But unpublished opinions may be persuasive.<sup>83</sup>

The foregoing discussion examined the precedential value of decisions of the Minnesota Court of Appeals with a focus mainly on the district courts. This is, in part, due to the fact an intermediate appellate court’s opinions have no precedential value for a higher court. The district courts, however, are only one of the consumers of the court of appeals’ decisions. Even though unpublished opinions, by law, have absolutely no precedential value, they are available to the public in general and practitioners more specifically. In order to keep abreast of developments in the law and to be able to provide their clients the utmost representation, practitioners read and cite unpublished Minnesota Court of Appeals opinions to district courts all the time, arguing that the unpublished decisions are “at the very least” persuasive. To not do so would be considered by some to be malpractice.

It is certainly true that the unpublished decisions add to the body of law in Minnesota simply with their very existence. Practitioners and the public must rely on these decisions to a certain degree to help determine what the current state of the law might be. In this context, whether the opinions are precedent is beside the point. Instead, the focus becomes, “I need to advise my client that the court of appeals has issued this opinion and this is what the court will likely do and say about any given similar situation.” Moreover, practitioners often face the dilemma of being unable to find a published opinion on point when they are able to find an unpublished case that is roughly on point. Under these circumstances, practitioners must act in their client’s best interest and make the logical connection that this is likely what the law is because this is what the court said in this situation. Whether an unpublished decision, or a published decision for that matter,

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MINN. STAT. § 480.08, subdiv. 3(c).

82. *Vlahos v. R & I Constr.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004).

83. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993).

has any precedential value is moot because practitioners and their clients are relying on these decisions on a daily basis.

*D. The Impact of Specific Decisions of the Minnesota Court of Appeals upon Civil Litigation*

Having determined the role and precedential value of Minnesota Court of Appeal decisions, one remaining question that begs to be answered is: how have actual decisions of the Minnesota Court of Appeals affected the practice of law in Minnesota? The sheer volume of cases heard and the very nature of the court's position as an intermediate appellate court combined with the fact most decisions by the court are final, dictate that decisions by the court must be given significant weight by practitioners and district courts. Moreover, the court's position as an intermediate appellate court demands that the court wade into and make decisions dealing with issues of first impression for the state of Minnesota. In addition, by their nature, appellate courts are required to routinely issue decisions that reconcile difficult fact scenarios—the easy fact scenarios are not routinely appealed. The Minnesota Court of Appeals handles appeals on nearly every type of legal issue imaginable including various criminal law issues, family law, employment law, as well as other civil litigation matters. The effects of its decisions in each area are felt throughout the state.

It is probably inappropriate to single out one particular court of appeals decision as having more impact upon civil litigation than any other. Instead of picking out one particular decision we will examine the court's impact on one specific area of civil litigation, namely closely held corporations. However, if we were forced to pick one single case, *Pedro v Pedro*, 489 N.W.2d 798 (Minn. Ct. App. 1992)<sup>84</sup> (often referred to as *Pedro II*) certainly is a contender. In preparation for participation in the November 6, 2008, Day of Celebration of the 25th Anniversary of the court of appeals, the authors contacted a number of judges and appellate practitioners to seek their thoughts as to the impact on civil litigation of particular decisions of the court of appeals. Judge Matthew E. Johnson expressed these words to former court of appeals Judge Marianne Short who chaired a symposium including one of this

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84. *Pedro v. Pedro*, 489 N.W.2d 798 (Minn. Ct. App. 1992), *review denied* (Minn. Oct. 20, 1992) [hereinafter "*Pedro II*"]. *Pedro II* was decided with Judge Norton presiding, together with Judges Lansing and Davies.

article's authors:

Off the top of my head i.e., without looking hard to find a more worthy case I would nominate [*Pedro II*]. It seems to me that it has been the seminal case in the minority shareholder area since it was decided. It has been cited about fifty times by the court of appeals, the federal district court and other courts without ever as far as I can recall being overwritten by the supreme court; until last year, perhaps, when it received a cf. cite in *Drewitz v Motorwerks, Inc.*, 728 N.W.2d 231, 236 (Minn. 2007). Note also that the first *Pedro* case, *Pedro v Pedro*, 463 N.W.2d 285 (Minn. App. 1990) (*Pedro I*) has also been cited more than twenty times but never by the supreme court.<sup>85</sup>

*Pedro II* required the Minnesota Court of Appeals to deal with a unique set of facts.<sup>86</sup> Brothers Alfred, Carl, and Eugene Pedro each owned a one-third interest in the closely held Pedro Corporation.<sup>87</sup> All three brothers worked in the business for all or most of their adult lives.<sup>88</sup> The corporation had annual sales of approximately six million dollars.<sup>89</sup> Alfred was fired at the age of sixty-two after having worked for the corporation over forty-five years.<sup>90</sup> Each brother had received the same benefit and compensation as the others and held an equal voice in management.<sup>91</sup> Before being fired, Alfred had discovered what he thought to be a discrepancy in excess of three hundred thousand dollars within the corporate internal accounting records.<sup>92</sup> Some of the discrepancy was reconciled with the help of an outside accounting audit but about half was not.<sup>93</sup> A second independent accounting audit was conducted to no avail and that auditor testified at trial that he had been refused access to many documents and twenty leads were never followed up before he ended his investigation.<sup>94</sup> The trial court awarded Alfred various damages totaling around two million dollars including for breach of fiduciary duties, wrongful

85. Interview with the Honorable Marianne Short, Minnesota Court of Appeals, in St. Paul, Minn. (Nov. 2, 2008).

86. *Pedro II*, 489 N.W.2d 798.

87. *Id.* at 799.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 800.

93. *Id.*

94. *Id.*



termination, lost wages, interest and attorney fees.<sup>95</sup>

The court of appeals emphasized the unusual facts of the case: (1) the plaintiff had been an employee for forty-five years and (2) the majority owners fired him at the age of sixty-two after he had uncovered serious accounting irregularities.<sup>96</sup> Interesting language used by the court qualifies as holding rather than dictum. It is here paraphrased rather than directly quoted:

- (1) Shareholders in closely held corporations owe one another a fiduciary duty similar to that of partners in a business partnership.<sup>97</sup>
- (2) Owing a fiduciary duty includes dealing openly, honestly and fairly with other shareholders.<sup>98</sup>
- (3) An action depleting a corporation's value is not the exclusive method of breaching one's fiduciary duties.<sup>99</sup>
- (4) Minn. Stat. § 302A.751 subdiv. 3a allows courts to look to a minority shareholders' reasonable expectations when awarding damages in addition to an ownership interest. The reasonable expectations of such shareholders are a job, salary, significant place in management and economic security for his family.<sup>100</sup>
- (5) Alfred Pedro testified of his expectation of a lifetime job like his father. He had already been employed for forty-five years. It was reasonable for the trial court to determine that the parties did in fact have a contract that was not terminable at will and which provided Alfred rights beyond and inconsistent with those of the written contract.<sup>101</sup>
- (6) Alfred has two separate interests, as owner and employee. Thus allowing recovery for each interest is appropriate and will not be considered a double recovery.<sup>102</sup>

Along its way to judgment, the court of appeals dealt with a number of issues including imposing joint and several liability

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95. *Id.*

96. *Id.* at 803.

97. *Id.* at 801.

98. *Id.*

99. *Id.* at 803.

100. *Id.*

101. *Id.* at 803.

102. *Id.*

upon Alfred's brothers for their breach of their fiduciary duties to minority shareholder Alfred<sup>103</sup> and affirming the trial court's refusal to disqualify itself upon remand from the earlier appeal of *Pedro I*, noting that "[i]n order for bias . . . to be disqualifying it 'must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in [*Pedro I*']'" prior to appeal.<sup>104</sup>

According to one commentator, *Pedro II* attempts to correct the asymmetry between the liability model and the damages model typically associated with the oppression doctrine.<sup>105</sup> *Pedro II* stands for no more than the conventional propositions that wrongful termination damages can be recovered when an employment agreement is breached, and a standard buyout can be awarded when a reasonable expectation is frustrated.<sup>106</sup> Despite this criticism, it is hard to think of the court of appeals as only an error-correcting court. *Pedro II* is frequently quoted as authority in minority shareholder rights cases for defining a fiduciary duty to include conducting that fiduciary duty "openly, honestly, fairly" in recognition of a minority shareholder's reasonable expectation of lifetime employment, together with a significant role in management. *Pedro II* is also cited as authority for determination of the existence of joint and several liability of the majority shareholders in such context as well as entitlement to attorney's fees and to multiple categories of damages and interest on the part of the ill-treated minority shareholder of a close corporation. It is equally hard to think of *Pedro II* as lacking precedential value when it has been cited by courts fifty-four times and never overturned by the Minnesota Supreme Court.<sup>107</sup>

Eight years after *Pedro II*, the court of appeals had another opportunity to deal with a closely held corporation in *Berremán v. West Publishing Co.*<sup>108</sup> In *Berremán*, the court examined whether (1) the Minnesota Business Corporations Act abrogates the common

103. *Id.*

104. *Id.* at 804 (citing *In re Estate of Lange*, 398 N.W.2d 569, 573 (Minn. Ct. App. 1986)).

105. Douglas K. Moll, *Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution*, 1999 U. ILL. L.REV. 517, 572-73 (1999).

106. *Id.* at 573-74.

107. A Westlaw search reveals that courts have cited *Pedro II* fifty-four times. The case has been cited in secondary sources fifty-five times.

108. *Berremán v. West Publ'g Co.*, 615 N.W.2d 362 (Minn. Ct. App. 2000), *review denied* (Minn. Sept. 27, 2000).

law definition of a close corporation for purposes of determining the scope of a fiduciary duty;<sup>109</sup> (2) the fiduciary duty owed by one shareholder to another in a closely held corporation includes the duty to disclose material information about the corporation;<sup>110</sup> (3) materiality is an element of unfairly prejudicial conduct under Minn. Stat. § 302A.751, subdivision 1(b)(3) (1994)<sup>111</sup>; and (4) unfairly prejudicial conduct under Minnesota Statutes § 302A.751, subdivision 1(b)(3) is conduct that frustrates the reasonable expectations of shareholders in their capacity as shareholders or directors of a corporation that is not publicly held, or as officers or employees of a closely held corporation.<sup>112</sup>

Thomas Berreman was a twenty-five year employee of West Publishing Co.<sup>113</sup> Over a twenty-one year period he had acquired approximately 1,600 shares of that company's closely held common stock.<sup>114</sup> In April 1995, Berreman told West's Chief Executive Officer that he intended to retire effective June 1, 1995.<sup>115</sup> His last day of work was May 31, 1995, and on June 1, 1995, Berreman redeemed his 1,600 shares of West common stock at the then-current book value of \$2,088.90 per share, a value of \$3,342,240.00.<sup>116</sup>

When he redeemed his shares, Berreman was unaware that: (1) during the second week of May 1995, West's Chief Financial Officer concluded that West should consider being acquired or enter into a joint venture; (2) on May 17, 1995, West's directors met with an investment banking firm to obtain advice about the company's future financial options, including a possible sale of the company, and (3) on May 23, 1995, the West board authorized its investment bankers to explore financing options beyond West's local bank.<sup>117</sup> These decisions had a dramatic affect on the value of West stock. On August 29, 1995, West publicly announced that it had engaged investment bankers and was considering alternative financial options.<sup>118</sup> In September 1995, West sent out requests for

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109. *Id.* at 368–69.

110. *Id.* at 370–71.

111. *Id.* at 372–73.

112. *Id.* at 373–74.

113. *Id.* at 365.

114. *Id.*

115. *Id.*

116. *Id.* at 366.

117. *Id.*

118. *Id.* at 366–67.

bids to potential acquirers.<sup>119</sup> In February 1996, West entered into a merger agreement with Thomson Corporation, and four months later Thomson paid \$10,445 per share to acquire West Publishing Co.<sup>120</sup> At this price Berreman's interest would have been valued at \$16,712,000, roughly \$13 million more than he received in June of 1995.

Berreman claimed that West and three of its directors breached fiduciary duties owed to him, and that they committed fraud.<sup>121</sup> These claims required the court to consider when preliminary merger discussions become "material" for purposes of fraud. The court of appeals relied upon *Pedro* to determine that a fiduciary duty exists in a closely held corporation because "the relationship among shareholders on a closely held corporation is analogous to that of partners"<sup>122</sup> and "that shareholders in a close corporation have a duty to deal 'openly, honestly, and fairly with other shareholders.'"<sup>123</sup>

After determining that a fiduciary duty existed and that the fiduciary duty required that a shareholder of a closely held corporation must disclose material facts, the court of appeals then relied upon the analysis of the United States Supreme Court as set forth in *Basic Inc. v. Levinson* as well as securities law cases from federal circuit courts to determine what materiality was.<sup>124</sup> Reiterating the Supreme Court's test for materiality, the court of appeals required a balancing of both the "indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."<sup>125</sup> Applying that balancing test, the court held that the facts known to West at the time of Berreman's resignation were immaterial as a matter of law.<sup>126</sup> Thus a corporate decision to explore restructuring options, including the possible sale of the company, coupled with the retention of an investment banker, without a decision to solicit bids or enter into discussion with potential buyers is not material. Like *Pedro II Berreman* adds to the understanding of duties in closely held

119. *Id.* at 367.

120. *Id.*

121. *Id.* at 365.

122. *Id.* (citing *Pedro v. Pedro*, 489 N.W.2d 798, 801 (Minn. Ct. App. 1992)).

123. *Id.* at 371 (quoting *Pedro*, 489 N.W.2d at 801).

124. *Id.* at 371–72 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988), and *Taylor v. First Union Corp.*, 857 F.2d 240, 243 (4th Cir. 1988)).

125. *Id.*

126. *Id.* at 372.

corporations, is still good law, and has been cited numerous times in this and other jurisdictions.<sup>127</sup>

The following year, the court considered whether the shareholder-employee of a closely held corporation had a claim for unfairly prejudicial conduct based on his termination. In *Gunderson v. Alliance of Computer Professionals*,<sup>128</sup> the Minnesota Court of Appeals relied on both *Pedro II* and *Berremán* to hold that a plaintiff claiming that termination violated a reasonable expectation of continued employment must surmount two threshold elements and a balancing test.<sup>129</sup>

In *Gunderson*, shortly after Alliance of Computer Professionals, Inc., (“ACP”) was formed in 1994, Gunderson joined without a written employment contract.<sup>130</sup> Gunderson subsequently drafted and filed the articles of incorporation and became responsible for the administrative and financial affairs of the corporation.<sup>131</sup>

In 1997, Gunderson assumed primary responsibility for drafting a buy-sell agreement, which all of the shareholders signed.<sup>132</sup> He selected the attorney who provided him assistance with the drafting the agreement.<sup>133</sup> The buy-sell agreement included a provision, drafted by Gunderson, allowing for involuntary withdrawal of any shareholder by a 75% vote of all outstanding shares with a formula purchase price based in part on length of time the shareholder had been with the corporation.<sup>134</sup>

In 1998, Gunderson was terminated amid allegations of dishonesty, working short and unpredictable hours, incompetence, failure to draw the corporation’s bylaws, and spending too much time on his own outside consulting business.<sup>135</sup> Based upon the formula that Gunderson created in the buy-sell agreement, the board offered Gunderson \$2,300 for his shares.<sup>136</sup> Gunderson balked and claimed the fair market value of his shares was

127. A Westlaw search reveals that *Berremán* has been cited 117 times in at least five separate jurisdictions and numerous secondary sources.

128. 628 N.W.2d 173 (Minn. Ct. App. 2001), *review granted* (Minn. July 24, 2001), *appeal dismissed* (Aug. 17, 2001).

129. *See id.*

130. *Id.* at 179.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 179–80.

135. *Id.* at 180.

136. *Id.*

\$1,133,000.<sup>137</sup> He then brought claims for breach of employment contract claiming that the founder of ACP had created an oral contract for lifetime employment when he allegedly stated that Gunderson “would always be taken care of” and “stick with me and I will make you rich when we sell the company.”<sup>138</sup> Gunderson also argued that ACP acted in a manner that was unfairly prejudicial toward him as a shareholder of a closely held corporation and as a shareholder-employee, and he sought a buyout at fair value under Minnesota Statutes section 302A.751.<sup>139</sup> Gunderson’s claims were dismissed on summary judgment, and he appealed the district court decision.<sup>140</sup>

The Minnesota Court of Appeals affirmed the district court’s decision with respect to the lifetime-employment claim, reasoning that because there was no contract, Gunderson was an employee at will and certain vague statements by the founder of ACP did not constitute an employment agreement.<sup>141</sup> In considering whether ACP acted in an unfairly prejudicial manner regarding Gunderson’s capacity as a shareholder of a closely held corporation, the court cited *Berremán* stating “we have interpreted the phrase [in a manner unfairly prejudicial toward a shareholder] to mean conduct that frustrates the reasonable expectations of all shareholders in their capacity as shareholders or directors of a corporation that is not publicly held or as officers or employees of a closely held corporation.”<sup>142</sup> The court of appeals agreed with the district court and affirmed on this point as well holding that buying Gunderson out under the buy-sell agreement for \$2,300 was not unfairly prejudicial to him as a shareholder because he had drafted the buy-sell agreement, the agreement was an arm’s-length transaction, and all the shareholders assumed the same risk.<sup>143</sup>

The court of appeals next addressed whether ACP had acted in an unfairly prejudicial manner towards Gunderson as a shareholder-employee. In analyzing this question the court turned to *Pedro II*, finding that “[t]ypical close-corporation shareholders commonly have an expectation of continuing employment with the

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137. *Id.*

138. *Id.*

139. *Id.* (citing Minn. Stat. § 302A.751, subdiv. 2 (1998)).

140. *Id.* at 180–81.

141. *Id.* at 182–84.

142. *Id.* at 184 (citing *Berremán v. West Publ’g Co.*, 615 N.W.2d 362, 374 (Minn. Ct. App. 2000)).

143. *Id.* at 186–87.

corporation.”<sup>144</sup> In the words of the court of appeals:

[E]ven though Gunderson was an at-will employee and, therefore, not wrongfully discharged in the breach-of-contract or tort sense, his employment termination triggers a separate inquiry into whether ACP unfairly prejudiced Gunderson in his capacity as a shareholder-employee. The doctrine of employment-based shareholder oppression is distinct from the wrongful-termination doctrine, and the analysis under the separate doctrines should attempt to protect close-corporation employment and, at the same time, respect the legitimate sphere of the at-will rule.<sup>145</sup>

To the court, there were two threshold questions needing to be addressed. First, in the wrongful termination context the question was whether a contractual agreement or a promise inducing reliance existed.<sup>146</sup> Second, in the context of a claim of shareholder oppression based on the termination of employment the question was whether a minority shareholder’s expectation of continuing employment is reasonable.<sup>147</sup> The court reasoned that a shareholder-employee’s expectation of continuing employment must be balanced against the controlling shareholder’s need for flexibility to run the business in a productive manner.<sup>148</sup> The court further suggested that liability does not arise when the shareholder-employee’s own misconduct or incompetence causes the termination of employment.<sup>149</sup> Because the record was not sufficiently developed, the court of appeals remanded the shareholder-employee claim to the district court for further findings of fact as to whether, despite Gunderson’s employment at will, his termination might have been “unfairly prejudicial” to him as a shareholder-employee.<sup>150</sup> The court suggested that Gunderson could have met his burden if he had a written employment contract along with a written buy-sell agreement defining the parties’ reasonable expectations regarding employment matters.<sup>151</sup>

*Gunderson* is important because it teaches that for purposes of

144. *Id.* at 189 (citing *Pedro v. Pedro*, 489 N.W.2d 798, 802 (Minn. Ct. App. 1992)).

145. *Id.* at 190.

146. *Id.*

147. *Id.*

148. *Id.* at 191.

149. *Id.* at 192.

150. *Id.*

151. *Id.*

contract law and employment law, Gunderson was an employee at will and entitled to no remedy for the termination of his employment. Nonetheless, he could still be entitled to a section 302A.751 buyout. According to one commentator, the problem that *Gunderson* underscores with respect to section 302A.751, is its incredible power to single-handedly undermine entire bodies of law because the *Gunderson* court outlined “the rules of a new body of meta-employment and meta-contract law applicable to determine whether a remedy is still available under section 302A.751.”<sup>152</sup> *Gunderson*, despite some criticism, is still good law and has been cited often by various jurisdictions.<sup>153</sup>

The *Pedro II*, *Berreman*, and *Gunderson* line of cases has had a dramatic impact on the practice of law in Minnesota which continues to this day. Together they read Minnesota Statutes section 302A.751 in an expansive manner, thereby allowing numerous plaintiffs the ability to seek redress of perceived wrongs.<sup>154</sup> In many other states, these plaintiffs would have had no chance at any type of recovery.<sup>155</sup> These cases have necessitated that business owners and closely held corporations consider the ramifications of Minnesota Statute section 302A.751 when making business decisions regarding doing business, setting up a corporation, or issuing stock in Minnesota. The *Pedro*, *Berreman*, *Gunderson* line is certainly not the only specific decisions of the Minnesota Court of Appeals worthy of mention, if time and space would permit; but, they are examples of myriad others which bear significant weight upon civil litigation.

#### V. ENSURING THAT THE MINNESOTA COURT OF APPEALS CONTINUES TO POSITIVELY IMPACT THE MINNESOTA JUDICIARY

The Minnesota Court of Appeals has been incredibly successful in achieving or exceeding all the expectations that were either mandated or expected of it. The court’s impact can be felt throughout the state, and the effect of its creation should not be

152. Bryn Vaalar, *Scrap the Minnesota Business Corporation Act!*, 28 WM. MITCHELL L. REV. 1365, 1414 (2002).

153. A Westlaw search reveals that *Gunderson* has been cited by courts and secondary sources 125 times in at least five separate jurisdictions.

154. John H. Matheson and R. Kevin Maler, *A Simple Statutory Solution to Minority Oppression in the Closely Held Business*, 91 MINN. L. REV. 657, 700 (2007).

155. See *id.* (listing Alaska, California, Illinois, Minnesota, New Jersey, North Dakota, and Oregon as the seven states in the country who view liability in an expansive manner).



understated. With the exception of the Minnesota Supreme Court, practitioners and the Minnesota judiciary give the decisions of Minnesota Court of Appeals the proper deference worthy of the significant weight carried by an intermediate appellate court. In fact, even the court's unpublished opinions, although not precedential, are cited to by district courts on a daily basis. Despite the successes, the Minnesota Court of Appeals is not a panacea for the ails of the judicial system, and like all things, there is room for improvement. The following suggestions are meant to ensure that the Minnesota Court of Appeals continues not only to impact the practice of law in Minnesota and the Minnesota judiciary in a positive manner, but that its impact grows to become the gold standard of intermediate appellate courts everywhere. As with any change, funding becomes a major concern. In a perfect world, all of these suggestions could be implemented. In reality, a cost-benefit analysis would likely be performed and any changes would necessarily depend on the state budget. The authors believe that a cost-benefit analysis of the following suggestions weighs in favor of implementation.

*A. Establish an Appellate Mediation Procedure*

The Minnesota Court of Appeals is currently operating a pilot program aimed at mediation for family law matters.<sup>156</sup> The court should expand that program to cover all civil cases and establish a mediation procedure having the following features. The template for such a procedure is the *Sixth Circuit Practice Manual*, Chapter 5, authored by Robert W. Rack, Jr., Chief Circuit Mediator, United States Court of Appeals for the Sixth Circuit.<sup>157</sup> We have deviated, embellished or abbreviated in our proposal.

First, the court should create a protocol for early mediation of all or many civil appeals. Within a few weeks of the joinder of issue between appellants and respondents, an initial telephone mediation conference should be conducted. To accomplish this, as soon as the statement of the case has been filed and the filing fee has been paid, the parties will be presented with a mediation notice

156. Family Law Appellant Mediation Program, <http://www.mncourts.gov/?page=3412>. "The pilot program, which began in September 2008, is designed with the goal of decreasing the conflict levels for families, decreasing the costs to litigants and the court, and increasing efficiency and litigation satisfaction." *Id.*

157. ROBERT W. RACK, ANDERSON'S SIXTH CIRCUIT PRACTICE MANUAL, ch. 5, 41–47 (Michael L. Cioffi et.al., eds. 2006).

setting the time and place for an initial mediation conference together with the form for a pre-mediation statement on which the parties will identify themselves, their designated mediation participant, mediation background information including an identification of the issues for consideration at mediation, obstacles to settlement, and any requests of the mediator or confidential information of which the mediator should be aware. The timetable will be such as to bring the matter to an initial mediation conference in three to four weeks after the parties have appeared and before briefing begins.

The Minnesota Court of Appeals will establish a roster of mediators. Applications to be listed on the roster will be received, and the court should proactively seek participation by appellate lawyers who have established their qualification to mediate at this level. The parties can join in requesting assignment of a mediator from the roster or list their preferences in order, but the court will make an assignment in order to expedite the process.

There should be a selection process to determine which appeals will be mediated. A request for mediation by either party will prioritize selection of the particular appeal for mediation but will not ensure it. Mediation request forms would be provided by the Clerk's of Appellate Courts' Office in the opening case materials and would be available on the court of appeals' website. All fully counseled civil appeals will be considered for mediation with the exception of prisoner appeals and governmental agency appeals.

Counsel would be encouraged but not required to have the party they represent participate in the conference if they think it might be helpful in reaching settlement. If it is learned that participation by non-parties is essential to reach settlement, the mediator has discretion to invite such participation. Procedural questions may be addressed as early as the initial telephone conference or in the following in-person conference if the mediator decides to have one. These include adjustments to the briefing schedule, questions about contents of briefs and appendices, requests or questions about oral argument. If the mediator cannot answer a question the mediator will call or refer the parties to other court staff who can.

Discussion in the initial telephone conference or in additional telephone conferences or in a personal conference may go beyond discussion of issues and procedures into constructive settlement

negotiations if the mediator so decides. The mediator may also conduct private caucuses with the separate parties.

The initial telephone conference may last an hour but the time allotted is at the discretion of the mediator. The goal is to dispose of about one-fourth of the mediated cases during the initial telephone conference. If the mediation continues and is proceeding constructively and if all parties and the mediator agree, the mediator may extend briefing schedules for a reasonable time until negotiations are completed.

The goal of the program is to screen out cases with no settlement potential and in the others to find solutions that each side believes are better than the risks and costs of the litigation alternatives. Prior to the initial telephone conference, the mediator will, hopefully, have read the district court's decision, if there is one, as well as the written submissions of the parties in response to the notice of mediation. At an appropriate time in the process, the mediator will explore motivations for and obstacles to settlement and will attempt to assist the parties in devising creative resolutions to their dispute as well as encourage offers and counter offers directed toward settlement.

If the proceeding goes to an in-person mediation session the mediator will have encouraged the attorneys to come with clients or their representatives possessing authority to settle. If the mediator perceives a party or the attorney for a party to view the matter unrealistically, the mediator will encourage adjustment of that view.

The same standards of confidentiality and integrity which apply to Rule 114 of the Minnesota General Rules of Practice<sup>158</sup> for the district courts' mediations will pertain. The mediator will have discretion to declare impasse whenever it appears that mediation will be pointless, which appearance might occur based upon written submissions in advance of the initial telephone conference, at that conference or at any time thereafter. The mediator will have the authority to propose to the court adjustments in the briefing schedule, oral argument issues or other matters of an administrative nature which may facilitate the passage of the appeal through the judicial system.

If mediation results in agreement to terms which constitute a binding contract of settlement and basis for dismissal of the appeal,

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158. Minn. R. 114.08(e), 114 App. (2008).

the mediator will assist the parties in reducing the agreement to writing unless the mediator and the parties agree that such assistance is not required. The mediator will report to the court as to whether the mediation process has resulted in settlement or as to any steps which might be taken by the parties or the court to facilitate either settlement or expeditious passing of the appeal through the court system to conclusion.

Participation in the mediation process through the conclusion of the initial telephone conference is mandatory and the associated fees and costs to that point will be assessed by the court and borne by each party pro rata. If mediation goes forward beyond the initial telephone conference, participation is voluntary and fees and costs will be established by an agreement to mediate entered by the parties and the mediator.

Establishing a mediation process would benefit the court in numerous ways. Initially, assuming that at least some of the mediations are successful and result in settlements, the case load of the court would decline. Additionally, because the mediation would come prior to the submission of the parties' briefs, the court would likely receive more focused briefs. Even when mediation does not result in a settlement, it would focus the parties on the real issues or at least the most relevant issues because these issues would have been discussed in great detail throughout the mediation. This sharper focus would allow the court to spend less time dealing with issues that are tangential to the important issues.

Not only would requiring a day of mandatory mediation benefit the court, it would also likely benefit the parties. The process of filing, briefing, and arguing an appeal is a costly venture for the litigants because the filing fees and attorneys need to be paid. The parties may be able to save a significant amount of money by being required to mediate prior to submitting briefs to the court. This would be especially true if a settlement is reached, but could also be true even if the appeal proceeds. Because the mediation would be required prior to the submission of the briefs the parties would not have to pay attorneys for time they spent working on appellate briefs or arguing the appeal to the court. Depending on the fee structure and the nature of the appeal this could be a substantial savings.

#### *B. Publish More Opinions*

The Minnesota Court of Appeals should publish more

opinions. This may be accomplished in two ways. First, the legislature would need to repeal or amend Minnesota Statutes section 480A.08, subdivisions 3(b)–(c). As previously discussed, section 480A.08, subdivisions 3(b) allows the court of appeals to issue unpublished and unprecedential opinions. Wholesale repeal of this section would necessarily mandate that the court publish all of its opinions—not something the authors are advocating. A compromise would amend the current language to read “[t]he decision of the court should include a written opinion.” Section 480A.08, subdivisions 3(c) mandates that the court only publish decisions if they meet certain criteria. Subdivision 3(c) could be amended to read “[t]he Court of Appeals must publish those decisions that: . . . (5) would significantly aid in the understanding of the law or the administration of justice.” Clauses 1 through 4 would remain unchanged. These amendments would provide the court of appeals with the ability to publish more opinions because nearly all written opinions aid in the understanding of the law and the administration of justice.

The second way the court could publish more opinions would be to change the internal guidelines for publication, and recognizing that the work done by the court is important to the court’s many consumers. The court eschews the idea of publishing more opinions suggesting that the costs are prohibitive and that doing so would create a large backlog—the very problems that section 480A.08, subdivisions 3(b)–(c) were designed to eliminate in the first place. But currently every case must have a hearing or at the very least a thorough review, and the court must perform enough work to release unpublished opinions for public consumption. As such, much of the work is being done to reach a full published opinion, including: the analysis of the issues; determination of the standard of review; determination and review of the applicable statutes; determination and review of applicable caselaw; and application of the facts to the law. The extra review or scrutiny necessary to issue published opinions would be worth any additional costs.

As previously discussed, unpublished opinions are cited every day in district courts. Allowing these opinions to have precedential value may relieve some pressure on the district courts because, instead of trying to determine how the court might apply the law to the facts at hand the district court would know how the court would apply the law. In the long run, the court of appeals may find that it

saves time because the court of appeals would be analyzing more published cases and these cases necessarily hold precedent for the court of appeals. With all the cases published, the court of appeals would find more cases on point thereby allowing the court of appeals to dispose of the cases more readily. Because there would be published cases on point, the court of appeals would not need to spend time recreating and reanalyzing the logic of an unpublished opinion that is on point. Therefore, the court of appeals should see some time savings.

*C. Decrease and Eliminate the Backlog*

The Minnesota Court of Appeals should continue to work to decrease and eliminate any backlog. The hiring of the new panel at the beginning of 2008 should help in this regard. So too should the continued use of retired judges to relieve judges for vacations or illness. The court could also add another additional panel through the use of retired judges for the sole purpose of elimination of the backlog. The implementation of a mandatory mediation process would assist in decreasing and eliminating the backlog. Returning to the pre-2003 timeliness levels is an important goal that would help both the public perception of the court of appeals and the Minnesota judiciary. As the mantra goes “justice delayed is justice denied.”

The Minnesota Court of Appeals has had a dramatic and positive impact on the practice of law, the Minnesota judiciary, and the public at large since its inception twenty-five years ago. The court has successfully met every goal that was established for it, and in doing so, has become a true asset to the state of Minnesota. Over the next twenty-five years it is the authors’ hope that the court will continue to set and achieve high goals in order to meet Chief Justice Burger’s challenge to carry out justice in every case in the shortest possible time and at the lowest possible cost.