"Order Opinions"—The Public's Perception of Injustice

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"ORDER OPINIONS"—THE PUBLIC'S
PERCEPTION OF INJUSTICE

Ideas, ideals and great conceptions are vital to a system of justice, but it must have more than that—there must be delivery and execution. Concepts of justice must have hands and feet or they remain sterile abstractions. The hands and feet we need are efficient means and methods to carry out justice in every case in the shortest possible time and at the lowest possible cost. This is the challenge to every lawyer and judge in America. 1

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Imagine an appellate judge who, after hearing oral arguments and reviewing the record, retreats to his or her chambers and throws one die for each party to decide the outcome of a case; the party with the highest number wins. The judge then waits an acceptable period of time before rendering a decision, to give an appearance of formality. The decision may or may not be correct. If the decision appears correct, however, the judge may earn the respect and admiration of the legal community and the public.

The point of this illustration is that a judicial decision may appear legitimate regardless of how the judge reached the decision. Reasoning backwards from this illustration, if citizens perceive a judicial decision as unjust, few citizens may notice or care about its substance even if the decision is fair. Therefore, the appearance that the judicial system distributes justice fairly has much to do with the public's acceptance of the judicial system and the public's perception of its legitimacy. Furthermore, it is this appearance of justice that allows

2. See David A. Harris, The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System, 35 ARIZ. L. REV. 785, 793-94 (1993). Harris tells the story of Judge Bridlegoose, who actually used this dice method to decide cases. Id. The story was discovered in the works of Francois Rabelais in The Complete Works of Francois Rabelais and The Portable Rabelais. Id. at 793 n.61. According to the story, "In the end, Bridlegoose is pardoned not only because of his age and simple mindedness, but because each of the judges trying him have themselves upheld all of his decisions." Id. at 794.

3. See id. at 793. "The idea of formality as a critical part of the legal process is what makes Bridlegoose's story recognizable even today as a sharp parody of the justice system." Id. at 794.

4. See id.

5. Id.

6. See id.

7. See id. The Supreme Court has stated that "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954). Chief Judge Howard Markey of the Federal Circuit remarked that the "appearance of justice is today seen not as separate from, but as an integral part of justice itself . . . . It simply is not enough that justice be actually done. It must be seen to have been done." Chief Judge Howard T. Markey, The Delicate Dichotomies of Judicial Ethics, 101 F.R.D. 373, 380 (1984). Furthermore, the appearance of justice is "so significant that there are mechanisms, rules, and procedures designed into our legal institutions to insure that our courts and laws not only are just, but that they also appear just." Harris, supra note 2, at 788 (discussing features that reinforce public confidence in the criminal justice system). Both Canon 9 of the Model Code of Professional Responsibility and Canon 2 of the
people to feel comfortable to criticize the courts.\textsuperscript{8}

The Minnesota Court of Appeals has two basic functions: (1) to resolve disputes; and (2) to make new laws and policies.\textsuperscript{9} At the center of both functions are the judges who deal directly with "society's most precious asset, justice."\textsuperscript{10} Most citizens have little or no experience with the judicial system, and therefore base their knowledge and understanding of the judicial system on their perceptions of that system. The public determines its perceptions of the legal system and of justice from judicial opinions, as they are the dominant features of the judicial system.\textsuperscript{11} Appellate judges, however, must make many difficult decisions for the sake of efficiency as caseloads in appellate courts continue to rise.\textsuperscript{12} One difficult decision appellate judges make is to determine the fastest way to issue a well-reasoned written opinion that the public perceives as such.

The court of appeals faces the difficult task of balancing a huge caseload with limited judicial resources against writing well-reasoned opinions in each case and then allowing fair access to each of these

\textsuperscript{8}See Harris, supra note 2, at 790-91 (discussing the importance of the appearance of justice in a democratic society).


\textsuperscript{10}Markey, supra note 7, at 385. Chief Judge Markey commented: "[J]udging is not merely a "job," like plumbing, or carpentering, or whatever. Judges are given the privileged joy of working at the heartbeat of a free society, the law. They deal daily with society's most precious asset, justice. The property, the liberty, the fortunes, and the very lives of citizens, are often in their hands... For much of the public, appearances are all it has to go by."

\textsuperscript{11}See Harris, supra note 2, at 792. Moreover, the judges who author opinions "have ethical obligations to the public and to our system of justice." Joe G. Riley, Ethical Obligations of Judges, 23 Mem. St. U. L. Rev. 507, 507 (1993).

\textsuperscript{12}See generally Steven E. Hairston et al., The Work of State Appellate Courts, 17 St. Ct. J. 18 (Spring 1993) (providing statistics for individual state appellate courts). The authors predict that "[i]f the rate of increase remains constant over the rest of the decade, there will be more than 350,000 appeals [in state appellate courts] by the year 2000—a cumulative increase of at least 40 percent from 1990." Id. at 18; see infra Appendix (providing statistics for the Minnesota Court of Appeals).
opinions. 13 The court of appeals has, however, only one ultimate objective: To provide the citizens of Minnesota "with an efficient, inexpensive, and expeditious appeal process because the public and the bar came to the realization that justice delayed [is] justice denied." 14 Thus far, the court of appeals has accomplished this objective in its relatively brief existence. Founding Chief Judge Peter Popovich attributes the appellate court's success to "strong case management and adherence to reasonable procedural processing rules . . . [and to] the strength, quality, and loyalty of the judges and staff [which] make the court a model of cooperation and dedication for deciding cases efficiently and with due consideration." 15 It is time, however, to reevaluate the reasonableness of one of these procedural processing rules that the court of appeals has used to achieve its notable success.

Most practicing attorneys in Minnesota are aware that the Minnesota Court of Appeals issues published and unpublished opinions. However, many practitioners are unaware of a third type of judicial decision issued by the court of appeals—"Unpublished Order Opinions." 16 An order opinion is "a compromise between the one-word decisions criticized by many commentators and fully-written opinions." 17 The court of appeals uses order opinions as an efficient way to deal with its increasing court docket. The Minneapolis Star

13. See infra parts V.A-C, VI.A-B.
15. The Honorable Peter S. Popovich, Ten Years Later: Justice Delayed Is No More, 19 WM. MITCHELL L. REV. 581, 581 (1993); see also The Honorable D.D. Wozniak, A True Success Story, 19 WM. MITCHELL L. REV. 589, 589-90 (1993) (describing the success of the first 10 years of the court of appeals, along with the reasons for its success). In particular, Judge Wozniak reports that the Minnesota Court of Appeals is one of only two state judiciaries without a backlog problem. Id. at 589 (citing Arthur S. Hayes, Minnesota Appeals Court Program Eliminates Crushing Case Backlog, WALL ST. J., June 8, 1992, at B8). According to Judge Wozniak, this accomplishment was "made possible by the abilities, commitment, and hard work of its judges and staff, the deep commitment of the court to aggressive case management, and the use of a comprehensive automated record-keeping system which tracks the progress of each case to ensure its timely disposition." Id. at 589-90. The appellate court judges were highly productive, each authoring more than 100 opinions each year and issuing all decisions within 90 days of hearing. Id. at 590; see infra Appendix.
16. See David Peterson, Appeals Court Dispenses Private Justice. Nearly Everyone Seems to Agree Charlotte Ann Nielsen Got a Bad Divorce Settlement. But Is a Nearly Secret State Appeals Court Ruling the Way to Handle Such Cases?, STAR TRIB. (Minneapolis), July 5, 1994, at 1B. According to Mr. Peterson, "dozens of attorneys contacted in recent weeks said they did not know the practice [of issuing order opinions] was being used, and none knew the extent to which it's happening." Id.
17. Jenny Mockenhaupt, Assessing the Nonpublication Practice of the Minnesota Court of Appeals, 19 WM. MITCHELL L. REV. 787, 798 (1993); see infra parts II.B.2.a-c, III.
"ORDER OPINIONS", apparently concerned with the "appearance of justice" and the legitimacy of such opinions, ran such eyecatching headlines as "Appeals Court Dispenses Private Justice . . . .",18 and "Court of Appeals Is Not Secretive About Its Decisions and Opinions."19 These articles prompted much discussion about the need to reexamine the process of issuing order opinions.20 The appellate court needs to focus not only on efficiency in the appellate process, but also on the quality of justice it distributes to those it serves. By redirecting its focus, the court of appeals will assure that litigants, the public, and the bar perceive that quality justice is administered via the appellate court's written opinions.

Throughout this Note's discussion of order opinions, it is important to keep in mind that the decision whether to publish an opinion is distinct from the decision whether to write a full opinion or an abbreviated opinion (e.g., an order opinion), although the latter may be a subset of the former.21 In a system that values the appearance of justice as much as it values justice itself, however, a decision to issue an order opinion may produce suspicions and accusations, since it departs from the accepted appellate tradition of writing and publishing full opinions.22 In fact, many people perceive order opinions as a mysterious judicial process that the court of appeals employs to render decisions. Such a mysterious judicial process creates negative publicity

18. See Peterson, supra note 16. According to Mr. Peterson:

The main difference between order opinions and other opinions issued by the appeals court is that they don’t appear in any law books or on lawyers’ computers. The news media aren’t advised when they come out, and when you call the state law library to ask to see one, they say it isn’t there. The only people notified of such opinions are the attorneys in the cases.

Id.

19. See Anne V. Simonett, Court of Appeals Is Not Secretive About Its Decisions and Opinions, STAR TRIB. (Minneapolis), July 16, 1994, at 15A. Judge Anne Simonett, the late Chief Judge of the Minnesota Court of Appeals, responding to David Peterson’s article, supra note 16, stated, “Whereas it is true that not all decisions by the Court of Appeals are published in the official law books, there is nothing secret or private about the opinions that are not published, all of which are readily available to the public.” Id. Judge Simonett noted that order opinions are a type of unpublished decision rendered by the appellate court. Id.

20. See David Peterson, Appeals Court Will End Practice of Not Publicizing All Rulings, STAR TRIB. (Minneapolis), July 14, 1994, at 1B. In this article, Michael Galvin, president of the Minnesota State Bar Association (MSBA), acknowledged that he had “no idea the court was doing this,” and that he “expects bar leaders to ask for clarification.” Id.

21. See ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS 115 (Summer 1977) [hereinafter ABA TASK FORCE ON APPELLATE PROCEDURE] (“The question of whether the opinion should be published or not published is quite separate from the question of whether there shall be any opinion at all.”).

that adversely affects the justice system, as it reduces the public’s confidence and respect in the court. Specifically, order opinions reduce public confidence and respect in two ways: "they diminish the public’s understanding of the legal process and they undermine the public’s belief in the overall fairness of the judicial system."23 Accordingly, the court must adopt new rules and procedures for order opinions that not only are fair, but also that are perceived as fair by litigants, the bar, and the public,24 since public confidence and respect are essential to the success of the judicial system.25

The purpose of this Note is to discuss the use of order opinions by the court of appeals, to raise questions, and to identify issues that may be important to the legal consumer.26 Although the court of appeals has used order opinions for nearly ten years, there is still confusion surrounding the practice of issuing them. Part II of this Note begins by examining the history of the Minnesota Court of Appeals. This section then discusses the development of different types of judicial opinions used by the federal and state appellate courts, focusing on the Minnesota Court of Appeals’ use of order opinions. Part III of this Note describes the deliberative process the court of appeals employs to determine the form of a judicial opinion. It describes the rules the court follows to reach the decision to issue an order opinion instead of another type of opinion.

Part IV sets forth the views of those supporting the practice of order


Judges are obviously caught in a squeeze between the need to give litigants the reasons for the disposition and the need to keep those reasons brief and informal, while preserving the reputation of the court for scholarship. An unpublished opinion accommodates both of these, but the very danger of this system lies in its fulfillment of the tribunal’s desire to avoid critical review by nonparties, legal commentators, and even other courts . . . .

Id. at 158 n.74 (quoting Herbert J. Stern, The Enigma of Unpublished Opinions, 64 A.B.A. J. 1245, 1246 (1978)).

24. See Jerold H. Israel, Cornerstones of the Judicial Process, 2 KAN. J.L. & PUB. POL’Y 5, 20 (Spring 1993). According to Israel, the “fact that . . . procedures are fair is not sufficient; the procedures must also be perceived as fair (and as fairly administered) by both its participants and the public.” Id.

25. See id. (stating that “it is vital to maintain public confidence in the [judicial] process”); Harris, supra note 2, at 792 (commenting that the “message is clear: The need for public respect for the [legal] profession and the law requires that no reason emerge to question the integrity of the system”); FitzGerald, supra note 23, at 398 (“[O]ne of the most important policies underlying open courts [is] the maintenance of public confidence in the judicial process.”).

26. The “legal consumer” is comprised of “the bench, the bar, the scholars, and the public.” William L. Reynolds & William M. Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 COLUM. L. REV. 1167, 1202 (1978).
opinions. The proponents argue that in the face of an increasing case load and insufficient number of judges, the most productive solution to prevent backlog is to reduce the burden of writing full opinions in cases where the law is well settled. Order opinions prevent the repetitive production of judicial opinions by briefly stating the reasoning behind the court's decision. The proponents also argue that the judiciary does not have the resources available to produce full published opinions in each case. Furthermore, those in favor of order opinions believe that they are sufficiently indexed and available to those who want them, which makes the judges fully accountable for these decisions and prevents any allegations of secret law.

Part V sets forth the contrary view. Those who criticize the use of order opinions are primarily concerned with whether order opinions are: (1) well-reasoned decisions; (2) accessible to the general public; (3) the appropriate form for the individual case; (4) fair; (5) uniform and clear; and (6) reviewable.

Finally, Part VI of this Note details a proposal for reforming the current system. The proposal focuses on making the current rules more detailed and distinguishable from those used to issue an unpublished opinion. These changes would increase the understanding and decrease the confusion surrounding this third type of judicial decision. The proposal provides suggestions the court may wish to consider if it truly wants to achieve the perception of fairness and justice in its practice of issuing order opinions. As one court stated, "important as it [is] that people should get justice, it [is] even more important that they should be made to feel and see that they [are] getting it."28

II. HISTORICAL OVERVIEW

A. History of the Minnesota Court of Appeals

Until 1983, Minnesota had a single-tier appellate system, in which the Minnesota Supreme Court was responsible for the appellate review of all trial court decisions.29 As the supreme court's case load
and its administrative obligations increased, the court became overburdened and inefficient. The court attempted to become more efficient and to alleviate its burdens by disposing of many of its cases via summary disposition. A summary disposition, often called a summary affirmance, is a short opinion, typically a single paragraph or the single word "affirmed," unsupported by any reasoning. Unfortunately, this practice allowed the quality of justice received by Minnesota litigants to deteriorate to its all-time low, as evidenced by the supreme court's admission that it was in desperate

reviewing trial decisions, the court also developed new law and policy." Id. at 581. Litigants had a right to appeal, but because of the overburdened and inefficient supreme court, this right existed only in theory since in practice it was "merely an empty promise." Wozniak, supra note 15, at 589.

The number of cases filed annually with the supreme court "rose from 419 cases in 1964 to 677 cases in 1973. By 1982, the number of filings increased to 1682, a 400% increase in filings since 1964." Popovich, supra note 15, at 582.


There is increased pressure on state supreme courts to provide leadership and supervision over the bench and bar as part of their judicial responsibilities. These administrative burdens include the establishment of forms of pleading and rules of procedure and evidence, regulation of bar admissions, regulation of bar discipline and adjudication of discipline cases, regulation of the bar in other respects (advertising, specialization, continuing legal education), and administration of the justice system (including state court financing, liaison with other branches of government, administrative rulemaking, and judicial discipline and removal).

Id.

See OFFICE OF THE STATE COURT ADMINISTRATOR, THE MINNESOTA COURTS: 1984, at 9 (1985) [hereinafter MINNESOTA COURTS 1984] (explaining that the pace of appellate justice was suffering in the years preceding the formation of the appellate court, because a case took 17 to 24 months to complete); see also Anderson, supra note 31, at 745-46 (describing how the supreme court also tried limiting oral arguments, using partial panels, and increasing the number of judges to increase productivity).

See Popovich, supra note 15, at 582. When former Chief Judge Wozniak was retiring from the bench, he was asked about the need for an appellate court and replied, "The Supreme Court [in 1983] was behind two to three years and in most cases they just issued a summary affirmance. It was just a very bad situation, where the public and lawyers were very angry about the fact that their appeals were not being heard." Wozniak to Retire from the Bench After Career Serving Public Profession, 8 MSBA IN BRIEF, Aug. 1992, at 1 (bracketed text in original).

See Popovich, supra note 15, at 582; see also Hoff v. Kempton, 317 N.W.2d 361, 365-66 (Minn. 1982) (discussing supreme court's summary affirmance procedure); FRANK M. COFFIN, ON APPEAL—COURTS, LAWYERING, AND JUDGING 165, 177-80 (1994) (describing these short dispositions).
need of help. \(^5\)

Various groups proposed the idea of creating an intermediate court to help alleviate the supreme court's burdens and to restore the efficient administration of justice as early as the mid-1960s. \(^6\) Those opposing the creation of an intermediary court had the following primary concerns: (1) that an intermediate court would create substantial additional costs; \(^7\) (2) that an intermediate court would substitute its judgment for that of the supreme court; and (3) that an intermediate court would increase the time required to receive a final disposition. \(^8\) Finally, in 1982, Chief Justice Douglas Amdahl's campaign to inform the public about the state of inefficiency at the supreme court persuaded the citizens of Minnesota to vote for the creation of a new appellate court. \(^9\) In November of 1982, Minnesota successfully voted to create an intermediate court. \(^40\)

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35. See Popovich, supra note 15, at 582; see also Peter S. Popovich, Beginning a Judicial Tradition: Formative Years of the Minnesota Court of Appeals 1983-1987, at 8 (1987) [hereinafter Judicial Tradition] ("Decisions needed to be made by judges, not by staff. Written appellate opinions were needed. Consistency in appellate decision-making needed to be restored.").

In 1982, Douglas K. Amdahl, then Chief Justice of the Minnesota Supreme Court, while speaking about the enormous supreme court backlog, stated, "Consequently, backlogs 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." Chief Justice Douglas K. Amdahl, State of the Judiciary Address to the Minnesota State Bar Association (June 19, 1982).

36. See Anderson, supra note 31, at 745-48 (detailing the history of the Minnesota Court of Appeals); 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).

37. See Carl Norberg, Some Second and Third Thoughts on an Intermediate Court of Appeals, 7 WM. MITCHELL L. REV. 93, 105 (1981). It was thought that an intermediate court would manifest its cost "both as a direct cost to the state treasury and to the litigants who must finance another appeal and an indirect cost to the public who fund the court system." Id.

38. See id. (discussing the primary concerns of those opposing creation of an appellate court); see also Anderson, supra note 31, at 745-46 (discussing the creation of the Minnesota Court of Appeals).

39. See Amdahl, supra note 35; see also MINNESOTA COURTS 1984, supra note 32, at 1 (explaining that the campaign was intense and "ranged from 'whistle stop' speeches to telephone banks").

40. See Judicial Tradition, supra note 35, at 3. Of the total Minnesota voters in the 1982 election, 77% voted for the creation of an intermediate court. Id. at 12. On November 2, 1983, the court of appeals began with the first six judges taking office, and the final six taking office on April 2, 1984. See WEST PUBLISHING CO., BIOGRAPHICAL SKETCHES OF JUSTICES OF THE MINNESOTA SUPREME COURT AND JUDGES OF THE MINNESOTA COURT OF APPEALS FROM TERRITORIAL DAYS TO 1990 (1990) [hereinafter Sketches]. The first six judges appointed in 1983 were Chief Judge Peter Popovich,
Immediately thereafter, the legislature amended the Minnesota Constitution to provide for the Minnesota Court of Appeals, and in 1983, legislation was approved to create, implement, and fund the court of appeals. In response to those opposing the creation of the new court, the legislature designed the appellate court as an "error-correcting" court only, leaving all "lawmaking" to the supreme court. In reality, however, the court of appeals has become a

Edward Parker, Daniel Foley, Donald Wozniak, Suzanne Sedgwick, and Harriet Lansing. Id. at 40-41.

The final six judges took office on April 2, 1984. Id. at 41. In 1984, the following judges were appointed: Doris Ohsen Huspeni, Thomas Forsberg, David Leslie, Roger Nierengarten, R.A. Randall, and Gary Crippen. Id. In 1987, the court of appeals added a thirteenth judge, Fred Norton, and Judge Wozniak succeeded Chief Judge Popovich. Id. at 42. In 1989, the court added a fourteenth judge, Sandra Gardebring. Id. at 42-43. In 1990, the court added a fifteenth judge, Jack Davies, and a sixteenth judge, Randy Peterson. Id. at 45; Newest Appeals Court Judge, STAR TRIB. (Minneapolis), Dec. 29, 1990, at 4B. In 1992, Paul Anderson succeeded Chief Judge Wozniak, and in 1994, Judge Anne Simonett succeeded Chief Judge Anderson. Donna Halvorsen, Simonett Plays the Right Tune: Onetime Pianist Now Leads State Appeals Court, STAR TRIB. (Minneapolis), July 1, 1994, at 1B. Today, after Chief Judge Simonett's death in 1995, Edward Toussaint, Jr., is the Chief Judge of the Minnesota Court of Appeals. Patricia Lopez Baden, Toussaint Named Chief of Appeals Court, STAR TRIB. (Minneapolis), Apr. 5, 1995, at 2B.

41. See MINN. CONST. art. VI, § 2 (amended 1982). The Minnesota Constitution was amended to read:

The 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 jurisdiction as prescribed by law.

Id. This amendment provided a means of dealing with the situation at the supreme court. According to Judge Wozniak, all the court of appeals had to do was "to make certain that we kept our promises to the bar, the public, and the Legislature to provide efficient, prompt, inexpensive, and quality review . . . without a backlog." See MSBA IN BRIEF, supra note 33, at 1.

42. See, e.g., MINN. STAT. §§ 480A.01, .06, .08, .10, .11 (1994).

43. See JUDICIAL TRADITION, supra note 35, at 3. Former Chief Judge Popovich stated that the "primary function of the [appellate] court was the correction of error. It is the function of the supreme court to formulate legal principles and establish precedent and judicial doctrine." Id. at 22; see also Anderson, supra note 31, at 746. The distinction is that an error-correcting court has as its primary function the correction of trial court errors, as compared with a law-making court whose primary function is to formulate legal principles and establish new law. Id.

Moreover, the Minnesota Court of Appeals does not have the power of discretionary review, as does the Minnesota Supreme Court. Instead, it must address every appeal made from a final trial court decision. See Wozniak, supra note 15, at 589 (confirming that the "Minnesota Court of Appeals . . . must handle every appeal that is filed"); see also MINN. STAT. § 480A.10, subd. 1 (1994) (stating that the supreme court has discretionary review and describing the criteria it considers when deciding to accept review); Murphy v. Milbank Mut. Ins. Co., 388 N.W.2d 732, 739 (Minn. 1986) (discussing subdivision 2 of Rule 117 of the Minnesota Rules of Civil Appellate
lawmaking court. On August 1, 1983, the first cases were filed with the new court. In November of 1983, the court of appeals adopted its own Internal Rules to explain how matters were to be processed in the court. The purpose of the Internal Rules was, and remains, informational. "They are complementary to the appellate rules . . . . [They] enable lawyers to understand the mechanics of the Court's procedure; provide a basis for evaluation and improvement of the administration of the court; and promote public understanding of the judicial deliberative process." 

The Minnesota Court of Appeals, full of energy at its inception, set forth its goals for the future. One of the appellate 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 written opinions. In 1983, the Minnesota Supreme Court, which promulgates the rules for appellate practice, amended Rule 136.01 of the Minnesota Rules of Civil Appellate Procedure to incorporate this goal. Subdivision 1 of Rule 136.01 reads as follows:

Subdivision 1. Written Decision
(a) Each Court of Appeals disposition shall be in the form of a statement of the decision, accompanied by an opinion containing a summary of the case and the reasons for the decision; however if the appeal is dismissed for failure to comply with these rules or if the court determines that the contents of the statement of the decision sufficiently explain the disposition made, no written opinion need be prepared.
(b) A statement of the decision without a written opinion shall not be officially published and shall not be cited as precedent, except as law of the case, res judicata or collateral estoppel.

Procedure, which gives the supreme court discretionary review power); Anderson, supra note 31, at 746 (stating that the appellate court has jurisdiction over all final decisions of trial courts, except conciliation court decisions and first degree murder appeals).

44. See Anderson, supra note 31, at 760 (stating that the appellate court has become a law-making body, as evidenced by new policies and laws it has created since its inception).

45. See Popovich, supra note 15, at 584-85 (setting forth the standards by which the new court was to operate). Two standards are of particular importance: (1) all decisions of the appellate court were to be indexed and readily available to the public; and (2) the legislature gave the appellate court the authority to create its own rules. Id.

46. Id. at 583.
47. JUDICIAL TRADITION, supra note 35, at 23.
48. See Popovich, supra note 15, at 584-85.
49. Id. at 584; see also JUDICIAL TRADITION, supra note 35, at 24.
50. MINN. R. CIV. APP. P. 136.01, subd. 1 (1995). Prior to 1983, Rule 136.01 read as follows:
(1) Notice of Decision. Upon the filing of a decision or order which
As a result, the appellate court must now "issue a statement of the decision" for each disposition. Similarly, a criteria the bar established to judge the performance of the new court was the court's ability to resolve all issues addressed on appeal in a concise written decision with accurate facts and supporting reasoning.\textsuperscript{51}

B. Overview of Judicial Decisions

Appellate courts render various types of decisions. The continuum of appellate decisions ranges from a full, published opinion, the most formal type of decision, to a one-sentence order affirming the decision below, the least formal type of decision.\textsuperscript{52} The former is an "opinion," while the latter is a "judgment." An opinion sets forth the reasoning upon which the court bases its decision. A judgment, determines the matter, the clerk shall mail a copy thereof to the attorneys for the parties and to the trial court. The mailing of such copy shall constitute notice of the filing.

\textsuperscript{(2) Summary Opinion. In any case decided under Rule 133.01 or in any other case where the Supreme Court determines that a detailed opinion would have no precedential value, the Supreme Court in its discretion may enter the following summary opinion:}

"Affirmed (or reversed or other appropriate direction for action), pursuant to Rule 136.01 (2)."

\textsuperscript{51. See JUDICIAL TRADITION, supra note 35, at 586-87 (noting that the bar developed criteria by which it was going to judge the new court's ability to meet the needs of practitioners).}

\textsuperscript{52. See COFFIN, supra note 34, at 165. Judge Coffin commented:}

\textsuperscript{In the continuum of increasing formality, decisions may be ranked as follows: a one-sentence or several-sentence order affirming under a rule or a cited authority; a sentence indicating adoption of the opinion of the trial court, sometimes with a few added comments; a per curiam opinion (i.e., unsigned, without indication of individual authorship) of a paragraph or two, usually unpublished; a full opinion, but so fact-bound and lacking in precedent that it is not to be published and is often unsigned; a full opinion, signed, and to be published.}

\textsuperscript{Id. COFFIN also divided appellate decisions into three categories "depending on the amount of time expected to be put into writing the opinion." Id. at 177. These categories are as follows: (1) decisions that take from one to two hours to no more than a day; (2) decisions prepared in two to three days to a week; and (3) decisions in which the expected time for the opinion to be written is substantial, from two to six weeks. Id. at 177-80. The first category includes the following types of decisions: (1) those which affirm the opinion below; (2) short orders; and (3) memorandum opinions or per curiam. Id. at 177. The second class includes unpublished opinions, some which may actually fall within the third category. Id. at 178. The final category includes published decisions which involve (1) multiple issues and defendants, (2) overreaching legal issues and factual questions, and (3) court policy. Id. at 178-79.}
commonly called an order, is the court’s decision itself. Opinions, as one commentator states, “are [the] most visible and enduring contribution to the legal system.”

Despite the valuable contribution published opinions make to the legal system, appellate courts issue far more unpublished opinions than published opinions because the use of unpublished opinions increases the productivity of the court. Unpublished opinions appear in one of three forms: (1) a full, written opinion; (2) a memorandum opinion, which is shorter than a full written opinion but varies in length; or (3) an order, a decision without any opinion—just the

53. David M. Gunn, "Unpublished Opinions Shall Not Be Cited as Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i), 24 ST. MARY'S L.J. 115, 138 (1992). Gunn, relying on a U.S. Supreme Court decision, claims that "[a]n opinion gives reasons; it says why. A judgment gives orders; it says what." Id.; see also Rogers v. Hill, 289 U.S. 582, 587 (1933) (stating that while the terms order and decision are often used interchangeably, they are not equivalents).

This Note will use the term “order” throughout.

54. Coffin, supra note 34, at 171. Coffin also states an “appellate opinion serves three functions: it decides a case . . . ; it continues the story by making some law . . . ; and it projects the story into the future by giving intimations of further directions.” Id. Furthermore, as the Ninth Circuit’s Rule 36-1 states, an opinion is a written reasoned disposition of a case which is intended for publication. 9TH CIR. R. 36-1.

55. A full, signed opinion will be issued when, based upon the complexity and importance of the issues:
   (1) an opinion would have precedential value, because the decision involves an unstated or undecided issue of law; or
   (2) an opinion would have precedential value, because the decision requires an application of established principles of law to new, novel, or exceptionally illustrative facts; or
   (3) a reversal or modification requires more than a summary statement of the reasons; or
   (4) issues or unusual public concern are presented.

56. See Thomas B. Marvell & Carlisle E. Moody, The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output, 21 U. MICH. J.L. REF. 415, 438 (1988). Memorandum opinions are commonly referred to as either a per curiam, memorandum, or memo opinion. Id. These authors state that memo opinions vary in length, “[m]ost are much shorter than regular signed opinions, but several courts issue lengthy memo opinions, and a few courts issue very short signed opinions.” Id. Furthermore, per curiam opinions may be issued when: (1) the case is relatively simple; (2) the case is complex and the judges share in the writing, thus producing a combined effort, and therefore no single judge signs as author; or (3) the case is controversial and no one signs because the court shares responsibility. Id. Thus, per curiam opinions represent a work of the court instead of one single judge. See Robert L. Stern, APPELLATE PRACTICE IN THE UNITED STATES 477-78 (2d ed. 1989); see also ABA TASK FORCE ON APPELLATE PROCEEDURE, supra note 21, at 107. The task force concluded: Contemporary unpublished opinions are of two types. Some may be memoranda, whether short or long, which decide the questions presented and give guidance for further disposition of the case at the trial court if any is needed. Such decisions may have few or no citations—they are intended primarily to tell counsel, the parties, and the trial court why the case is
bare holding of the case.57


In 1964, the ever-increasing case loads of the U.S. Circuit Courts of Appeals, along with the uncontrollable growth of law reports58 and the costs of retaining accessibility to decisions, compelled the Judicial Conference of the United States to recommend that the federal appellate courts limit publication to only those opinions “which were of general precedential value.”59 This recommendation was unsatisfactory, however, as it did not provide sufficient detail to guarantee consistency among the courts. As a result, by 1972, the Judicial Conference was again striving for more effective publication rules.

The Federal Judicial Center reported that there was “widespread agreement that too many opinions are being printed and published,’ but [no] . . . ‘consensus about how to limit publication.”60 Following the Federal Judicial Center’s recommendation that the federal circuits modify their existing rules, the Judicial Conference requested:

[E]ach circuit council to review its publication policy and to implement the following modifications:

a. Opinions will not be published unless ordered by a majority of the panel rendering the decision;

b. Non-published opinions should not be cited, either in briefs or in court opinions;

c. When an opinion is not published the public record shall be completed by publishing the judgment of the Court.61

As a result, each circuit submitted its revised rules to the Judicial

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57. According to the ABA Task Force, an order “illumina[es] nothing but the result as, ‘affirmed’ or ‘reversed’ with either no or perfunctory explanation.” ABA TASK FORCE ON APPELLATE PROCEDURE, supra note 21, at 107. Thus, orders are decisions based on the merits, but lacking any opinion, and providing only the bare holding. See Marvell & Moody, supra note 56, at 439. For example, the supreme court issues an order for a denial of discretionary appeal. Id.


60. Stienstra, supra note 59, at 501. In addition, the Advisory Council, organized by the Judicial Center in 1971, published a report in 1973 proposing standards for publication and recommending that nonpublished opinions not be cited as precedent since access to these opinions was unequal. Id. at 501-02.

61. Reynolds & Richman, supra note 26, at 1170.
Conference and by 1974, each federal circuit court had adopted its own rules for further limiting the publication of opinions. Although each circuit devised its own unique plan for publishing opinions, there were two similarities among them: (1) opinions that serve no lawmaking function, or have no precedential effect, should not be published; and (2) all federal circuit courts designated at least some of their opinions as unpublished. There was no general rule, however, as to the precedential value of an unpublished opinion. In 1977, a subcommittee of the Judicial Conference reported that at "this time we are unable to say that one opinion publication plan is preferable to another, nor is there a sufficient consensus on either legal or policy matters, to enable us to recommend a model rule. We believe that continued experimentation under a variety of plans is desirable." Today, the situation remains unsettled, and the federal appellate courts do not employ a uniform rule regarding the publication of opinions. As a result, there remains a debate over how to interpret and how to apply the "unpublished no-citation rule." It appears, however, that the underlying rationale for each rule remains identical: only those opinions of general precedential value should be published. Thus, one must examine each federal circuit's publication

62. Id. at 1171-72. The Judicial Conference was pleased with the circuits' efforts, but the proposed plans submitted by the circuits were not identical. Id. The Conference used the inconsistencies between the circuits as an experimental tool to try and derive one uniform rule on publication. Id.

63. Gunn, supra note 53, at 124-25. Gunn stated that "[t]he general rule in federal courts of appeals is that unpublished opinions have no precedential effect. And every federal appellate court except the Supreme Court designates some of its opinions as unpublished." Id. (footnotes omitted).

64. See id. Gunn concluded that there is a "wide range of views among the courts as to how they value an unpublished opinion as precedent. In the Fifth Circuit, for example, an unpublished opinion is precedent." Id. (footnotes omitted).

65. Stienstra, supra note 59, at 506-07.

66. See id. at 507. Stienstra stated that:

The debate has, in a way, ended where it began. Out of concern for the delay and attendant injustice caused by rising caseloads, the courts adopted limited-publication policies to increase judicial efficiency. Then, because the unpublished decisions were not uniformly available to all litigants, the courts established limitations on citation of these decisions. Now, under criticism for promoting yet another kind of unfairness through these practices, the courts are being called on to reevaluate their policies. It is in the context of this continuing debate that the current distribution, citation, and publication rules and practices of the appellate courts are examined.

Id. at 507-08. Stienstra also gave a summary of each circuit's publication rule with respect to the publication, citation, distribution, and precedential value of unpublished decisions. Id. at 581-34.

67. See Robel, supra note 9, at 940-42; see generally Stienstra, supra note 59 (discussing selective publication plans of federal circuits).
rule carefully to determine the applicable rules for that circuit.68

The Eighth Circuit's publication rule provides an illustration of one such publication rule used at the federal level.69 The Eighth Circuit has no rule on the distribution of published or unpublished decisions, or where these decisions are made available.70 Although not specifically required in a rule, the Eighth Circuit does send its unpublished opinions to all the circuit and district court judges.71 Furthermore, the Eighth Circuit's Plan for Publication specifically restricts citing unpublished opinions because they are not "uniformly available to all parties."72 The concern that arises when a circuit combines this type


69. The Eighth Circuit's publication rule provides:

The Court or a panel will determine which of its opinions are to be published, except that a judge may make any of his opinions available for publication. The decision on publication of an opinion will ordinarily be made prior to its preparation. The direction as to publication will appear on the face of the opinion. Unpublished opinions, since they are unreported and not uniformly available to all parties, may not be cited or otherwise used in any proceedings before this "court or any district court in this circuit" except when the cases are related by virtue of an identity between the parties or the causes of action.

8TH CIR. APP. 1. The Eighth Circuit's publication plan states that:

An opinion should be published when the case or opinion:

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

Id.; see also FED. R. APP. P. 47 (giving the federal courts of appeals authority to implement rules governing their practice).

70. See Stienstra, supra note 59, at 509.

71. See id. at 510.

72. See 8TH CIR. APP. 1. The Eighth Circuit's Publication Plan includes the following exception for when an unpublished opinion can be cited, "except when the
of distribution rule with such a strict "no-citation" rule is that "the courts will rely on arguments or trends gleaned from unpublished decisions that remain unavailable and unusable to litigants." 

The federal circuits continued their efforts to reform the judicial opinion-writing process even further to allow for economic efficiency and to alleviate the heavy burden on appellate judges. Besides the selective publication rules that each circuit adopted, several other reforms have occurred in the federal circuits. These reforms include the following: (1) limiting or eliminating oral arguments and placing more emphasis on the written brief; (2) reducing or even eliminating opinion writing; and (3) rendering decisions from the bench without issuing an opinion at all. These practices, however, have not been accepted without criticism. Most criticism falls on those circuits that eliminate writing opinions altogether, and instead simply issue decisions that state "Affirmed (or Reversed) based on the decision below," or even merely "Affirmed" or "Reversed."

2. History of Unpublished Opinions in the Minnesota Court of Appeals

The changes that took place in the federal system prompted most state courts to look for ways to increase decision output and thereby

cases are related by virtue of an identity between the parties or the causes of action." Id.

73. See Stienstra, supra note 59, at 516.


75. See id. at 441 (dismissing the changes in decision formats that some federal courts instituted as an attempt to "economize the time it takes to issue final orders and close cases"). Furthermore, this article discusses the reliance some courts placed on using memorandum opinions. Id.; see infra part VI.A; see also Robel, supra note 9, at 941. Robel claims the "option most responsive to the concerns underlying the publication plans would be to eliminate opinions altogether. By doing this, the courts would achieve every cost saving that was hypothesized in connection with nonpublication, but would avoid entirely the risk of creating a twilight zone of written-but-unpublished work." Id. at 943.

76. See Mathy, supra note 74, at 442-43. Mathy discusses the Second Circuit's method of disposing of cases in this manner. Id. This method is highly criticized, however, because litigants expend their resources and receive practically nothing in return from the court insofar as the court's decision lacks reasoning and a written decision. Id. Rendering a decision from the bench does not propose to be a solution to the order opinion problem, and thus will not be discussed in this Note. This Note discusses opinion writing only; therefore, reducing or eliminating oral arguments is also outside its scope.

77. See, e.g., Pratt, supra note 68, at 502 (discussing the criticisms of the Second Circuit's use of summary orders).
improve their own backlog problems.78 Most states followed the recommendation set forth by the Judicial Conference, and adopted a limited publication rule.79 The Minnesota Court of Appeals published all of its decisions until 1987, when, despite the Minnesota State Bar Association’s recommendation to continue publishing all opinions,80 the legislature amended section 480A.08 of the Minnesota Statutes, giving the appellate court the discretion to decide whether or not to publish an opinion. In 1987, the legislature amended subdivision 3 of section 480A.08 to read:

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

78. See Marvell & Moody, supra note 56, at 416.

The changes fall into seven categories: (1) adding judges or temporarily assigning trial and retired judges; (2) hiring law clerks and staff attorneys; (3) curtailing opinion practices by deciding cases with unpublished opinions, with unsigned opinions, or without opinions; (4) creating or expanding intermediate courts; (5) reducing the number of judges who participate in each decision; (6) curtailing oral arguments; and (7) using summary judgment procedures.

Id.

79. See Weirich v. Weirich, 867 S.W.2d 787, 788 n.2 (Tex. 1993) (stating applicable state rules for states that regulate publication of intermediate court opinions). California has a unique and highly-criticized practice, whereby its supreme court assumes the power to “decertify” decisions of its intermediate court; meaning it converts them from published to unpublished decisions. See Joseph R. Grodin, The Depublication Practice of the California Supreme Court, 72 CAL. L. REV. 514 (1984) (discussing California’s depublication rule); see also Gunn, supra note 53, at 138-44 (discussing depublication practices used in Texas).

80. See Mockenhaupt, supra note 17, at 793-94 & n.41. A majority of the MSBA’s Subcommittee on Appellate Court Opinions suggested “maintaining publication of all written appellate opinions and increasing the use of memorandum decisions or summary dispositions.” Id. at 794. One concern of the MSBA Judicial Administration Committee was that if the court did not have to publish all of its decisions, it would reduce “judicial accountability because a judge is under less pressure to fit unpublished cases into the stream of published decisions.” Id. at 795. For text of the MSBA’s recommendation, see infra text accompanying note 308.
This amendment was an attempt to allow the appellate court to dispose of cases in a much faster and more efficient manner.\(^{82}\)

The Minnesota Legislature enacted the amendment for two reasons: (1) the difficulty of obtaining new judges on the court of appeals; and (2) the necessity for avoiding publication of redundant legal analysis.\(^{83}\) The adoption of this statute generated much criticism concerning the court's ability to issue an unpublished opinion, whether to allow citation of unpublished opinions, and what the nonprecedential value of an unpublished opinion would do to the concept of \textit{stare decisis} and the laws of the state.\(^{84}\) Despite these concerns, the court of appeals has freely exercised its right to issue unpublished opinions. In 1988, for example, it issued 706 unpublished and 611 published opinions. In 1994, the court issued 1007 unpublished (not including 307 unpublished order opinions) and only 374 published opinions.\(^{85}\)

Similarly, on September 25, 1987, the court of appeals amended its own Internal Rules to implement the changes made to section 480A.08.\(^{86}\) In 1991, however, the court of appeals repealed and

\(^{81}\) \textit{MINN. STAT. § 480A.08, subd. 3 (1986 & Supp. 1987)} (emphasis added to indicate amended language).

\(^{82}\) \textit{See} Mockenhaupt, \textit{supra} note 17, at 792-96 (examining opposing and supporting arguments to nonpublication rule and recommendations that were proposed instead of rule adopted by the Minnesota Legislature); \textit{see also} Popovich, \textit{supra} note 15, at 585 (nonpublication rule created as a result of suggestions of legislative inquiry).

\(^{83}\) \textit{See} Popovich, \textit{supra} note 15, at 585. Furthermore, former Chief Judge Popovich stated that “[p]ublication would be limited to far-reaching and important cases affecting more than just fact-orientated decisions.” \textit{Id.} The purpose of the nonpublication rule was to “avoid publication of repetitive legal analysis.” \textit{Id.}

\(^{84}\) \textit{See generally} Mockenhaupt, \textit{supra} note 17, at 799-807 (assessing the court of appeal’s nonpublication practice); Anderson, \textit{supra} note 31 (discussing the impact of unprecedential decisions on Minnesota’s legal system).

\(^{85}\) \textit{See infra} Appendix.

\(^{86}\) \textit{See} Mockenhaupt, \textit{supra} note 17, at 796-97 (detailing Internal Rules court adopted as guidelines to follow when issuing unpublished decisions). Former Chief Judge Popovich noted that the legislature “made a statutory change to reduce the workload of the court by not requiring published opinions in all matters.” \textit{JUDICIAL TRADITION, supra} note 35, at 24-25. \textit{Internal Rule 10.1} addressed the non-publication of opinions, and it set forth the identical criteria for publication as amended 480A.08, which the court uses to decide when to publish. \textit{Id.} at 89. The only difference is that the Internal Rule stated that the decision not to publish must also be “in accordance
replaced its Internal Rules with the Special Rules of Practice for the Minnesota Court of Appeals.\(^\text{87}\) Rule 4 of the Special Rules deals with judicial opinions in general, and it reiterates the criteria for unpublished opinions. Rule 4 specifically states:

Opinions state the nature of the case and the reasons for the decision. The panel will decide at its conference whether to publish an opinion. The publication decision is guided by Minn. Stat. § 480A.08, subd. 3, which provides for publication of opinions which establish a new rule of law, overrule a previous Court of Appeals decision not reviewed by the Minnesota Supreme Court, provide important procedural guidelines in interpreting statutes or administrative rules, involve a significant legal issue, or significantly aid in the administration of justice. All other opinions are unpublished.

Unpublished opinions are not precedential and may not be cited unless copies are provided to other counsel at least 48 hours before their use at any pretrial conference, hearing, or trial. If an unpublished opinion is cited in a brief or memorandum, copies must be provided to all other counsel at the time the brief or memorandum is served.\(^\text{88}\)

The court of appeals intended the Special Rules to complement the Rules of Civil Appellate Procedure and to inform attorneys and the public about appellate procedures and the judicial deliberative process.\(^\text{89}\) More importantly, the Special Rules also provide a means for evaluating and improving the court of appeals.\(^\text{90}\)

\(a\). Order Opinions—What Are They?

Following the lead of the federal circuit courts, most state appellate courts also developed their own form of unpublished abbreviated

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with Minn. R. Civ. App. P. 136." \(\text{Id.}\) Moreover, Internal Rule 10.4 stated:

If it is determined that an opinion should not be published, the opinion on its face shall carry the following notation:

"This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3."

It shall then be filed with the Clerk of the Appellate Courts and shall be released weekly by the clerk in a separate packet to those who subscribe to receive opinions from the clerk’s office as opinions are released. It is still considered a public document. Minn. Ct. App. Internal R. 10.4 (repealed 1991).

87. \textit{See} Mockenhaupt, supra note 17, at 797-98 (discussing new Special Rules and comparing them with prior Internal Rules).
90. \textit{Id.} For example, the bar or the public could look to the Special Rules to see if the court of appeals followed the correct procedure when deciding whether or not to publish an opinion, or if the rule gives sufficient information about the court’s deliberative process. Thus, an outsider to the court can use the Special Rules to determine if the court came to a correct decision. \textit{See infra} part VI.B.
In Minnesota, when the court of appeals declares a decision unpublished, the disposition may appear in an abbreviated format called an order opinion. Where an order opinion fits along the continuum of appellate decisions determines the applicable rules for publication and the opinion's precedential value, if any.

Since no clear definition states exactly what constitutes an order opinion, it is difficult to determine where an order opinion fits on the continuum of appellate decisions. One definition explains that order opinions "are shorter than memorandum decisions, providing only a very short statement of the facts and the reasons for the court's decision." Former Chief Judge Peter Popovich has stated that "[a]n order opinion is not supposed to have a discussion of facts and analysis." Furthermore, Rule 136.01, which the court of appeals cites as its authority to issue an order opinion, suggests that an order opinion is a "statement of the decision without a written opinion." Former Chief Judge Anderson, however, has declared that Rule 136.01 was poorly drafted, and that order opinions "do have written opinions." Thus, it is difficult to determine precisely how to treat an order opinion without a concrete definition.

One reason it is difficult to define an order opinion is because each opinion is unique to the style of the authoring judge. However, based on an examination of more than 250 order opinions, it is clear that...

91. In a telephone conversation with the National Center for State Courts, a representative claimed that because each state calls its unpublished abbreviated opinions something different, and because these dispositions are neither published nor easily accessible, the only accurate way to track each court's procedures is to send a survey to the clerk of each state's appellate court asking them for the pertinent information. Such a survey is beyond the scope of this Note. Similarities can be found, however, between the rules for unpublished opinions and those for abbreviated dispositions, since an order opinion is a subset of each. For example, Second Circuit Rule 0.23 allows the court to issue a "summary order," which appears to be similar to an order opinion. See generally Pratt, supra note 68, at 481 (explaining that "a summary order may include a 'brief written statement'" and that "these statements may run from a sentence or paragraph in length to as many as seven or eight pages").

92. See supra notes 52-57 and accompanying text for discussion pertaining to continuum of appellate decisions.

93. Mockenhaupt, supra note 17, at 798. The court of appeals uses unpublished opinions more than it uses order opinions. Id. The court limits its use of order opinions because it is "concern[ed] with providing adequate reasons for all of its decisions." Id. at 798-99 n.64; see also Wozniak, supra note 14 (declaring that order opinions state ",[i]imited facts and written reasons").

94. See Peterson, supra note 16.

95. MINN. R. CIV. APP. P. 136.01, subd. 1(b); see also supra text accompanying note 50.

96. Peterson, supra note 16.
order opinions do share some fundamental common characteristics. First, the initial page of each decision contains the label "order opinion." Second, each sets forth the names of the judges on the panel that considered and decided the case. Third, each provides a brief summary of what the trial court decided and what the appellant argued on appeal. Fourth, most cite the statutes and/or cases that support the court's decision. Fifth, each order opinion ends by stating what the appellate court orders, either by declaring "it is hereby ordered" or "it is ordered." Finally, each contains a citation to Rule 136.

These common characteristics of order opinions, however, do not help define whether an order opinion is an "order" or whether it is an "opinion." Some order opinions lean more toward a simple order while others lean more toward a simple unpublished opinion. On the continuum of appellate court decisions, it appears that an order opinion would best be placed near a "memorandum opinion." Similar to order opinions, courts use memorandum opinions when they feel "impelled to go beyond summary conclusions and to give, in short compass, its reasoning." This is a logical inference, since the definition of a "memorandum opinion" in the Internal Rules is very similar to the order opinions used by the appellate court.

The court of appeals also issues "Special Term" orders which are similar to order opinions. Special Term orders are similar to order opinions in that they are they are unpublished and nonprecedential, and they "contain a minimal recitation of facts and an abbreviated explanation of the decision." Since the appellate court issues special term opinions only under special circumstances, order opinions do not fall closer to special term opinions on the continuum of appellate decisions.

97. This author examined over 250 order opinions on file at the court of appeals, issued between 1989 and 1994, searching for similarities and differences between order opinions.
98. COFFIN, supra note 34, at 177.
99. The Internal Rules defined a memorandum opinion as a "condensed, short statement of the facts, the question involved and decision and citation of the statute, case or other authority." MINN. CT. APP. INTERNAL R. 5.5 (repealed 1991). In practice, most order opinions are written in this fashion. A memorandum opinion, like many order opinions, is "a one-page document that indicates which party has prevailed and, perhaps but not always, includes a few sentences which cite cases in support or otherwise indicate the reasons for the ruling. A memorandum opinion is rarely published." Mathy, supra note 74, at 441.
100. See State v. Russell, 481 N.W.2d 148, 150 (Minn. Ct. App. 1992). These opinions are written "solely for the benefit of the parties" and "[t]hey are not published, nor generally available to counsel in other cases." Id. "The state collects special term orders and has a right to do so. But they should not be cited as precedent on another case in this court or in the trial court." Id.
b. Order Opinions—When Did Minnesota Begin Using Them?

Exactly when the Minnesota Court of Appeals began using order opinions is uncertain. Former Chief Judge Popovich once commented that "[d]uring the first four years of the court's existence, all opinions, except order opinions, were published . . . ." Chief Judge Popovich also noted that:

The former practice of the supreme court to grant Summary Affirmance without a statement of the reasons would not be followed. The court's decisions are issued either by full opinion (see Internal Rule 3.6), a memorandum opinion (see Internal Rule 3.5), or an order opinion pursuant to Rule 136 of the Rules of Civil Appellate Procedure. As Chief Judge Popovich wrote these statements in 1987, it is logical to infer that the court of appeals began using order opinions at its inception. It is difficult to determine whether the court of appeals began using a memorandum opinion and then later, after it began rendering unpublished opinions, switched to the order opinion, or if the appellate court began using both at its inception. If the court used order opinions from its inception, the Internal Rules did not mention the term "order opinion," only "memorandum opinion."

101. JUDICIAL TRADITION, supra note 35, at 25 (emphasis added).
102. Id. at 24-25 (emphasis added).
103. Cynthia L. Lehr, Chief Staff Attorney at the Court of Appeals, stated that memorandum opinions were issued by the court of appeals at the time when all of its opinions were published. They were a means of writing shorter opinions for the cases in which the law was clear and did not add anything to a body of precedent. Interview with former Chief Judge Anne Simonett and Chief Staff Attorney Cynthia L. Lehr, in St. Paul, Minn. (Jan. 9, 1995) [hereinafter Interview]. After the court began issuing unpublished opinions, it began using order opinions instead of memorandum opinions. Id.
104. Minnesota Court of Appeals Internal Rule 3.5 provided as follows:

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

MINN. CT. APP. INTERNAL R. 3.5 (repealed 1991); see also JUDICIAL TRADITION, supra note 35, at 80-81 (setting forth the different types of opinions in the Internal Rules). The exact date of the first order opinion is further obscured by the fact that the earliest order opinions on file at the court of appeals, in its chambers, are dated 1988, but the court has cited a 1987 order opinion in an unpublished opinion. See Hamilton v. State, No. C5-87-2513, 1988 Minn. App. LEXIS 176, at *3 (Minn. Ct. App. Mar. 10, 1988). Furthermore, according to statistics compiled at the court of appeals, it appears that the practice of issuing order opinions began as early as 1986, with ten order opinions being issued that year. See infra Appendix.
The term "order opinion," first appeared in 1991 when the supreme court adopted the Special Rules of Practice for the appellate court. The final paragraph of Special Rule 4 states that "[p]ursuant to Minn. R. Civ. App. P. 136.01, subd. 1(a), the panel may decide to issue an order opinion." The Special Rules, however, are more general than the old Internal Rules and unfortunately do not give descriptions for the different types of opinions the court may issue. Thus, the Special Rules do not specify what constitutes an order opinion and, more importantly, under what situations the court will issue one.

c. Order Opinions—From What Source Does Their Authority Arise?

Another troubling point is determining precisely what statute or rule actually gave rise to the order opinion. If the relevant authority is Rule 136.01, then it would appear that the supreme court, in promulgating the Rules of Civil Appellate Procedure, gave the appellate court the authority to issue order opinions from its inception. Rule 136.01 provides that "if the court determines that the contents of the statement of the decision sufficiently explain the disposition made, no written opinion need be prepared." Therefore, because the appellate court had the authority to issue a decision without an opinion, then a fortiori it should have had the power to issue an abbreviated opinion.

According to the late Chief Judge Anne Simonett, however, the legislature requires the court of appeals to issue some form of abbreviated opinion. In this regard, the appellate court is presumably referring to the 1989 amendment to section 480A.08 of the Minnesota Statutes apparently made to codify Rule 136.01. In 1989, the legislature amended section 480A.08, adding the following language: "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." To some, it was

106. Id.
107. Id. There is no longer any guidance on the types of opinions issued by the court, as was provided in the Internal Rules; only that "[o]pinions state the nature of the case and the reasons for the decision." Id.
108. Minn. R. Civ. App. P. 136.01, subd. 1(a); see also supra text accompanying note 50.
109. Interview, supra note 108.
110. See Weaver, supra note 58, at 482 (explaining that law of the case doctrine "prohibits the relitigation in a single case of an issue already decided in that case").
111. Id. ("Under the doctrine of res judicata, a valid, final decision and judgment, when rendered on the merits, is an absolute bar to a subsequent suit between the same
this amendment that created the order opinion. In sum, although the origin of order opinions is unclear, the court of appeals frequently issues order opinions today as a way to increase its output and prevent backlog.

III. DELIBERATIVE PROCESS USED TO ISSUE ORDER OPINIONS

Rule 3 of the Special Rules of Practice for the Minnesota Court of Appeals explains that the court assigns a case to a panel of three judges, whereupon the Chief Judge names one of the three to preside. The panel decides at its conference, either following oral arguments or a scheduled conference, whether an opinion will be published following the publication criteria in section 480A.08. After this decision is made, the presiding judge assigns preparation of parties, or those in privity with them, on the same cause of action."; see also Hauser v. Mealey, 263 N.W.2d 803, 806-09 (Minn. 1978) (explaining affects of res judicata and distinguishing it from collateral estoppel).

112. MINN. STAT. § 480A.08, subd. 3(b) (1994). Legislative history for this statute is unavailable. The statutory change was, however, part of an appropriations bill that was not mentioned in any session weekly of the proposition coming before the court. See 1989 Minn. Laws ch. 335, art. 1, § 256.

The doctrine of collateral estoppel "provides that certain issues which are finally determined may not be relitigated even in a subsequent suit over a different cause of action when the subsequent suit involves a party to the first case or his privy." Weaver, supra note 58, at 482. These doctrines "must apply to unpublished opinions for them to have any legal significance." Id.; see also Mattson v. Underwriters at Lloyds of London, 414 N.W.2d 717, 719-20 (Minn. 1987) (explaining legal doctrines of res judicata and law of the case).

113. See Wozniak, supra note 14. A portion of Judge Wozniak's speech stated: [W]ithout our request, [the Legislature] gave us the power to issue summary affirmances . . . . They added a simple line to our law: "The decision of the court need not include a written opinion." We did not wish to adopt this concept. Promises were made to the bench and bar and to the public that a written opinion would always issue stating our reasons for our decisions. This gave birth to the order opinion. Limited facts and written reasons are stated and, under Rule 136, these opinions are not published in Finance and Commerce or Wesdaw, are sent only to the attorneys of record, and have no precedential value, but represent an official opinion of our court. By using this abbreviated format, we avoid summary affirmances, which have had a bad connotation and which are a red flag to the bar, and yet we are able to satisfy both the bar and legislative intent. Its use can be expected on sufficiency of the evidence appeals; appeals which shall have little or no merit; remands to the trial court; and where the law is clear and controlling. They rarely exceed four or five pages . . . .

Id.

114. SPEC. R. PRA. MINN. CT. APP. 3.

115. See id. (stating a conference is held either immediately following a case with oral argument or it is scheduled for non-oral cases).

116. SPEC. R. PRA. MINN. CT. APP. 4 (listing criteria identical to the criteria listed in MINN. STAT. § 480A.08, subd. 3 that the panel should use when making this decision).
the opinion to a member of the panel. The panel may also decide at its conference to issue an order opinion. Thus, the panel, after full consideration of the merits of the case, can decide to issue a published opinion, an unpublished opinion, or an unpublished order opinion.

The late Chief Judge Simonett stated that the court applies the publication criteria set out in the Special Rules, which is identical to that in section 480A.08, to decide whether to issue an unpublished order opinion or an unpublished opinion. According to the former Chief Judge, order opinions are a subset of unpublished opinions and, therefore, the same rules and criteria apply. The former Chief Judge further explained that the decision of how the disposition of the case will look is part of the entire deliberative process, and that each case is given the same treatment, scrutiny, and careful review of its merits. The only difference, noted former Chief Judge Simonett, is the form of the opinion, which is determined by how useful the decision will be to all litigants beyond the case. When asked if the panel had to unanimously agree to issue an unpublished order opinion, the former Chief Judge responded that it was most likely a unanimous panel, since she was not aware of any situations where a member of the panel did not agree to issue an order opinion in a case.

After the panel decides to issue an order opinion, the disposition of the case is prepared. The Special Rules require that all opinions "state the nature of the case and the reasons for the decisions." Each order opinion should satisfy this language, if the authoring judge adequately sets forth sufficient reasoning for the court's decision.

117. SPEC. R. PRAC. MINN. CT. APP. 3.
118. SPEC. R. PRAC. MINN. CT. APP. 4. Judges, not law clerks, are the authors of order opinions. One commentator has stated that the judge is the author of this kind of "quicky" opinion, where the goal is to say just enough to explain to the parties why the court reached its result. . . . [I]t is easier [for any judge] than for a law clerk because the judge has enough experience to know that not every contention need be addressed nor authority cited for every proposition in a simple case where the law is clear. 

COFFIN, supra note 34, at 180.
119. See Simonett, supra note 19.
120. See supra note 81 and accompanying text.
121. See Interview, supra note 103.
122. Id.
123. Id.
124. Id.
125. Id.
126. SPEC. R. PRAC. MINN. CT. APP. 4.
127. Interview, supra note 103.
However, if order opinions are opinions which set forth the reasoning of the decision, is it inconsistent for the appellate court to cite Rule 136.01(a) as its authority to issue an order opinion, since that rule states no written opinion need be prepared if the contents of the statement of the decision sufficiently explains the disposition of the case?128

In sum, the court of appeals applies a rule that appears to apply only to a disposition without a written opinion.

IV. THE CASE FOR ORDER OPINIONS—PROONENT’S PERSPECTIVE

According to the late Chief Judge Simonett of the court of appeals, the court is operating under legislative authority when it disposes of a case by order opinion.129 Moreover, the court uses order opinions rather than summary affirmances because judges generally feel compelled to explain their decisions, and they do so by giving a “statement of the decision without a written opinion” pursuant to the statute.130 Thus, the appellate court agrees with the legal consumer that every appellate decision requires some statement of reason in order to demonstrate that the court has not acted arbitrarily.131 Furthermore, according to the appellate court, if a litigant is unhappy with the court’s decision and feels that perhaps the court has acted arbitrarily, the unhappy litigant still has the option of appealing the decision to the Minnesota Supreme Court.132

Those supporting the court of appeals’ use of order opinions focus primarily on three arguments. First, for the sake of judicial efficiency, the court of appeals needs an abbreviated opinion to prevent a backlog

128. MINN. R. CIV. APP. P. 136.01, subd. 1(a); see supra note 50 and accompanying text; see, e.g., Anderson v. Anderson, No. C7-91-2341 (Minn. Ct. App. Apr. 20, 1992).
129. Interview, supra note 103. The statute the Chief Judge referred to as the authority for order opinions is 480A.08, subd. 3. Id. Additionally, former Chief Judge Wozniak stated that the legislature “firmly believes that (1) there is absolutely too much litigation; (2) there are too many frivolous lawsuits and frivolous appeals; and (3) there is no real need to write opinions and give our reasons—just say yes or no.” Wozniak, supra note 14.
130. Interview, supra note 103.
131. See STERN, supra note 56, at 24. Stern states that a “statement of reasons however short, demonstrates that the court has acted judicially, not arbitrarily.” Id. at 24-25; see also Nathan Dodell, On Wanting to Know Why, 2 FED. CIR. B.J. 465, 467 (1992). The “discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the court that a bare signal of affirmation, dismissal, or reversal does not.” Id. (quoting D.C. Circuit Judge Patricia M. Wald); ROBERT A. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 52 (1976) (“Two lines in a per curiam, memorandum, or even a signed opinion can provide all the reasons relevant to the decision.”).
132. Interview, supra note 103; see also Simonett, supra note 19 (stating that “parties in every case may request further review in the Minnesota Supreme Court”).
as the court's docket continues to increase. Second, judicial resources are insufficient to allow the court to issue full written opinions in every case. Finally, although order opinions are unpublished, they are still public documents available to anyone interested in seeing them; so the judges remain accountable for these decisions, thereby preventing any secret decisions.\(^\text{133}\)

A. Judicial Efficiency

The most important rationale underlying order opinions is judicial efficiency.\(^\text{134}\) As the appellate court case load continues to increase, and because the court of appeals lacks the power of discretionary review,\(^\text{135}\) some procedures are necessary to allow the court to hear appeals in a more efficient manner.\(^\text{136}\) The most advantageous and productive change for the court is to reduce the burden of writing full opinions when deciding a case, and simply issue an order opinion.\(^\text{137}\)

According to former Chief Judge Anderson, the idea behind order opinions "is to avoid having either the court or public laboring over a case that is cut and dried, in which the facts and law are clear . . . . \[T\]here's less of a need to publish opinions repeating the same points over and over."\(^\text{138}\) Once a law is promulgated and has become clearly defined, there is no longer any need to write a published opinion detailing the reasoning of the law.\(^\text{139}\) In these situations, "it

\(^{133}\) See Simonett, supra note 19.

\(^{134}\) See generally Office of the State Court Administrator, Minnesota State Court Report: 1987, at 15 (1987) (discussing the need to balance the demands for court services and disposing of cases). This report also stated that the "clearance rate" is an indicator which allows the court to measure its ability to keep pace with its caseload. Id. at 26. "The clearance rate is determined by dividing the number of dispositions by the number of new filings, and multiplying by 100 to convert the measure to a percentage." Id. Ideally the clearance rate should be at 100%; this indicates that the court is keeping up with its caseload. Id. Consequently, a clearance rate above 100% indicates the court is reducing any backlog and below 100% indicates the court is developing a backlog. Id.; cf. Hairston et al., supra note 12, at 19-20 (indicating that the Minnesota Court of Appeals is developing a backlog problem, e.g., 1989 clearance rate was 105.6% and the 1991 clearance rate was 99.5%).

\(^{135}\) See supra notes 43-44 and accompanying text.

\(^{136}\) It has been suggested that due to the growing case volume, both judges and attorneys seem overworked, causing a decline in civility. See Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371, 374-78 (1991); see also Hairston et al., supra note 12, at 18 (stating that as caseloads increase, but the judiciary does not, there is "less time for appellate judges to review the record, read the briefs, hear oral arguments, discuss the case, and prepare an order or opinion"). This article also gives each state appellate court's filings for 1991. Id. at 20.

\(^{137}\) See Marvell & Moody, supra note 56, at 441.

\(^{138}\) Peterson, supra note 16.

\(^{139}\) See Norberg, supra note 37, at 124. Some appropriate situations in which the court may reduce the length of its opinion are "those that clearly are controlled by a
is wrong to ask publishers to publish, libraries to collect, and scholars to read opinions that merely labor the obvious, so far as they deal with the law at all, rehashing conclusions already reached in authoritative decisions of the same court . . . ."140 Accordingly, since the law is clearly established, the court is able to use order opinions to help clear its docket.

Order opinions undoubtedly help the court to clear its docket, since they are far less time-consuming to write, allowing judges to spend more time on the complex appeals141 and prevents backlog and delay at the court of appeals.142 Thus, through the use of order opinions, judges are able to write more opinions.143 Although judges spend

statute that is not challenged on constitutional grounds, cases that clearly are controlled by a prior rule of law and that rule does not require elaboration, or cases involving only factual issues." Id.

140. The Honorable Philip Nichols, Jr., Selective Publication of Opinions: One Judge's View, 35 AM. U. L. REV. 909, 916 (1986). Judge Nichols continues proclaiming that litigants cannot demand "that every appeal [appellate courts] take . . . will result in loading up the law publishers and the libraries with useless dissertations. They cannot require that forests be destroyed . . . ." Id. at 919-20. Furthermore, the ABA Task Force on Appellate Procedure announced that there are two fundamental purposes of unpublished opinions:

First, there are too many books on the shelves, and too many opinions in the books . . . . Second, the unpublished opinion is faster and easier for the court. Since it is intended primarily for the litigants and for the instruction of the trial court, all of whom are familiar with the matter to start with, considerably less thorough exposition is required. Since the opinion will not be cited as authority, there need be less pruning and polishing. The premium on research and erudition goes down, the premium on simple exposition goes up.

ABA TASK FORCE ON APPELLATE PROCEDURE, supra note 21, at 109.

141. See Patricia M. Wald, The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?, 42 MD. L. REV. 766, 781 (1983). According to Wald, an important factor assisting a judge in deciding how to allocate her time "is the type of opinion that accompanies a decision. Although every litigant would like an ultimate exposition of reasons for a decision, the truth is that judges should allocate more effort to the opinions in hard cases in which the courts must 'develop and declare the law.'" Id.; see also LEFLAR, supra note 131, at 42 (stating that 'good writing takes time and careful thought, which, especially when dockets are overcrowded, should not be spent on opinions for unimportant cases').

142. See Wozniak, supra note 15, at 589. Judge Wozniak states that in order for the court of appeals to avoid a backlog, the "court filings must be disposed of at a rate at least equal to the rate of new cases entering the system." Id.; see also Baker, supra note 22, at 246-56 (discussing that reducing opinion length, or even eliminating opinions, is another way to deal with the problem of delay and backlog).

143. See Marvell & Moody, supra note 56, at 441; see also Irah H. Donner, Should Nonprecedential Opinions Establish New Precedent?—JMOL Motions as an Example, 11 COMPUTER L. 16, 16 (1994) (stating that "nonprecedential opinions require less attention by the judges with respect to whether these opinions conform to established precedent . . . [and] perhaps need not be drafted as elegantly as precedential opinions, and therefore, nonprecedential opinions likely require less time and effort to be
less time writing an order opinion, they still must include the court’s reasoning for the decision, since one standard the court set for itself at its inception was to grant written opinions containing the reasoning for the decision.144

B. Insufficient Judicial Resources

In 1992, former Chief Judge Wozniak speculated:

[W]e’re going to have a budget crunch for at least another two, maybe three years. So we can forget about new judges. We’re not going to get any. But we’re adopting some other means of shortcutting some of the cases, . . . issuing different kinds of orders that are only two or three or four pages long and yet give the attorneys the opinion in a written form with reasons and case citations therein.145

Today, the judiciary represents a mere three-fourths of one percent of the state budget.146 Order opinions are one of the means adopted by the court for “shortcutting” cases, and they are an extremely effective method of saving scarce judicial resources.147 Order opinions reduce the cost of practicing law,148 which is important at a time

144. See supra text accompanying note 49.
145. MSBA IN BRIEF, supra note 33, at 2.
146. Data obtained from telephone interview with the State Court Information Office on January 6, 1995. This percentage figure has remained somewhat constant since 1987 when the “state-funded judicial budget . . . represented a fraction of the entire state budget, approximately one-half of one percent.” OFFICE OF THE STATE COURT ADMINISTRATOR, supra note 134, at 55.
147. See Donner, supra note 143, at 16. According to Donner, order opinions would “economize scarce judicial resources for important decisions that will affect more than simply the parties to the lawsuit. With the impending spending cuts to be imposed on virtually all government departments, [order opinions] can be viewed as a vehicle for helping balance the . . . budget.” Id.
148. See ABA TASK FORCE ON APPELLATE PROCEDURE, supra note 21, at 109. According to the Task Force:

Publication adds materially to the cost of practicing law, a cost to be borne in dollars and time not merely by the lawyer, but by the courts and their staff and, eventually, by the general public which must pay for the infinite perusal of identical headnotes. It may cost more than it is worth to pursue 100 cases on the legal problems of inspection at the border crossings in order to be able to decide the 101st case.

Id.; see also STERN, supra note 56, at 480. According to Stern:

Routine publication of all opinions involves substantial expense and results in publication of many decisions that are of little interest or use to anyone other than the immediate parties. The total cost includes not only printing, distribution, and storage, but also, ultimately, the rapidly increasing expense of legal research resulting from the proliferation of published reports. Where the point is reached in an individual jurisdiction that these costs outweigh the value of routine publication of all appellate opinions, procedures should be
when judicial budgets are limited. Thus, the use of order opinions helps the judiciary to work within its budget, since it does not have the option to increase the number of judges to help deal effectively with its increasing case load.\textsuperscript{149} Some commentators claim, however, that the only way states can maintain quality in their opinion-writing practices and productivity is by increasing the number of judges.\textsuperscript{150}

When the Minnesota Court of Appeals was formed in 1983, the legislature intended a ratio of approximately 100 cases per judge per year.\textsuperscript{151} In 1990, however, the legislature amended subdivision 3 of section 480A.01 and eliminated the following language: “The normal number of judges of the court of appeals shall be one judge for every 100 cases in that average. If this normal number increases the number of judges, new judges shall be appointed . . . .”\textsuperscript{152} Today, subdivision 3 of section 480A.01 entitled “Establishing Number of Judges,” no longer specifies the number of judges the court of appeals shall need or when the court can add additional judges.\textsuperscript{153} Assuming, \textit{arguendo},

\begin{itemize}
  \item adopted that limit publication to those opinions having some apparent precedential significance.
\end{itemize}

\textit{Id.} (quoting ABA \textsc{Comm’
\textsuperscript{n} on Standards of Judicial Administration, Standards Relating to Appellate Courts} 63-64 (1977)).

\textsuperscript{149} \textit{See} Robel, \textit{supra} note 9, at 961. Robel states:

\textquote{The biggest objection most judges have to changing the present system is that any change will increase the demands on judges. Judges generally agree that they cannot be expected to increase their output significantly, nor can they be expected to take on the task of authoring decisions in the large number of unpublished cases.}

\textit{Id.}

\textsuperscript{150} \textit{See} Hairston et al., \textit{supra} note 12, at 18. The authors of this article argue:

\textquote{If judges are not added . . . either quality is diminished or productivity drops and a backlog begins. Thus, appellate court caseloads and resources have a direct bearing on the courts’ institutional responsibilities to correct lower court errors, ensure uniformity in the application of laws, protect the constitutional rights of litigants, and clarify the meaning of laws.}

\textit{Id.; see generally} Victor E. Flango et al., \textit{How Do States Determine the Need for Judges?}, 17 \textsc{St. Ct. J.} 3 (Summer/Fall 1993) (discussing indicators that states use to determine their need for judges). According to this article, Minnesota looks at such factors as the number of cases filed, the number of dispositions by the judges on the bench, the types of cases on appeal, and the number of judges it already has on the bench. \textit{Id.} at 4-7. The article also discusses the use of a weighted caseload system as the “best direct measure” of the demand for court services . . . . Weighted caseloads permit taking the differences in case mix into account and make it easier to determine the extent to which caseload equals workload. Case weighing adjusts court activity by the amount of judicial time spent on each activity.” \textit{Id.} at 9.

\textsuperscript{151} \textit{See} Minn. \textsc{Stat.} \textsection 480A.01 (1983); \textit{see also} \textsc{Judicial Tradition, supra} note 35, at 15 (stating that one of the standards established by the legislature at the appellate court’s inception was that the “normal number of judges assigned to the court was to be one for every hundred cases”).

\textsuperscript{152} \textit{See} 1990 \textsc{Minn. Laws} 2361.

\textsuperscript{153} \textsc{Minn. Stat.} \textsection 480A.01, subd. 3 (1994 & Supp. 1995).
that the statute had not been amended, the court may have a legitimate argument for adding more judges. For example, in 1993, there were 2403 cases filed with the court of appeals; each judge handled 150 cases since there was sixteen judges on the court. Thus, the appellate court would have more judges today had the statutory language not been deleted. Nevertheless, the statutory support for adding new judges is gone, and the appellate court uses retired judges to assist the court with its increasing case load.

C. No "Secret Law"

When the court of appeals issues an order opinion, that decision contains language stating that it is not to be cited as precedent and it is not to be published. This does not mean, however, "that the parties get a 'private deal' or 'private justice.'" The court of appeals issues an order opinion only after a thorough judicial deliberation process. According to former Chief Judge Simonett, "[t]he same rules of law govern all decisions made by the Court of Appeals, regardless of whether a decision is ultimately published or not, and regardless of the form of the decision, the parties in every case may request further review in the Minnesota Supreme Court."

Furthermore, simply because an order opinion is unpublished and cannot be cited as precedent does not mean that it is hidden away from the public eye. Former Chief Judge Simonett explained that an order opinion "is a public document that is then kept in a public file in the clerk of court's office in two public buildings—the Minnesota Judicial Center and the appropriate county courthouse, indexed by file number and readily available to anyone who asks for it, including the news media." Moreover, since July of 1994, Finance and Commerce reports a weekly list of order opinions issued by the court of appeals. Former Chief Judge Simonett also stated that it is unlikely, however, that anyone would examine an order opinion, except the

154. See infra Appendix; cf. OFFICE OF THE STATE COURT ADMINISTRATOR, supra note 134, at 15-16 (illustrating calculations based on 1987 figures).
155. Id. at 16.
156. See Simonett, supra note 19.
157. Id.
158. Id.; see also The Honorable Bruce M. Selya, Judges on Judging—Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age, 55 OHIO ST. L.J. 405, 412 (1994). Judge Selya announces another strike against the "secret law" concern, that the quality of a decision would be adequately assured by professional pride, the vigilance of colleagues, and the possibility of further review. Even now, these, rather than some hypothetical mass public, furnish the primary checks on a judge's discretion." Id.
159. Simonett, supra note 19.
160. Id.; see infra part V.E.
parties to the litigation, which is the primary reason order opinions are not published and are not citable.\textsuperscript{161}

In addition, former Chief Judge Simonett stated that the fact order opinions are neither published nor citable does \textit{not} mean the court is unaccountable for these decisions; there is nothing secret or private about this practice.\textsuperscript{162} According to the former Chief Judge, "the judges are bound to operate according to the statute and furthermore, everyone is able to read everything we write."\textsuperscript{163} The former Chief Judge then added that the court of appeals is living with what the rules say and with what they do, and they do not set up a "secret format" or "private justice."\textsuperscript{164}

In conclusion, those supporting the use of order opinions feel they are the most efficient way for the court to maintain a manageable docket with its limited judicial resources. As former Chief Judge Anderson has emphasized, the appellate court has "a limited ability to deal effectively with all the problems."\textsuperscript{166} Thus, the court does not have the financial and human resources to resolve all cases on appeal with full written opinions. Furthermore, the proponents believe that these decisions are adequately indexed according to the statute and are

\begin{itemize}
\item \textsuperscript{161} See \textit{infra} part VI; see Pratt, \textit{supra} note 68, at 494. Comparing order opinions to the summary orders used in the Second Circuit, it can be said that order opinions contain too little factual background to make them clear enough to be useful as precedents. Without a full statement of facts, it is difficult to know just what an order means, and asking the parties citing the order or the court to whom the order is cited to delve back into the record of the case is scarcely an efficient use of time . . . . [And since they] add little or nothing to the development of the law, it would be inefficient to publish such orders. Such publication would double the number of decisions published each year and therefore double the number of cases to be researched by attorneys and courts.
\item \textit{Id.}; \textit{accord} Baker, \textit{supra} note 22, at 251. According to Baker:
Proponents of a non-citation rule argue: (1) unpublished opinions are written for the litigants only and would require substantial refinement to merit wider distribution; (2) if citation were permitted, a black market in unreported opinions would develop, which would frustrate part of the reason for nonpublication; (3) access would necessarily be unequal, as for example, between institutional litigators who could maintain an opinion bank and private persons; (4) properly unpublished opinions represent mere applications of settled principles, adding nothing but volume to the precedent stream.
\item \textit{Id.}
\item \textsuperscript{162} Interview, \textit{supra} note 103.
\item \textit{Id.}
\item \textit{Id.}
\end{itemize}
available to whomever is interested in reviewing them.\textsuperscript{166} For the late Chief Judge Simonett the real issue here is how the decision of a case affects the state and its citizens as a whole; not how an issue of law affects one particular person.\textsuperscript{167} "If an issue has already been well-decided, and the trial court correctly applied the law to that issue, then we will affirm in an order opinion because that decision will have no impact on the citizens of Minnesota."\textsuperscript{168} The late Chief Judge Simonett acknowledged, however, that the name given to this form of decision was poorly chosen.\textsuperscript{169}

\section*{V. THE CASE AGAINST ORDER OPINIONS—OPPONENT'S PERSPECTIVE}

The Minnesota Court of Appeals offers a product to those who use the appellate system,\textsuperscript{170} which includes both a written product, such as an opinion,\textsuperscript{171} and the services provided by the judiciary.\textsuperscript{172} Those receiving this product justifiably expect that the opinions will be "well-reasoned and consistent."\textsuperscript{173} Even though the court of appeals claims that it "always issue[s] written decisions,"\textsuperscript{174} and that it explains "the reasons for every ruling," critics, particularly legal scholars and members of the bar, question whether the appellate court actually

\begin{itemize}
\item \textsuperscript{166} Interview, supra note 103. According to former Chief Judge Simonett, there is no need to index order opinions in any different manner because "[w]ho would want them? They cannot be cited and they have no precedential value so there really is no use for them." \textit{Id.}
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} Anderson, supra note 165, at 575 (remarking that "litigants, attorneys, and district court judges are the chief consumers of [the court's] product").
\item \textsuperscript{171} \textit{See} Baker, supra note 22, at 247. According to Baker, a written opinion serves three significant purposes:
\begin{itemize}
\item First, litigants and the public are assured the decision is the product of reasoned judgment and thoughtful evaluation rather than the mere exercise of whim and caprice. Second, the very writing of an opinion reinforces the decision-making and ensures correctness. Third, appellate opinions are the lifstream of the common law, for they create precedents.
\end{itemize}
\item \textsuperscript{172} \textit{Id.}; \textit{see also} Donald R. Songer et al., Nonpublication in the Eleventh Circuit: An Empirical Analysis, 16 FLA. ST. U. L. REV. 963, 963 (1989) (explaining the importance of a judicial opinion in the practice of law).
\item \textsuperscript{173} Anderson, supra note 165, at 575; \textit{see also} OFFICE OF THE STATE COURT ADMINISTRATOR, THE NEW MINNESOTA APPPELLATE COURT SYSTEM: REPORT ON THE FIRST FULL YEAR OF OPERATION: 1984, at 16 (1985) ("The proportion of cases receiving written opinion is another measure of the service provided by the court [of appeals] to its litigants. Those undertaking the substantial expense of an appeal expect the court to provide an explanation of its decision.").
\item \textsuperscript{174} Anderson, supra note 165, at 575. Furthermore, "[t]he very integrity of the appellate process requires that courts state their reasons."; \textit{see also} Baker, supra note 22, at 247.
\item \textsuperscript{174} Wozniak, supra note 14.
\end{itemize}
lives up to these promises.\textsuperscript{175} In addition, there is a concern that when the written product is in the form of an order opinion, the court's decision becomes a private decision useful only to those involved with the litigation, and as a result, a taxpayer-financed appellate process produces a product that is useless to those who finance it.\textsuperscript{176}

As the use of order opinions increased,\textsuperscript{177} it generated much-anticipated criticism. The critics believe that the judiciary is sacrificing quality for quantity as case management, rather than justice, becomes the focus. One argument is that order opinions reduce the quality of the product coming from the court of appeals because an order opinion, in an effort to dispose of the case as quickly as possible, is perhaps not well-reasoned.\textsuperscript{178} Although speed is one indicator of the quality of justice, equally important indicators are comprehension, clarity, fairness, and consistency in the written product, all of which critics claim are lacking in order opinions.\textsuperscript{179}

Overall, the concerns of those opposing the practice of order opinions are \textit{not} over whether a case should be published if it has no precedential value, no significant public policy, and where clear law already exists.\textsuperscript{180} The controversy is over one or all of the following concerns: How much reasoning is required for a well-written opinion? Is an order opinion sufficiently comprehensive so that litigants, attorneys, and the interested public, not just the appellate court itself, completely understand the court's reasoning? Are the cases designated as order opinions really appropriate cases for such an abbreviated

\textsuperscript{175} Id.

\textsuperscript{176} See Weirich v. Weirich, 867 S.W.2d 787, 789 n.2 (Tex. 1993) (Doggett, J., dissenting) (stating that courts serve a public purpose; they are not private courts).

\textsuperscript{177} See infra Appendix (showing that the use of order opinions increased by more than 50\% from 1992 to 1993). The use of order opinions has decreased in 1994 and 1995, and perhaps this reduction can be attributed to the negative attention the order opinion process received from the \textit{Star Tribune} articles.

\textsuperscript{178} See Baker, supra note 22, at 247 ("Quantity/Quality tradeoffs are frequently argued and, properly, have been pursued, because opinion writing is the most labor intensive feature of the appellate process."); see also Gilbert S. Merritt, Judges on Judging—The Decision Making Process in Federal Courts of Appeals, 51 OHIO ST. L.J. 1385, 1385-86 (1990) (stating one of the three “trends as evidence of the decline in the quality of judicial decision making” is deciding cases without “reasoned opinions”); Norberg, supra note 37, at 112 (commenting that to some extent, “the nature of the audience determines the quality of the written effort. When no broad audience exists, opinions may be written more quickly and carelessly.”).

\textsuperscript{179} See OFFICE OF THE STATE COURT ADMINISTRATOR, MINNESOTA STATE COURT REPORT: 1987, at 15 (Nov. 1987). The quality of justice received also has to do with how fast cases are processed because as the court notes, “justice delayed is justice denied.” Id.

\textsuperscript{180} See Selya, supra note 158, at 410-11 (giving what one judge believes to be the four basic objections to limited publication).
disposition? Is the appellate court accountable for decisions made via order opinion? Does the order opinion process lack uniformity and clarity so as to create confusion for the legal consumer? Is the appellate practice fair and equal to all who use the appellate system? Are order opinions sufficiently indexed and easily available? Does the order opinion process allow the appellate court to make private or secret decisions? Most important, however, is the air of mystery surrounding this appellate practice and the lack of understanding of when and how the court decides to issue an order opinion. As a result of these concerns, there is a perception that justice is neither being served nor received.

A. Importance of a Well-Reasoned Written Opinion

Even though the court of appeals and legal consumers agree that the court should give written reasons for its decisions, a concern is that a "statement of the decision without a written opinion" does not provide litigants and the lower courts with sufficient guidance. This concern is not the same as when an unpublished opinion is used, since unpublished opinions do not eliminate the practice of issuing a full written opinion.

Full well-reasoned written opinions serve a variety of functions. They

181. See generally Re Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36 (10th Cir. 1992) (Holloway, C.J., dissenting) (providing the unpublished dissent of the Chief Judge of the Tenth Circuit to the adoption of Tenth Circuit Rule 36.3, which states that unpublished opinions and orders shall not be cited and are of no precedential value). According to Chief Judge Holloway:

[T]he basic purpose for stating reasons within an opinion or order should never be forgotten—that the decision must be able to withstand the scrutiny of analysis, against the record evidence, as to soundness under the Constitution and the statutory and decisional law we must follow, as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination. Id. at 38. Chief Judge Holloway also states that to deny a litigant an opportunity to cite a prior ruling of a court may have some constitutional overtones of infringement. Id. at 37. The Chief Judge notes that the "Supreme Court has had two opportunities to rule on the constitutionality of the Seventh Circuit's no-citation rule... but has not done so." Id. at 37 n.1; see also Jay Judge, Allow Citation of Unpublished Opinions: Dissent, CHICAGO DAILY L. BULL., Apr. 14, 1992, at 5; Mathy, supra note 74, at 445 (discussing the importance of reason); Songer et al., supra note 171, at 963 (explaining the significance of judicial opinions and the need for reasoning in decisions).

182. See Robel, supra note 9, at 943-44. According to Robel, "The result of this tension between the need to explain and legitimate results to the parties and the premises of the selective publication plans has been that unpublished opinions are still opinions—providing insights into a court's reasoning and suggesting to advocates the arguments that could win or lose a case." Id.
are informative as to the reasoning behind the court's decision. They educate the bar, the lower courts, and the public at large. They provide guidance to the lower courts and also to lawyers on how to best counsel their clients. They can be used by attorneys to predict and plan what the court may decide. Furthermore, they help to ensure that the appellate court has made the correct decision. Finally, a well-reasoned written opinion is one way to guarantee equal justice to legal consumers and to satisfy the perception of justice.

If order opinions do contain sufficient reasoning, then they are not completely useless to people not directly involved in the litigation. An order opinion can tell a lawyer what the law is, even if it is clear and well-established, and this will always be of value to any member of the

183. See Dodell, supra note 131, at 465. According to Dodell, "[A] judge must give reasons; this is the long tradition of western jurisprudence. The outcome and consequence are not sufficient to tell whether a decision is a good one; one must know the reasons given." Id. (quoting Justice Antonin Scalia).

184. See generally Mark Tushnet, Style and the Supreme Court's Educational Role in Government, 11 CONST. COMMENTARY 215 (1994) (describing the educational role of judicial opinions). Another commentator states that "courts must inform fully the litigants and the interested public as to the reasons compelling the ruling so that they can learn from the past and conform their conduct to the dictates of the law." Mathy, supra note 74, at 446; see also JUDICIAL TRADITION, supra note 75, at 45-46 (explaining that written opinions of the courts educate "[l]aw students, practicing lawyers, and citizens . . . about the law and how it is applied to specific circumstances").

185. See Pratt, supra note 68, at 491. According to Pratt, order opinions would, "no matter how routine, provide[] significant information about how particular legal principles are applied to particular situations." Id. Furthermore, "[w]hen an attorney does not understand his or her loss, and is not in a position to explain the loss to the client, it is not clear that justice has been done. Certainly, the appearance of justice will not have been served." Dodell, supra note 131, at 467.

186. See Weaver, supra note 58, at 485 (stating that "[p]redictability and stability in the law" are important policies).

187. See Dodell, supra note 131, at 466. According to Dodell, "Sometimes a judge may arrive at an apparently correct conclusion, only to find that 'it doesn't write.' The need to put justification into words helps to expose flaws in reasoning." Id. Another commentator expresses that:

Written opinions serve several functions. First, they are bulwarks against bribery and other extrinsic influences upon judges, for a judge faced with "the necessity of publicly setting forth his reasons [for deciding the case as he did] upon the basis of . . . rules, cannot do much for a corrupter, if he would." Second, a written opinion preserves the judge's legal reasoning from the specific application of law in a concrete factual setting. Moreover, another judge facing a similar issue will be relieved of the task of researching anew the legal question. Third, written opinions enable later judges to conform their own application of legal principles to prior decisions.


188. See Dodell, supra note 131, at 466.
Order opinions can be useful to an attorney who is counseling a client with a fact situation that has been decided on numerous occasions. If a lawyer can point to a multitude of decisions, including order opinions, where the court has decided an issue in a certain way according to a well-defined rule, the lawyer can feel confident in advising his or her client how to proceed with a case.

An attorney might also be able to use order opinions to determine the odds of winning or losing, or to predict patterns or trends in the law. One commentator notes that "[e]very case is unique, and the more cases a lawyer—or a lower court—can study, the better he or she will understand the way the court of appeals interprets the law." Furthermore, the "no-citation rule" will not prevent an attorney from using the reasoning expressed in an order opinion in another case. Finally, there is no way for the appellate court to predict the precedential value of an opinion, since it cannot predict what issues may be important in the future. Therefore, even if an order opinion may be of no use today to a practicing attorney, it may become important in years to come.

If order opinions do not contain sufficient reasoning to support the appellate court's decisions, they will not be as readily accepted by a losing litigant. The court of appeals must give adequate explanations to help losing litigants understand the judge's decision and, therefore, the law. If the losing litigant understands why the judge made the decision, that party is more likely to comply with the judge's decision and less likely to appeal. Without an adequate explanation, a dissatisfied litigant who receives an order opinion may jump to the conclusion that the court issued an order opinion to conceal the rationale for its decision for some improper reason.

The lack of detail in the rules pertaining to order opinions is one reason why a dissatisfied client may perceive improper conduct from the court. The inadequate rules make it difficult to presume that the decision to issue an order opinion was made after thorough judicial

189. See Robel, supra note 9, at 947. Robel states that an important piece of information litigants can get from these types of dispositions is "the shape of the universe of decisions by a court in a particular area of law. The information might be as simple as knowing the odds." Id.
190. See Pratt, supra note 68, at 491. Pratt states that for this reason, "every case decision should be made generally available and should be citable." Id. Hence, everyone should be afforded the same opportunity to learn from these decisions; so they "should be reported as fully as any other court decision." Id.
191. See ABA TASK FORCE ON APPELLATE PROCEDURE, supra note 21, at 111.
192. See Render, supra note 23, at 153.
194. See Render, supra note 23, at 158.
deliberation. There is a legitimate concern that without more detailed rules for deciding when cases should be disposed of by order opinion, an appellate judge is given too much discretion. Consequently, legal consumers fear that some cases disposed of by order opinions may actually involve nonroutine and important legal issues instead of clear, cut-and-dried cases. For example, the rules do not state that "by a unanimous decision, or a majority of this panel" that the panel was united in its decision to issue an order opinion. Rule 5 of the Special Rules states that a "draft opinion" is circulated among the judges for comment. Yet, given what is known about the purposes for issuing an order opinion, it is reasonable to assume that an order opinion would not be circulated; for, if the law is so clear, circulating these decisions would be a waste of judicial resources.

The court of appeals, however, has an obligation to demonstrate that it has given thorough consideration to the merits of the case before deciding to issue an order opinion. This obligation extends to providing the appearance of due consideration, not just letting the parties assume that the court has satisfied this obligation.

The judiciary should be concerned about the respect that is afforded to its decision making process, and about the loss in that respect that results from unexplained decision making. "The goal is not only to assure continued acceptance of the rule of law in a democratic society, but also general satisfaction with its administration and operation." Hence, without more detailed rules for order opinions, the court cannot satisfy the perception that the litigants received a thorough deliberative process.

Without more specific rules, it may also be difficult to determine if the court of appeals addresses each issue on appeal, and whether each issue is given adequate attention. In an order opinion, the court

195. See Wald, supra note 141, at 778. According to Wald, "The court's distinctive role in our constitutional framework requires that a judge's opinions reflect the judge's thinking, familiarity with the facts and arguments, legal analysis, and literary style." Id.

196. See Songer, supra note 59, at 313. The author analyzed unpublished decisions in three circuits and concluded that many such decisions involve cases that are nonroutine, politically significant, and present the judges with an opportunity to exercise substantial discretion. Id.

197. SPEC. R. PRAC. MINN. CT. APP. 5.

198. See Mockenhaupt, supra note 17, at 803-04. The author discusses the importance of when a judge disagrees or concurs with the majority, and the use of writing a separate opinion. Id.

199. Dodell, supra note 131, at 466 (quoting the Commission on Revision of the Federal Court Appellate System).

200. "Written opinions are valued because they provide the judicial reasoning for the decision and clarify the issues presented in the case." OFFICE OF THE STATE COURT ADMINISTRATOR, MINNESOTA SUPREME COURT REPORT ON OPERATIONS 15 (1987).
may not clearly express which issues and arguments were dismissed and why. Thus, it could be argued that these decisions have "not received enough work, the writing will be sloppy, and the real difficulties with a position taken will be passed over in silence." Moreover, there is a concern that if a full opinion is never written, the opinion's true informative value will remain unknown. Thus, one cannot make the assumption that if the court has not addressed an issue, that the issue is unimportant. It is still possible that the supreme court may find an excluded issue important and reverse the decision of the appellate court.

201. One author suggests that the following elements should be included in every opinion from the court: "(1) the nature of the action and how it reached the appellate court, (2) the questions to be decided, (3) the essential facts, (4) a determination of the answers to the questions, and (5) the disposition of the case." LEFLAR, supra note 131, at 42-43.

202. Nichols, supra note 140, at 914. According to Nichols, it "is assumed, and rightly assumed, that a decision not to publish will tend towards simplicity, brevity, and directness." Id. at 915. Furthermore, judges "are likely to spend less time on a nonprecedential decision, sometimes this lack of attention results in opinions which in fact contain precedent or opinions which apparently conflict with established precedent." Donner, supra note 143, at 16.

203. The argument is as follows:
A decisionmaker who must reason through to a conclusion in print has reasoned in fact. Misconceptions and oversights of fact and law are discoverable in the process of writing. Everyone familiar with the appellate process has heard and used the expression, "It will not write that way" to mean that a tentative vote will not withstand the careful discipline of record reading, legal research, and opinion drafting. Yet, without a writing requirement some tentative votes would escape such scrutiny. Baker, supra note 22, at 247-48; see also Pratt, supra note 68, at 491 (proclaiming a panel cannot know when it decides not to publish which decisions serve "no jurisprudential purpose" because "what looks like a trivial or run-of-the-mill case today could appear considerably more important tomorrow"); Songer, supra note 59, at 309 (noting criticisms of "the ability of judges to make consistent decisions about whether a decision is nonprecedential, especially when the decision on publication is often made before an opinion is written").

First, the standard of importance applied by an appellate court will not always coincide with the standard of importance applied by the supreme court. Second, workload considerations play a significant part in determining how much will be written. An abbreviated opinion which omits jurisdictionally relevant words can be as preclusive as a decision without opinion. Third, impending changes in decisional law will be known in the supreme court for considerable periods of time before an opinion is approved and released. It will not be known in advance to the appellate court and, therefore, cannot be taken into account in deciding whether to write an opinion or certify a decision.

Id. (footnotes omitted). Cope demonstrates that Gideon v. Wainwright, 83 S.Ct. 792 (1963), the landmark decision on the right to counsel in a criminal case, had been
It is also troublesome when the court of appeals reverses the lower court and then renders its decision with an order opinion. One concern is that the court should be explaining its reasons for reversal and providing guidance for the lower court. According to the statutory language pertaining to the publication of opinions, a reversal would imply that there is a need to clarify existing law. If the trial court is not provided a proper explanation on remand as to the reasoning for the appellate court’s decision, it is very possible that the case will come back to haunt the court of appeals. Finally, reversing the lower court with an order opinion gives the perception of injustice.

Id. at 80.

205. See, e.g., In re Opp, 516 N.W.2d 193, 198 (Minn. Ct. App. 1994) (referring to an order opinion in which the court reversed the district court’s order requiring appellant to place homestead for sale on the open market).

206. See generally Mockenhaupt, supra note 17, at 799 (discussing the precedent-setting purpose of opinions). The author notes:

One court reversing another indicates an inconsistency of opinion within the system. A reversal by an appellate court almost assuredly indicates enough interest to warrant publication. In addition, "reversals are quite likely to create law . . . . That observation should come as no surprise; where the reversal does not turn on correction of plain error, it is likely that the court below could not possibly have known the 'true' state of the law, because it had never been declared."


207. See MINN. STAT. § 480A.08, subd. 3 (1994).

208. See Songer et al., supra note 171, at 976. The authors state:

When a reversal occurs in a case, inevitably it involves a question of law, with the court addressing a legal mistake from below. It would seem that in any case where the appellate courts find it necessary to overturn a decision from below, one might assume that existing law is unclear. Otherwise, the district judge would not have reached an erroneous decision . . . . Reversals may be an objective indicator that, at least for the district judge (and therefore presumably others, as well), the law is in need of clarification.

Id.

209. See, e.g., State v. Kimmons, No. CIV. C2-92-118, 1992 WL 510193 (Minn. Ct. App. Dec. 28, 1992); State v. Kimmons, 502 N.W.2d 391, 393 (Minn. Ct. App. 1993) (demonstrating that the order opinion failed to provide direction on sentencing). Had the court of appeals written a full opinion as to why it was reversing and remanding, the trial judge and the litigants would have had a better understanding of the law and the statute that was being applied, and therefore the second appeal may never have been brought.

210. The same problem arises when the Minnesota Supreme Court employs an “Order” (or judgment) to reverse an unpublished order opinion. See, e.g., Shaw Lumber Co. v. RJG Construction Co., 515 N.W.2d 240 (Minn. 1994); State v. Sellers, 507 N.W.2d 235 (Minn. 1993). In this situation, where there are two reversals at the appellate levels, both appearing in an abbreviated format, it appears that the litigants and
B. Perception of Injustice—“Secret Law”

Another problem with the acceptance of order opinions is that the legal consumer may perceive this appellate practice as mysterious.211 If the public feels that the court is “hiding the ball,” its perception of judicial fairness becomes distorted and arouses suspicion that a secret decision has been made.212 The general lack of accessibility to order opinions reinforces this perception of secrecy and mystery. The public may perceive secrecy from this general lack of accessibility in two different ways.213

The first perception of secret law from the lack of accessibility to order opinions is that these decisions are a source of law only to the parties of the suit, but not to the rest of the bar. As a result, large law firms and institutions, which are frequently involved in litigation at the court of appeals and often receive order opinions, maintain their own “private source” of judicial opinions.214 This gives an unfair advantage to these frequent litigants, (e.g., the Attorney General’s Office or large law firms). The concern is that these frequent litigants, as well as the court, are able to develop their own “secondary system” of law which keeps them continually aware of what the court feels are important issues and what law is considered to be well-settled.215 Furthermore, the indexing system of the court of appeals contributes to this secrecy because it is designed so that only parties to the litigation have the information necessary to easily find particular decisions without the inconvenience of searching through every public lower court judges are not receiving an adequate explanation of the court’s reasoning. As a result, clarification is necessary.

211. See Harris, supra note 2, at 794-95 (stating that a court “shrouded in mystery ill serves democracy”).

212. See FitzGerald, supra note 23, at 400. Another author states, “To the suspicious, unpublished [decisions] will often suggest secret and corrupt. The commonwealth’s judicial system and bar do not need this kind of ill-favored speculation about their activities.” Render, supra note 23, at 158.


214. See Mockenhaupt, supra note 17, at 801-02.

215. See Norberg, supra note 37, at 112. Norberg states that secret law must necessarily engender, on the one hand, needless duplication of efforts by attorneys who are unaware that the court has already decided a particular issue or, on the other hand, unfair advantage for “institutional” law offices, for example, the attorney general, metropolitan county attorneys, and large law firms that possess the resources to develop their own “secondary systems” designed to give them a continuing awareness of unpublished opinions.

Id.
The second perception of secret law which arises from the lack of accessibility to order opinions is that there is always the lurking possibility that these decisions can be used to conceal unacceptable or questionable decisions. If the court fails to communicate an adequate explanation of its reasoning, order opinions may be perceived by some as a means for the court to avoid dealing with difficult issues, rendering disturbing decisions, exposing divisions within the panel or within the court, or avoiding precedent. The Nielsen case, reported in the Star Tribune, is an example of this perception of secret law. In this case, the losing litigant accused the court of appeals, by issuing an order opinion, of “dodge[ing] precedent in divorce law on behalf of a woman who sought changes in her divorce settlement.” The attorney for the appellant stated that the woman may deserve to have the case reopened, but the “courts should not create a ‘private deal’ for one person in a non-publicized manner and then not be willing to

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216. See Dunn, supra note 68, at 141. According to Dunn, if the court creates an index system “to which only they can refer, they will be creating a secret body of law which judges can apply, modify, or ignore as they see fit.” Id. For a discussion of the index system used by the appellate court, see infra part V.D.

217. See Pratt, supra note 68, at 491-92. Pratt declares that a judge’s power to issue an unpublished abbreviated opinion creates the danger of intentional or careless abuse, “to ‘hide,’ or to make relatively inaccessible, a decision or the considerations which have gone into a decision.” Id. at 491. Pratt continues:

[T]he abbreviated form and general inaccessibility of [unpublished decisions] may tempt a panel to make a difficult decision easy by ignoring or gliding over genuine problems in the law. [Unpublished abbreviated opinions] might also be used to conceal divisions within the court or within a panel, or to avoid issues entirely. If all decisions were published and citable, however, these temptations for abuse would be largely removed, since there would be a much greater chance that any failure to fully address the issue of a case would reach the eyes of the legal community.

Id. at 491-92.

218. Peterson, supra note 16; Peterson, supra note 20. The Nielsen case involved the reopening of a stipulated divorce decree. After the stipulation was entered as judgment and decree, Charlotte Nielsen brought a motion to reopen the judgment. The trial court granted the motion and the suit was appealed to the court of appeals, which affirmed in an order opinion. The order opinion expressly stated that “[u]nder these unique facts, we cannot say that the trial court abused its discretion in vacating the decree.” Nielsen v. Nielsen, No. C6-94-3, at 2 (Minn. Ct. App. May 31, 1994) (emphasis added). Sue Wilson, attorney for the appellant, stated, and the trial judge agreed, that the trial judge “reopen[ed] the divorce settlement, even though the law really did not allow him to, simply because ‘he felt sorry for her and thought the deal wasn’t fair.’” See Peterson, supra note 16. The trial judge “speculated that the court may have used the secretive format to affirm his decision to reopen the case because ‘they were afraid if they agreed to vacate this decree, there would be a whole wave of people wanting to get the same treatment’—that is wanting to redo the terms of their divorces.” Id.

do it for others.” The attorney claimed that the court of appeals avoided precedent and then issued its decision in an order opinion, which is nonprecedential and not citable, so the decision is effectively “private,” since it applies to no one but the respondent. Thus, when a decision is unpublished and cannot be cited, a possible public perception is that the court is free to make unprincipled and inconsistent decisions. Publicity then becomes the most important constraint on the court.

In sum, order opinions stimulate suspicions about what is really taking place inside the court of appeals because there is no way of knowing what is happening across the board. This “veil of secrecy” involved with using order opinions generates distrust of the judicial system. Society, therefore, must protect the integrity of the judicial system by scrutinizing and criticizing the judicial deliberative process because society informs and instructs the public and lawmakers about necessary changes.

C. Accountability

Another concern of those criticizing order opinions is that if “secret law” exits, then one can imply that the judges are not accountable for these decisions. Even if the court of appeals is providing sufficient reasoning in its order opinions, no one will know, since these decisions are not routinely reviewed by the supreme court or by legal consumers. This lack of review creates the perception that the judges are not

220. Id.
221. Appellant’s Petition for Review of Decision of Court of Appeals at 5, Nielsen v. Nielsen, No. C6-94-3 (Minn. Ct. App. May 31, 1994). In appellant’s petition for review to the supreme court, appellant argued that:

[T]he trial court and court of appeals ignored a significant, unambiguous body of law that has developed around re-opening [divorce] decrees . . . . [Furthermore], the Court of Appeals was deciding the case on an ad hoc basis, making a 'secret' ruling in order to avoid opening the floodgates to parties to stipulated decrees who are subsequently unhappy with their agreements . . . .

The Court of Appeals’ decision here creates chaos, both in this case, and by implication, in the entire judicial system.

Id.

222. See Harris, supra note 2, at 790.
223. See Pratt, supra note 68, at 492.
224. See id. The author claims that a “veil of secrecy . . . generates distrust for the whole system and deprives the court of desirable feedback on its work.” Id.; see also In re Campbell, 522 A.2d 892, 896 (D.C. 1987) (quoting the District of Columbia Board of Professional Responsibility, which stated that “society must protect the integrity of the judicial system so that people will submit their disputes to that system and abide by its judgements, at least in part, of their own free will”).
accountable for their decisions. Moreover, since the supreme court reviews so few order opinions, it appears that the court's accountability will be based upon the legal consumer's review of decisions.

Legal consumers will face difficulties ensuring that the judges are accountable for these decisions, due primarily to the inaccessibility of order opinions. Order opinions thus allow the appellate court to avoid the critical scrutiny of the legal consumers, creating a general anxiety about the perception of justice at the appellate level. Furthermore, since it does not appear that the judges need to circulate a draft of their order opinion, the resulting perception is that they may dodge review of an order opinion by their own colleagues, as well as the public and the bar. Since order opinions are virtually out of the public eye for review and scrutiny, the accountability of the judges for their decisions to the public (and even other judges) has been drastically reduced.

225. See Reynolds & Richman, supra note 26, at 1202. Checks on the court of appeals come from two places: (1) the Minnesota Supreme Court, which can reverse or modify the court of appeals' decisions; and (2) the legal consumers, who exercise a more subtle type of control. Id. One Minneapolis attorney comments that the real problem with the use of order opinions is "the lack of routine review of the court's operation by lawyers and judges across the state." Peterson, supra note 20 (quoting M. Sue Wilson); see also Songer, supra note 59, at 307. According to Songer, opinions "help to hold judges accountable for their decisions, for they must justify publicly their decisions to an attentive public which will examine and critique their rationale in terms of widely accepted . . . professional standards." Id.

226. See Peterson, supra note 20 (reporting that the "supreme court denies about 500 such requests each year"). However, the clerk for the appellate court and the state court administrator report they do not maintain this type of statistic; thus, it would be impossible to determine exactly how many order opinions are denied review each year by the supreme court.

227. See infra part VI.F.

228. See Reynolds & Richman, supra note 26, at 1203. The authors state that a "less obvious consideration is that there is relatively little incentive to comment upon an opinion that is not 'law.'" Id. Furthermore, scholarly opinions on the court's practices are an important check because "awareness of a knowledgeable audience—one that comments and criticizes—is helpful in keeping judges on their best behavior." Id.

229. See Dodell, supra note 131, at 467; see also Reynolds & Richman, supra note 26, at 1204 (discussing how unpublished opinions escape scrutiny). According to Reynolds and Richman, one of the most important forms of accountability comes from others on the bench. Id. "Judges feel an obligation to themselves, their colleagues, and their office to produce coherent legal work of high quality. Rules that rob an opinion of its precedential value considerably diminish this internal accountability." Id.

230. See Merritt, supra note 178, at 1386. Another author claims that "[w]hen judges are able to hide their work product from public view, they become unaccountable in the tribunal . . . and unassailable by their critics." James N. Gardner, Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?, 61 A.B.A. J. 1224, 1227 (1975). Gardner suggests that a lack of accountability allows judges to escape the embarrassment of
Furthermore, judges are very powerful individuals. If they are unaccountable for the decisions they render, then one may perceive that judges are above the law, which is detrimental to a representative democratic society. Moreover, considering that an appellate judge is an elected official, accurate information must be available for one to vote intelligently, and “intelligent voting translates into something more—accountability for our institutions. To the extent that [the public] know[s] how our institutions do and do not work, [it] can make better judgments about them and about what actions citizens and public officials might take to change them.” Therefore, the public and the bar need to be aware of, and familiar with, the process of issuing order opinions. If they perceive that a judge is misusing or abusing his or her authority to issue an order opinion, then they, through their electoral vote, have the power to change this practice, or to remove those who are not using this authority the way the supreme court and the legislature intended. Thus, the rules for order opinions create the perception that some powerful individuals are accountable to no one.

D. Fairness—Equal Treatment for All

Part of the problem of accountability arises from the fact that the rendering a bad decision since the decision was in an unpublished form. According to the Chief Judge of the Sixth Circuit, “The law needs to be visible to the public, and judges need to be accountable to the public.” Richard C. Reuben, New Cites for Sore Eyes, 80 A.B.A. J. 22 (June 1994). Moreover, Reuben states, “[A] court’s written opinion shows the public the court’s reasoning and grounds for decision, and provides a safeguard against judicial dereliction.”


We entrust our lives and fortunes to the judicial process. It may be a dynamic process, but we all recognize that individual judges have a remarkable amount of power over the lives, liberty, and property of the people. We cannot maintain an independent judiciary wisely if the judge has decided to follow his or her notions of an ideal society, and consciously is guided by that vision as opposed to that very subtle process that is ultimately a mysterious combination of judgment, conscience, and professional skills that we call the judicial process.

Id. at 505 (reiterating a remark made by U.S. Solicitor General Kenneth W. Starr).

232. Harris, supra note 2, at 789-90.

233. Id. at 790. Harris states that even though voting impacts how the judicial system works,

voting is only one way that concerned citizens can attain such goals. They could, for example, orchestrate or participate in lobbying campaigns, or bring issues to the attention of the press. Whichever method is used, one principle remains the same: The availability of accurate information will affect - some would say even govern - the framing of the issues and set the agenda for public debate.

Id.

http://open.mitchellhamline.edu/wmlr/vol21/iss4/6
use of order opinions produces a growing body of judicial decisions that are not easily accessible to legal consumers. The bar is not as concerned with the nonpublication and no-citation rules per se as it is with whether these rules are imposed equally on everybody. This lack of accessibility raises fundamental questions of fairness. Is there unequal access to order opinions? Does access give one legal consumer an unfair advantage over those whose access is restricted? Do the court's procedures appear fair to the public and members of the bar? In other words, another concern of those opposing the use of order opinions is that the court of appeals may not be treating all parties equally. According to former Chief Judge Paul Anderson, in a "strong and independent judiciary, . . . [there is a] guarantee that, under our Constitution and legal system, everyone is equal, everyone is guaranteed the same opportunity, and everyone will be treated fairly." 235

There are concerns, however, that the order opinion practice does not treat everyone equally and fairly. The late Chief Judge Anne Simonett stated that "[all] parties receive a copy of the opinion, as does the trial court judge." 236 The counter argument, however, is that frequent litigants in the court of appeals, such as the government, "will have unique access to a useful source of information known only to them and the judges before whom they appear." 237 Even though order opinions are not citable decisions, those who have access to them can still use them to their advantage. They can use any reasoning and citations to authority, and evaluate any unique fact situations and patterns of the court in their future arguments and briefs to the court. 238 Of particular concern is that the government and large law firms who appear as a party in a great number of appellate disputes will not be discouraged from using order opinions in some manner for their benefit. 239 Thus, as some scholars state,

234. See Stienstra, supra note 59, at 512.
236. Simonett, supra note 19.
237. For example, out of approximately 250 order opinions examined by this author, the government (or a government office) was a party to the litigation in approximately 120, not including the cases where the state intervened in child welfare and mental illness cases.
238. Robel, supra note 9, at 955; see also Stern, supra note 56, at 483-84 (discussing how unpublished, abbreviated opinions allow government and institutional lawyers to keep up on a court's reasoning and argue accordingly).
239. See Robel, supra note 9, at 956.
240. See id. at 956-59. Professor Robel presents the results of a survey she sent to the federal government. Id. The survey was designed to determine two things: (1) whether the government offices make abbreviated opinions accessible to the attorneys; and (2) whether the attorneys use them. Id. at 957. Four of the five offices surveyed claimed that they circulated copies of unpublished opinions because it "increases the likelihood
"To the extent that the law is published, it is available to all; to the extent it is unpublished, it supplies only a private good."241

The current indexing system at the court of appeals adds to this idea that an unpublished order opinion is a "private good." Until recently, the only location of order opinions was the Clerk of Courts for the Appellate Court. Even then, access was only available to those who had their case decided by an order opinion and, thereby, had the case file number. Now, according to the late Chief Judge Simonett, order opinions are more accessible and are sufficiently indexed by appellate file number, party name, or date of decision.242 Theoretically, however, even though an individual is able to obtain an order opinion from the clerk of courts or the state law library, there is no mechanism for efficiently or comprehensively tracking the subject matter of an order opinion without the appellate file number which is given only to the parties of the litigation.

Subdivision 3(a) of section 480A.08 of the Minnesota Statutes provides that "[i]n every case, the decision of the court, including any written opinion containing a summary of the case and a statement of the reasons for its decisions, shall be indexed and made readily available."243 Despite this indexing requirement, there has never been a workable indexing system established to locate desired order

that attorneys will remember the opinions should they be involved in similar litigation." Id. All offices said they filed their unpublished opinions, and one said that it indexed its unpublished opinions. Id. "All of the offices replied that they used unpublished opinions in making litigation and settlement decisions and in writing briefs. All [but one] also stated that they use the opinions in making determinations about whether to appeal or contest appeals in other cases." Id. In addition, "[l]awyers are trained to use opinions: to make arguments based on them, to try to distinguish them, and to consider how they bear on the outcome of their cases." Id. at 944; see also Render, supra note 23, at 161 (discussing how "knowledge of an unpublished opinion could give an attorney potential advantages in counseling and planning, as well as litigation").


One of the primary arguments for allowing the publication or distribution of opinions not in the official reports is fairness, because larger firms with greater resources often are better able to gather and use them. Use of unpublished decisions, which are often referred to by judges for guidance, is governed by strict rules, but knowledge of a substantial body of unpublished law could give one side a strategic advantage.

Id.

242. Interview, supra note 103. When asked what happens if one does not have any of this information, former Chief Judge Simonett responded, "We all have to do our own research." Id. Furthermore, order opinions on file at the court of appeals are indexed only by the appellate file number. Thus, if one only had the party's name or the date of the decision, he or she would still have to look through all the order opinions to find the case.

243. Minn. Stat. § 480A.08, subd. 3(a) (1994) (emphasis added).
opinions unless an individual knows of an order opinion and obtains the appellate file number. By not following statutory language and creating an indexing system in which the legal consumer may readily obtain information, the perception is fostered that the court of appeals is thwarting the public's access to these documents. Furthermore, an indexing system could guarantee equal access to all order opinions and eliminate the overwhelming task of searching every public file for an order opinion that may offer some guidance to an interested party.

The proponents of order opinions, however, argue that one reason for limiting accessibility is that these opinions cannot be cited, since they have no precedential value. In reality, however, any decision or ruling from the court that involves an application of facts of the case and applicable law is precedent, whether it is "citable" or not. Moreover, it is difficult to assume that there will never be a situation in which it may be necessary to cite an order opinion, and if there is a prior order opinion that a litigant can establish as essential to the determination of his or her case, shouldn't he or she, as a matter of justice and fundamental fairness be able to cite to that decision?

Even more disturbing, however, is the fact that the court of appeals used an order opinion, which is not readily accessible to all, to actively resolve a disputed issue. In an unpublished opinion, *Butkovich v. City of Golden Valley*, the city argued that it should be entitled to attorney fees based on an order opinion issued by the court of appeals. In this case, the court of appeals used this order opinion to discuss its reason for denying the city's request for attorney fees, instead of locating the published precedential decision to properly dismiss this claim. This example also demonstrates the prior notion that the government has the advantage of using such order opinions in its arguments to the court.

When discussing fundamental fairness, one must also examine if there are any constitutional due process implications associated with

244. Additionally, as one author states:

By limiting access to the opinions to the parties involved, the courts limit the number of attorneys who can use the opinion. Even though theoretically the opinions are available to anyone who wants to dig through the [public files] and retrieve them, practically speaking they are unavailable because they are neither indexed nor filed in a manner that would facilitate retrieval.

Robel, supra note 9, at 944.

245. See, e.g., Render, supra note 23, at 162. Assume that an order opinion is "used to quiet title to land in A. If A subsequently sells the land, the buyer should be able to rely on the [order opinion] if sued for possession of property he bought from A." *Id.*


247. *Id.*
rendering this type of an abbreviated opinion. The Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution require:

[T]hat all persons "have like access to the courts of the country for the protection of their persons and property" and "the prevention and redress of wrongs . . . ." The due process clauses thus require that "the burdens placed on one group of litigants be no greater nor less than those placed upon others." The due process right also allows litigants to use all means necessary to "get a fair hearing from the judiciary," which must necessarily include the chance to cite an order opinion of the appellate court. The Supreme Court has even held that the "Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable society from the overbearing concerns of efficiency and efficacy . . . ."

Thus, the question remains: Should not this idea of a fair trial extend all the way through until the final written decision is received by the litigants, to ensure that the parties to the suit understand precisely how and why the decision in their case was reached? The argument might proceed as follows: That all litigants should have access and the right to review all decisions of the appellate court; and if that litigant should discover an unpublished opinion, in any form, that is essential to his or her case, that litigant should have the right to use that decision. Furthermore, after the court decides the case, the litigant should receive a disposition to his or her case that sufficiently explains the court's decision; and if the litigant neither understands

248. See State v. Christie, 494 N.W.2d 492, 494 (Minn. Ct. App. 1993) (stating that the "due process protection provided under the Minnesota Constitution is identical to that guaranteed under the United States Constitution"), aff'd, 506 N.W.2d 293 (Minn. 1993). Further discussion of the due process implications is beyond the scope of this Note. For an interesting discussion on "void for vagueness," see Weaver, supra note 58, at 130 (stating that "vague laws offend several important values").


250. Id. at 117; see also In re Murchison, 349 U.S. 133, 136 (1955) (stating that a "fair trial in a fair tribunal is a basic requirement of due process"); Dunn, supra note 68, at 145 (stating that because due process requires the opportunity to present all available defenses, it must include the opportunity to cite to unpublished opinions).

251. Eisenstadt v. Baird, 405 U.S. 438, 465 (1972). However, in Jones v. Superintendent, Virginia State Farm, 465 F.2d 1091 (4th Cir. 1972), the Fourth Circuit dismissed the Due Process claim but did state that "any decision is by definition a precedent, and that we cannot deny litigants and the bar the right to urge upon us what we have previously done." Id. at 1094.
that decision nor has an opportunity to have it explained to him or her, then the litigant’s due process rights have been violated. Thus, unequal access to order opinions unfairly burdens one group of litigants more than another; thereby violating what is required from the Fifth and Fourteenth Amendments of the U.S. Constitution.

In sum, the Supreme Court has held that “our system of justice has always endeavored to prevent even the probability of unfairness.”

Therefore, if order opinions prevent a litigant from receiving a fair trial, then this abbreviated format should be deemed unconstitutional, since the court has an obligation to guarantee that litigants receive a fair hearing from the judiciary.

E. Lack of Uniformity and Clarity

In addition to issuing well-reasoned opinions that are equally accessible to all, it is important for the appellate court to have consistency in its written product. It is also important to create predictability in the law and in the judicial process in order to maintain confidence in the judiciary. As one commentator states, “[J]ustice is most often served by uniformity, which also generally fosters the appearance of justice.” Those criticizing the use of order opinions realize that not all cases should receive equal time on appeal. They do feel, however, that the court’s rules and procedures should be consistent, sensible, and workable in order to allow them to effectively understand the dissimilar cases encountered on appeal.

The basic concern is that the order opinion practice is confusing and unclear to the bar and the public, primarily because there are no clear and concise substantive rules and procedures promulgated for unpublished order opinions. Since the court of appeals has not taken measures to increase the legal consumer’s understanding of this practice, the court in effect is merely adding to the confusion and uncertainty. Furthermore, without a uniform rule to provide guidance as to when it is acceptable to issue an order opinion, the legal


253. Anderson, supra note 165, at 575. According to Judge Anderson:

Litigants, attorneys, and district court judges expect timely processing of appeals, courteous treatment from the judges and court staff, well-reasoned and consistent opinions, and decisions that provide a clear precedent for future cases. Success at these goals is essential for building confidence and trust in the court of appeals.

Id.; see also Anderson, supra note 31, at 744 (stating that “one of the most important purpose of the judicial system is to create predictability in the law”).

254. Colby, supra note 187, at 1056. Colby also expresses that uniformity “vindicates economic and other expectations, and avoids reversal.” Id. at 1056-57.
consumer may perceive that the court makes its decisions randomly.\textsuperscript{255}

One area causing confusion is that people may be uncertain as to whether this is an "order" or an "opinion" from the court. The court of appeals has neither defined exactly what constitutes an order opinion nor is there specific criteria to uniformly aid the court and the legal consumer in determining when it is appropriate to issue an order opinion. It is understandable for a legal consumer to classify this type of decision as an "order," since the statutory language the court refers to as its authority to issue an order opinion refers to a decision without an opinion, the terminology used in some order opinions says order, and the fact that some order opinions run no longer than one page.\textsuperscript{256} Alternatively, it is also acceptable to classify an order opinion as an "opinion," since many order opinions sufficiently set forth the important facts and the reasoning for the court's decision, use the terminology of opinions,\textsuperscript{257} and are as long as five or six pages. Thus, the name itself leads to unnecessary confusion as to what the court is trying to accomplish with order opinions.

Adding more confusion to whether this abbreviated format is an "order" or an "opinion" is that the judges authoring order opinions have not been consistent with their citation of authority for an order opinion. Some authors find it necessary to cite both subdivision 1(a) and subdivision 1(b) of Rule 136.01,\textsuperscript{258} while others find it necessary

\textsuperscript{255.} For example, it may appear that the decision was based "on particular judges' feelings about the cases, their views as to the significance of specific issues, and their individual beliefs on the importance of giving every litigant their fully developed reasons for the result." Wald, \textit{supra} note 141, at 782.

\textsuperscript{256.} Some order opinions state the "court makes the following order" or "remand for proceedings pursuant to this order." \textit{See, e.g., In re Ness v. Rademacher, No. C5-92-131} (Minn. Ct. App. June 5, 1992); \textit{In re Reinhold, No. C8-89-1764} (Minn. Ct. App. Dec. 15, 1989).


\textsuperscript{258.} \textit{See, e.g., State v. Hanson, No. C3-90-1743, C0-90-2123, 1991 Minn. App. LEXIS 1029, at *1} (Minn. Ct. App. Oct. 9, 1991). The judge authoring the opinion first states, "No written opinion need be prepared where the contents of the statement of decision sufficiently explains our disposition. \textit{MINN. R. CIV. APP. P. 136.01, subd. (1) (a)}," and then at the end of the opinion states, "[P]ursuant to \textit{MINN. R. CIV. APP. P. 136.01, subd. 1(b)}, this order opinion will not be published and shall not be cited as precedent." \textit{Id.; see also Curren v. State of Minnesota, Dep't of Labor and Indus., No. C9-91-347} (Minn. Ct. App. June 28, 1991) (providing a good example of sufficient and concise reasoning). \textit{But see State v. Ivey, No. C3-93-1319} (Minn. Ct. App. Jan. 25, 1995) (illustrating a very complicated sentencing issue which may have been worthy of a full opinion for litigants sake); \textit{In re Rolfson, No. C6-91-192} (Minn. Ct. App. May 15, 1991) (questioning whether a decision which basically states that the trial court did not abuse its discretion is sufficient reasoning).
to cite only Rule 136.01, subdivision 1(b) of Rule 136.01, or simply subdivision 1 of Rule 136.01. Inconsistencies such as these lead one to wonder which portion of Rule 136.01 is really the critical portion. Furthermore, most order opinions contain an exception to its “no-citation” rule, which states: “[T]his order opinion . . . shall not be cited as precedent, except as law of the case, res judicata, or collateral estoppel.” There are also, however, many order opinions that do not contain this exception. This inconsistency leads one to question if perhaps there are actually no exceptions to citing an order opinion. Finally, some authoring judges state that order opinions “shall not be cited,” while others state that they “may not be cited.” Although an inconsistency such as this may be of little significance to the appellate court or to the general public, a rule stating “may” one time and “shall” another is crucial to a practicing attorney who is trained to distinguish between permissive and absolute rules. Although critics are searching for consistency in the form of order opinions and the rules applied to order opinions, they are not requesting that this practice evolve into a sort of standardized form that is quickly completed. An ad hoc boilerplate decision reciting “after due consideration” or ‘upon a review of the record and the briefs of the parties’ is no better than the formal provisions that allow for a one word judgment ‘affirmed.’ Those are not unpublished opinions, however, not because they are not published, but because they


261. See, e.g., Basso v. Keith, No. C3-93-1224 (Minn. Ct. App. Dec. 20, 1993). The judge authoring the opinion in this situation usually writes, “This order opinion will not be published and shall not be cited as precedent. See Minn. R. Civ. App. P. 136.01, subd. 1.” Id.

262. See, e.g., Flores, 1994 WL 508953, at *1; Collins, No. C1-94-244 (stating the exception to the no-citation rule).


265. See Collins, No. C1-94-244.
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are not opinions.\textsuperscript{266}

One important reason for establishing an order opinion as an order or as an opinion is that if it is an unpublished opinion, then the disclaimer—"Notice: This opinion is designated as Unpublished and may not be cited except as provided by Minn. Stat. §480A.08 (3)\textsuperscript{267}—must be applied to order opinions as well as unpublished opinions. Subdivision 3 of section 480A.08 states that a party may cite an unpublished opinion if:

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.\textsuperscript{268}

From the face of the rule, then, the assumption is that an attorney may use an unpublished opinion as long as he or she provides counsel with a copy within the required time specifications.

It does not appear, however, that this rule is applicable to order opinions, since most order opinions hold that "pursuant to Minn. R. Civ. App. P. 136.01, subd. 1(b), this order opinion will not be published and shall not be cited as precedent, except as law of the case, res judicata or collateral estoppel."\textsuperscript{269} Subdivision 1(b) of Rule 136.01 also states that "[a] statement of the decision without a written opinion shall not be officially published and shall not be cited as precedent."\textsuperscript{270} If order opinions are truly unpublished opinions, however, they should be treated as such by having the more liberal citation rule, allowing the full text of order opinions to appear in Finance and Commerce weekly, and giving these decisions a full written opinion. Since this is not what the court of appeals does in practice, and since there is no established rule mandating otherwise, a legal consumer would most likely perceive that order opinions are summary affirmances, which are just longer than those used in the supreme court.

Furthermore, the language on which the court of appeals bases its

\textsuperscript{266} Baker, \textit{supra} note 22, at 254.
\textsuperscript{268} \textsc{Minn. Stat.} § 480A.08, subd. 3(c).
\textsuperscript{269} The first time this author posed this question to the late Chief Judge Simonett and Chief Staff Attorney Cynthia Lehr, Judge Simonett stated that one could probably cite an order opinion under this rule because it is just an unpublished opinion. Later in the interview, the late Chief Judge stated that an order opinion could not be cited under the disclaimer for unpublished opinions. An order opinion could only be cited under the exceptions—law of the case, res judicata, or collateral estoppel—given on the face of an order opinion. Interview, \textit{supra} note 103.
\textsuperscript{270} \textsc{Minn. R. Civ. App.} P. 136.01, subd. 1(b) (emphasis added).
authority to grant an order opinions provides an open door for the appellate court to begin using summary affirmances. 271 This concern stems from the fact that the Minnesota Supreme Court issues “Decisions Without Published Opinions.” 272 The authority for the supreme court to issue this type of decision is the same language used for an order opinion. 273 The argument is that if the supreme court relies on this rule when issuing a decision without a published opinion, as does the court of appeals when it issues an order opinion, there does not appear to be anything in the authority cited to prevent the court of appeals from some day adopting the supreme court’s practice of issuing a decision without a published opinion. 274 Thus, it appears that the same rule is applied to two very different types of decisions, contributing to the chaos surrounding the use of order opinions. 275

Another area of concern is the confusion surrounding what it means to “publish” an opinion. Some order opinions state that the order opinion will not be “published,” 276 and some say that the order opinion will not “officially be published.” 277 According to the Special Rules, “officially publishing” means only in Finance and Commerce or the St. Paul Legal Ledger. 278 In any event, if order opinions are not to be

271. For a definition of summary affirmation and the problems they caused at the supreme court, see supra notes 34-35 and accompanying text.

272. See, e.g., In re Petition of Hirsh, 519 N.W.2d 210 (Minn. 1994). This decision starts by stating whether the decision was affirmed or reversed and then it includes the following paragraph:

(The decision of the Court is referenced in the North Western Reporter in a table captioned “Decision Without Published Opinion.” By rule, a decision without a written opinion shall not be officially published and shall not be cited as precedent, except as law of the case, res judicata or collateral estoppel. Minnesota Rules of Civil Appellate Procedure, Rule 136.01 (1)(b)).

Id.

273. See MINN. R. CIV. APP. P. 136.01; SPEC. R. PRAC. MINN. CT. APP. 4; supra note 50 and accompanying text.

274. Wozniak, supra note 14. Former Chief Judge Wozniak claims that this authority to grant an order opinion gives the appellate court the “power to issue summary affirmances.” Id.

275. See id.


278. Compare MINN. CT. APP. INTERNAL R. 3.13 (repealed 1991) (stating that: West Publishing Company is authorized to publish opinions, but such publication is not to be regarded as containing the true and correct text of the Court’s opinions . . . . The official publications of the court of appeals for purpose of notice to the public and the legal profession shall be Finance and Commerce and the St. Paul Legal Ledger. Notices may be published elsewhere in the discretion of the Chief Judge.) with SPEC. R. PRAC. MINN. CT. APP. 6 (1991) (omitting any reference to West Publishing Company’s authority). Currently, there is some debate regarding whether an opinion is “published” once it is available electronically (e.g., on Westlaw or Lexis). See
published, regardless if officially or not, the court should enforce this
nonpublication rule, and it should not let the opinions be published
anywhere (e.g., on Westlaw or Lexis). To allow order opinions to
be published anywhere defeats the entire purpose of declaring that the
decision "shall not be published."
Finally, some individual order opinions add to the confusion
surrounding the order opinion process. In one case, the trial court
ruled from the bench, and the court of appeals disposed of the case
via order opinion. This decision is disturbing since the public may
perceive that the litigant did not receive a full opinion from either
court. In another case, the court of appeals cited authority from other
jurisdictions in support of its decision. The perception here is that
the law was not well-settled in Minnesota, since the court needed to
cite authority from other jurisdictions. In such a case, an order
opinion should not have been issued. In a third case, the court of
appeals issued a per curiam order opinion. This may pose a
serious problem when the state is a party and the court issues an
unsigned abbreviated opinion. In a fourth case, the court issued an

Mockenhaupt, supra note 17, at 801.
279. See Selya, supra note 158, at 409. According to Judge Seyla:
If an opinion should not be published, it should not be published either
manually or electronically. To make an opinion available electronically
defeats the whole purpose of the enterprise. If citation is permitted, then the
infoload crisis worsens, and unfair advantage is bestowed on more affluent
litigants. If citation is not permitted, then the transmission of the opinion is
at best a tease and at worse an invitation to violate or evade the prohibitory
rule.
Id. According to a Westlaw representative, order opinions are not routinely placed on-
line, and there currently is no established procedure for doing so. The ones that have
been placed on-line may have been put there for one of two reasons: (1) the case was
considered a "hot topic" as a result of being highly publicized in the media; or (2) one
of the editors came across a case that he or she thought was interesting enough to place
on-line. However, according to the representative, Westlaw requests the official text
from the court of appeals before it places it on-line. The representative also suggested
that there have been discussions about establishing a procedure, in which Westlaw
would receive order opinions from the court and routinely begin putting them all on-
line. Telephone interview with Westlaw Representative (Jan. 6, 1995). In a later phone
conversation with a Westlaw manager, she claimed that this procedure was not accurate.
It is not Westlaw's current practice to place order opinions on-line. As a result, all order
opinions that had been placed on Westlaw were removed. Telephone interview with
Westlaw Manager (January, 1994). Any order opinion cited in this article can no longer
be found on Westlaw.

May 25, 1994).
282. See, e.g., Hanson v. City of St. Cloud, No. C0-91-1211 (Minn. Ct. App. Feb. 25,
"amended" order opinion. This is somewhat unusual, since if the case is so clear and simple there should be no need for an amendment. To compound these problems, the appellate court and the supreme court have at times, cited order opinions. Even the late Chief Judge Simonett agreed that a published opinion should always be cited, not an order opinion. These order opinions create the perception that perhaps either these order opinions should have been published or were deserving of a full opinion.

Although former Chief Judge Simonett defined the previous discussion as "nitpicking," its purpose is to establish precisely how and why legal consumers are confused about the court's use of order opinions. Without established guidelines for when an order opinion should be used, it is not surprising to find such inconsistencies when evaluating the order opinion procedure. Without specific guidelines to follow, the bar and the public may perceive that judges develop their own internal (or implied) rules or criteria which they follow to determine whether an order opinion should be used in a particular case. This practice is not conducive to either judicial consistency or the appearance of justice.

F. Concern with Supreme Court Review

Finally, there is also concern that order opinions are not suitable decisions for review by a higher court. Litigants in every case, notwithstanding the form of the decision rendered from the court of appeals, have a right to seek further review in the Minnesota Supreme Court.

A question arises: Are there enough facts or reasoning in

285. Interview, supra note 103.
286. See Murphy, 388 N.W.2d at 739 (discussing MINN. R. CIV. APP. P. 117(2), which gives the supreme court the power of discretionary review); see also State v. Shamp, 427 N.W.2d 228, 230-31 n.3 (Minn. 1988) (stating that if the supreme court denies review, it does not mean the supreme court "endorse[s] either the reasoning of the court of appeals or the result"); Anderson, supra note 31, at 754-55 (discussing criteria supreme court uses when determining whether or not to accept review of a case).
287. Minnesota Rule of Civil Appellate Procedure 117(2) governs the Minnesota Supreme Court's review of court of appeals' decisions. MINN. R. CIV. APP. P. 117(2). Rule 117(2) states the criteria the supreme court used to determine whether or not to accept review. Id.
an order opinion to allow a supreme court to properly determine if certiorari is warranted? Only decisions with adequate reasoning and explanations facilitate review by the supreme court. Moreover, since an order opinion has no precedential value, it is less likely to be reviewed because there is no need to correct error in an opinion that has no value to begin with. Hence, the fact that the supreme court does not accept most order opinions for review increases the importance of receiving a high-quality appellate decision. If the supreme court does accept an order opinion for review, this indicates that the case was not so cut-and-dried. It indicates that the order opinion was deserving of a full opinion and that the judges' determination to use this abbreviated format is not always correct.

288. See Reynolds & Richman, supra note 26, at 1202-03. Since order opinions are not as meticulous as a published or unpublished opinion, the supreme court is less likely to review an order opinion because "less comprehensive and less thoughtful opinions make it more difficult for the Court to determine exactly what the lower court has done." Id. at 1203; see also Cope, supra note 204, at 87 (discussing state appellate courts' opinion writing practices and the importance of that opinion on review to the supreme court). According to Cope, the "ultimate inquiry in discretionary review should be whether the legal question presented is important enough to be resolved by the supreme court. In some cases the presence or absence of an opinion will be a strong consideration in granting or denying review, while in others it will not." Id.


290. See Reynolds & Richman, supra note 26, at 1203. It would appear highly unlikely for the supreme court to "make room on its discretionary and highly crowded docket for a case that merely settles a dispute incorrectly, that is, a case whose error is not likely to be perpetuated in future cases." Id.

291. The supreme court has accepted some order opinions for review, but the exact number is unknown since neither the court of appeals nor the supreme court maintains this type of statistic. For example, in Shaw Lumber Co. v. RJG Constr. Co., 513 N.W.2d 240 (Minn. 1994), the supreme court reversed an order opinion issued by the court of appeals and reinstated the judgment of the district court. This decision is somewhat troubling, however, for two reasons. First, the supreme court's decision was in the form of a one paragraph order. This order calls into question whether this was an appropriate disposition after the court of appeals issued an abbreviated opinion. As a result, nowhere on appeal is there a well-reasoned opinion completely addressing the reasons why, in the end, the trial court was correct and the appellate court was incorrect. Thus, from the public's eye, a situation such as this creates the perception that litigants are deprived of a complete explanation from the courts.

Second, the judiciary is failing to meet its obligation to educate the court and the parties to the litigation by not providing the appropriate guidance to the court which incorrectly applied the law. State v. Sellers, 507 N.W.2d 235 (Minn. 1993) (providing another example of the supreme court reversing an order opinion with an order); Neuman v. State Farm Mut. Auto. Ins. Co., 492 N.W.2d 530, 530 n.1 (Minn. 1992) (noting an order opinion the supreme court has accepted for review); State v. Christie, 494 N.W.2d 492, 496 n.2 (Minn. Ct. App. 1993) (citing a U.S. Supreme Court case stating that "due process requires . . . adequate findings for review"), aff'd, 506 N.W.2d 293 (Minn. 1993).
In sum, opponents are concerned that this “mysterious” appellate process gives the perception that litigants are not receiving justice on appeal. The opponents base this perception primarily on the fact that order opinions are or may be: (1) confusing and ambiguous to the members of the bar and to the public, 292 (2) unfair, (3) unaccessible, and (4) unreviewable. However, these concerns would be cured if the legislature, or the supreme court, enacted more detailed rules pertaining specifically to the appellate court’s use of order opinions.

VI. PROPOSAL FOR REFORM

The judges on the Minnesota Court of Appeals are in a difficult situation. They are following the rules and statutes promulgated by the supreme court and the legislature, and, until there is a change in these rules and statutes, the court of appeals will continue its practice of issuing order opinions. Many legal consumers, however, regard the order opinion process as somewhat mysterious. Therefore, since the use of order opinions is becoming more prevalent as a useful means for the court to manage its caseload, and since it does not seem likely that the court will be adding new judges any time soon, 293 the legislature or the supreme court must re-evaluate the rules currently in place 294 so that they satisfy the “appearance of justice.”

The court must satisfy the “appearance of justice” to maintain its reputation in the eyes of the legal consumer if our justice system is to function properly. To prevent unnecessary criticism of the court of appeals, the supreme court or the legislature must promulgate rules detailing the criteria to use when determining precisely when to issue an order opinion. At the very least, the supreme court or legislature should re-name and re-define these abbreviated opinions to assist the legal consumer in better understanding the procedures and rules under which the court operates.

Furthermore, the use of order opinions has increased significantly

292. See FitzGerald, supra note 23, at 398. A mysterious judicial process adversely affects one of the “most important policies underlying open courts—the maintenance of public confidence in the judicial process.” Id.; see also Riley, supra note 11, at 509. According to Riley:

It is of utmost importance that the public see the judicial branch of government as being independent and honorable . . . . Deference to the judgments and rulings of courts depends upon public confidence . . . . Because of the necessity for public confidence in the independence and integrity of the judiciary, judges must not only avoid impropriety, but must also avoid even the appearance of impropriety.

Id.

293. However, as former Chief Judge Paul Anderson said, “We should not shy away from making a request for additional judges if that is what the court of appeals needs to function effectively.” Anderson, supra note 165, at 579.

294. See supra part III (discussing the rules used in the deliberation process).
since the appellate court began this practice, becoming a key feature of the appellate process on which the court of appeals relies. The current rules and procedures, however, do not strike "the optimal balance between the competing considerations." Therefore, the court must switch gears and place more emphasis on the quality of justice, not merely the quantity of justice, received by the legal consumer. There must be rules adopted to bring about clarity and uniformity for those in the legal community. Procedural safeguards should also be implemented to ensure that the court of appeals has correctly decided to issue an order opinion and to avoid the perception that justice is not being distributed. As former Chief Judge Paul Anderson acknowledged, "[t]he court is maturing; some areas need refinement and development." One of the areas in need of "refinement" is the court's practice of rendering order opinions.

A. Re-Name Order Opinions

At the very least, serious consideration must be given to re-naming order opinions and to revising the Special Rules or the statutes to define each type of disposition the court may employ. This way, when one needs to determine exactly what the form of a decision is, and exactly what it means, they have a source that clearly and unambiguously answers these questions. For example, the Internal Rules, used by the court of appeals prior to the Special Rules, clearly defined the distinction between a memorandum opinion and a full opinion, the two types of published opinions used by the court at that time. Since the court of appeals is now using two different types of unpublished opinions, it must identify the distinction between the two.

One option is to re-name unpublished order opinions as unpublished "memorandum opinions." Based on the Internal Rules'
definition of a memorandum opinion, and other commentary, memorandum opinions are almost identical to order opinions in that they are intended only for the parties to the litigation, they identify the issues on appeal, and they contain the rationale for the disposition stated as briefly as possible. Thus, the “memorandum opinion” should take the place of the “order opinion.”

The memorandum opinion, however, should be applied only in two situations: (1) where existing, well-established laws are applied to standard fact situations; and (2) where there is no reason to qualify these well-established laws. Furthermore, the memorandum opinion must contain the following three elements: “(1) . . . identify the case decided; (2) . . . indicate the ultimate result or disposition; and (3) . . . reveal the reasons for the result.” In sum, both the appellate court and the legal consumer agree the court must not give the perception of deciding cases arbitrarily and the court must state the reasoning for its decision. The memorandum opinion would meet these mutual concerns. In addition, the memorandum opinion would resolve the definitional problem of whether an order opinion is an “order” or an “opinion.”

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Id. at 410.

302. See supra note 56.

303. See supra note 99 and accompanying text; see also Gunn, supra note 53, at 118 (discussing memorandum opinions and stating the “court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal”); Mathy, supra note 74, at 444 (stating that a memorandum opinion “minimiz[es] the time required by the court panel and the clerk of court to issue the decision; [it] is not published, so the panel need not labor over precedent-setting language; and [it] can educate the litigants and the interested public on the precise nature of their ‘error’”); Norberg, supra note 37, at 125 (stating “[i]t should be possible, however, in a case appropriate for disposition by memorandum opinion, to indicate concisely the grounds upon which the decision is based and the substance of the court’s reasoning”).

304. See Wald, supra note 141, at 782. Furthermore, according to Wald, the memorandum opinion “should not be used when the court develops or modifies a rule of law, resolves a conflict or apparent conflict between panels or its subordinate courts, faces an issue of special public interest, or is not unanimous in disposition of the matter.” Id.

305. Norberg, supra note 37, at 125 (quoting P. Carrington and an ABA committee on standards for appellate courts). This article also states that the “last element is particularly crucial if memorandum opinions are employed. To provide the assurance . . . that every case has been thoughtfully considered, the decision in each case must ‘be supported at least by reference to the authorities or grounds upon which it is based.’” Id. But see Stern, supra note 56, at 25 n.16 (noting that Illinois Supreme Court Rule 23 states that cases not disposed of by opinion “shall be disposed of by a written order which shall succinctly state the facts, the contentions of the party, the reasons for the decision, the disposition, and the names of the participating judges”).
B. Revise Rules

Whether the court of appeals works with an order opinion or a memorandum opinion, there must be revisions in the rules and procedures that the court follows when deciding to issue an abbreviated opinion. Since the court issues these two types of unpublished opinions, there must be criteria specifying circumstances under which an order opinion will be issued instead of an unpublished opinion. The most stringent rule the court could adopt to control judicial discretion would be a rule favoring publication, coupled with specific criteria for the court to employ when deciding whether an opinion should be written. Such a rule should also specify criteria the court should employ when deciding whether to publish. Since order opinions are a subset of unpublished opinions, they should still follow the statutory criteria for issuing such opinions. However, an unpublished order opinion is not precisely the same as an unpublished opinion, so there should be criteria that apply specifically to order opinions and not to unpublished opinions.

One suggestion for these additional criteria is to follow the proposal presented by the MSBA in 1986, wherein it advocated publishing all decisions of the appellate court, but also suggested guidelines for the court to follow when issuing abbreviated decisions. The MSBA made the following recommendation:

In deciding whether to write a full opinion or a memorandum decision, the Court should consider using the following standards.

1) a full opinion is appropriate when:
   a) in deciding the case, the court enunciates a new rule of law or modifies an existing rule;
   b) an apparent conflict of authority exists;
   c) the court is not unanimous in its disposition of the case;
   or
d) the decision is of substantial public interest;

2) a memorandum opinion is appropriate when:
   a) the issues involve no more than the application of well-settled rules of law to a recurring fact situation;
   b) the issue is whether the evidence is sufficient and it clearly is; or
   c) the case is clearly controlled by existing case law and there is no reason to modify or deviate from that law.

c. The Court should continue its practice of not issuing decisions

306. See Stienstra, supra note 59, at 519.
307. See supra note 86 and accompanying text.
without written opinions unless waived by all parties.\textsuperscript{308}

Another suggestion for additional criteria that can be specifically applied to order opinions can be found in appellate courts that have established a separate rule, in addition to their nonpublication rule, for deciding when to issue a decision without an opinion.\textsuperscript{309} The Minnesota Court of Appeals has not endorsed the practice of issuing decisions without any written opinion. The foundation for order opinions, however, is based on the notion of a \textit{statement of decision without a written opinion}. Thus, some of the following suggestions for additional criteria from other appellate courts may apply and prove helpful to the legal consumer.

The criteria for deciding when an order opinion is appropriate should contain a description of those situations in which an order opinion is to be expected from the court. One possible situation is when the court disposes of a frivolous appeal, since there is no basis upon which a decision could rest. Another situation is if the law is clear and the fact situation is not uncommon or unusual. However, if the fact situation is unique but the law is still clear, an unpublished opinion should be used.\textsuperscript{310} The court should also be allowed to issue an order opinion when it affirms the trial court's decision either on the basis that the trial court's findings of fact were not clearly erroneous or the evidence is sufficient to support the verdict. Finally, the court may be justified in issuing an order opinion where the court

\textsuperscript{308} See Mockenhaupt, \textit{supra} note 17, at 795 n.44 (emphasis added) (citing motions from the MSBA Judicial Administration Subcommittee, Files 1 \& 2 (March 8, 1986)).

\textsuperscript{309} For example, the Fifth Circuit will affirm or enforce a judgment without opinion if it finds:

(1) that a judgment of the district court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole, or (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant, and the court also determines that no reversible error of law appears and an opinion would have no precedential value . . . .

\textit{5TH CIR. R. 47.6. But see D.C. Cir. R. 36(b).} The District of Columbia Circuit Court has a rule that pertains particularly to abbreviated dispositions which states, "The court may, while according full consideration to the issues, dispense with published opinions where the issues occasion no need therefor [sic], and confine its action to such abbreviated disposition as it may deem appropriate . . . ." \textit{Id.}

\textsuperscript{310} See Stienstra, \textit{supra} note 59, at 522-23 (discussing circuits that choose to publish decisions when established law is applied to a new fact situation). Furthermore, if the court of appeals had used this criterion when it decided the \textit{Nielsen} case, it would not have been allowed to issue an order opinion, because that decision was based on the \textit{unique facts} of the case. Thus, an unpublished or published opinion would have been issued, and most likely the court would have avoided all the negative publicity it has received over its use of order opinions.
of appeals needs to remand (not reverse and remand) to the trial court for insufficiency of evidence.\textsuperscript{311}

The detailed rule for order opinions should also expressly specify situations in which a case cannot be disposed of with an order opinion. One such situation is if the court of appeals must use authority from another jurisdiction to decide the case, since this gives the perception that the law is not settled in Minnesota. A second situation is if the court of appeals reverses the trial court, since it appears there is a lack of understanding or clarity in the law that was applied.\textsuperscript{312} Thus, if the court is going to reverse the trial court, it should do so in either a published or unpublished opinion, but not an order opinion.\textsuperscript{313} Both of these situations militate against the underlying rationale for order opinions that the law is clear and well-settled.\textsuperscript{314}

The rule should also clearly state that the decision to issue an unpublished order opinion was decided by a unanimous panel.\textsuperscript{315} A rule containing such a requirement indicates clearly that all judges agreed to issue an unpublished order opinion. Most circuit courts have incorporated into their publication plan whether the panel of judges must have a majority, be unanimous, or if a single judge can decide whether to publish an opinion.\textsuperscript{316}

The rule might also contain criteria relating to the length of an order opinion. One suggestion is to set a maximum length, for example five pages for an order opinion; anything longer must be treated as an unpublished or published opinion.\textsuperscript{317} The reason for this requirement is that a legal consumer may perceive that if an order

\begin{itemize}
  \item \textsuperscript{311} Id. at 522 (stating that few circuits require appellate courts to publish an opinion if the case has been remanded from the U.S. Supreme Court).
  \item \textsuperscript{312} See Songer, supra note 59. Songer remarks that "it would seem that in any case where the court of appeals felt it necessary to overturn a decision from below, one might assume that the existing law was unclear. Otherwise the [trial] judge would not have made an erroneous decision." Id. at 511.
  \item \textsuperscript{313} See, e.g., Stienstra, supra note 59, at 521 (noting that five circuits' rules expressly state that if reversing lower court then decision will be published).
  \item \textsuperscript{314} See generally Songer, supra note 59, at 510 (suggesting that if the law is clear and well settled, then the "correct basis of decision should be obvious to any person who is well trained in the law").
  \item \textsuperscript{315} See, e.g., FED. CIR. R. 47.6 ("Opinions and orders which are designated as not citable as precedent are those unanimously determined by the panel at the time of their issuance as not adding significantly to the body of law.").
  \item \textsuperscript{316} See generally Stienstra, supra note 59, at 520 (stating each circuit's rule).
  \item \textsuperscript{317} See Nichols, supra note 140, at 915-16. Judge Nichols states that "[w]hen you see an unpublish decision run on for several pages, the question if it should be published at once comes to the mind. In that event, the original decision not to publish is not set in concrete: the decision is published." Id.; see also Popovich, supra note 15, at 586-87. The former Chief Judge Popovich notes that in 1983, the Minnesota Trial Lawyer's Association encouraged judges to "limit the length of opinions, resulting in an average opinion length for many of the judges of seven pages." Id. at 587.
\end{itemize}
opinion needs to be longer the case was not cut-and-dried. Furthermore, if a judge discovers while writing the order opinion that the case is more complicated than originally thought, the panel of judges should have the flexibility to change the form of the disposition after the initial decision has been made.

Finally, the rule should include a requirement which states the court’s plan for distribution of order opinions. The rule should specifically state who routinely receives these decisions, so the legal consumer knows where these decisions are readily available.

In sum, if these suggestions are utilized, there should be uniformity in the form and on the face of the order opinion itself. The final form of all order opinions should contain the following: cite the same rules for the authority to issue an order opinion; provide an explanation of the relevance and importance of any new authority used in the order opinion that was not used in either of the parties’ arguments (be it only an explanatory phrase following the citation); clearly state all issues on appeal; succinctly and briefly state all relevant facts to the decision; and clearly resolve each issue with adequate reasoning. If the rules are revised and uniformity is achieved, then the suspicion and confusion surrounding order opinions should disappear.

C. Create an Indexing System

One of the goals that the court of appeals established at its inception was that all of its decisions would be indexed and readily available. What precisely the court means by indexing, however, is not certain. To the average citizen, indexing likely means that there is a system in which obtaining decisions from the court would be much like going to the library and finding certain books, either by call number, author, or subject matter. Unfortunately, if he or she were to go to the court of appeals without the date the decision was made, the appellate file number, or the name of the parties in a case, he or she would have a difficult time obtaining all decisions by a certain judge or on a specific subject matter. Thus, without the “call numbers” from the face of the decision, the person would be forced to look through every order opinion to obtain the information he or she wants.

The court of appeals, along with the legislature, has adopted policies limiting publication of its decisions as a means of efficiently dealing with its rising caseload. Now the appellate court and the legislature must solve another problem—how to create equitable access to unpublished order opinions without having the burden of searching through each and every order opinion that the court has issued.

318. See generally Stienstra, supra note 59, at 530 (asserting that “any combination of restrictions or freedoms with regard to distribution and citation leads to problems for
There must be a better system in place, which would allow the legal consumer to easily find and review any decision, since it is ultimately the legal consumer who determines or questions the legal relevance of a case, even if it is an order opinion.

One suggestion to remedy this time-consuming approach is to create an index by topic, or a descriptive index, since a subject-matter index would be inefficient and impractical without adequate judicial resources. It does not appear that creating a topical or descriptive index would entail much more than what Finance and Commerce is now doing each week. The additional work would be to create an explanatory phrase to accompany the basic information that is disseminated weekly. For example, the explanatory phrase could be as simple as "Implied Consent Law—Driver's License Revocation" or "Family Law—Spousal Maintenance" or "Unemployment Compensation—Benefits Claim." This additional phrase would be beneficial because if one was interested in marriage dissolution cases, for example, she or he would only have to search the family law topic index, instead of all public records.

Another suggestion is to create an index which contains a random selection of order opinions. The primary purpose of such an index is that the bar and the public would have a means of examining the quality of order opinions decided by the court of appeals. Alternatively, the bar may consider forming a committee to review this index or make its own independent selection of order opinions. Furthermore, if a rule allowing for reconsideration is promulgated, this

319. *But see* Margaret Gilhooley, *The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of Information Act Publication Requirements*, 9 ADMIN. L.J. AM. U. 53, 85 (stating that the availability and indexing of numerous decisions is financially burdensome but concluding that "increasing the fairness of the process and developing a cohesive policy weigh in favor of these added costs"); *see also* CENTRAL STAFF OF THE COURT OF APPEALS, MINNESOTA COURT OF APPEALS SPECIAL TERM OPINION SUBJECT MATTER INDEX (Feb. 7, 1992) (demonstrating that the court of appeals produced a subject matter index for its special term decisions, which it no longer does); David F. Herr & Mary R. Vasaly, *Appellate Practice in Minnesota: A Decade of Experience with the Court of Appeals*, 19 WM. MITCHELL L. REV. 613, 652 (1993) (stating Special Term decisions are unpublished and nonprecedential, but even so, such an index "is a useful source of guidance on how the court may respond to a particular motion [or issue]").

320. Each week *Finance and Commerce* lists order opinions issued by the court of appeals in the following format:

Smith v. Commissioner of Public Safety
No. C5-94-148
Affirmed
Peterson, J.
Dakota County
Hon. Patrice K. Sutherland
Court of Appeals—Order Opinions, FIN. AND COM. APP. CTS. ED., Oct. 1994, at 44.
committee would also be able to request reconsideration of any order opinion it determines to be inconsistent with the rules allowing for order opinions. These alternatives would provide a mechanism for detecting any abuses in the system and would ensure that judges are accountable for their decisions. More specifically, they would guard against the perceptions of "secret law" or "private justice." Thus, any suspicions that have developed towards the court of appeals would be "offset by ensuring that the [judicial] process and its decisions are open to public review."

Finally, advanced technology may assist the court of appeals in designing an equitable indexing system by making the full text of order opinions instantaneously available and readily accessible to all interested individuals. One might suggest that this approach is not equitable, since not everyone has such on-line systems as Westlaw or Lexis. However, most individuals actually do have access to such a system but simply do not avail themselves of it.

D. Provide an Opportunity for Reconsideration

Another safeguard that could be adopted is a provision in the Special Rules or in the statutes that would allow the parties to the litigation to request review of the publication decision. For example, a party could request that an unpublished order opinion be changed to either an unpublished or published opinion. According to Rule

321. See generally Gilhooley, supra note 319, at 91-92 (stating that "on policy grounds, the availability of decisions and the indexing obligation should be governed by a test that looks at the needs of the public for guidance and not solely at the precedential significance of the decisions").

322. Israel, supra note 24, at 20; see also Gilhooley, supra note 319, at 54-60 (arguing that the Freedom of Information Act (FOIA) may have some relevance to this issue of accessibility and indexing of order opinions). In agency law, the FOIA "governs the affirmative obligation of agencies to index and make available prior decisions." Id. at 54. The FOIA "requires that each agency maintain an index of its unpublished materials to aid the public in identifying decisions." Id. at 60. Furthermore, part of the purpose of the FOIA indexing requirement was to "guard against 'secret law.'" Id. at 61.

323. See Robert Willard, Courts Lag in Use of Technology; Budgetary Constraints Blamed for Judiciary's Lack of Automation, LEGAL TIMES, Oct. 16, 1989, at S7 (discussing technological advancements made to reduce the time it takes to make court opinions public and its effect on the unpublished opinion debate).

324. See Stienstra, supra note 59, at 520 (discussing those circuits which allow an attorney to request that an unpublished decision be changed to a published decision). For example, in the U.S. Court of Appeals for the District of Columbia, there is a rule which states: "Any person may... request that an unpublished opinion be published... Motions for publication shall be based upon one or more of the criteria listed [for published opinions]. Such motions are not favored and will be granted only for compelling reasons." D.C. CIR. R. 36(d); see also Dunn, supra note 68, at 131-32 (discussing the explicit guidelines in the Ninth Circuit for requesting review of a publication
140.01 of the Minnesota Rules of Civil Appellate Procedure, the court of appeals does not currently allow petitions for rehearing or reconsideration. A motion for reconsideration, however, may prove a useful option to one unsatisfied with the court's decision to issue an unpublished opinion or an unpublished order opinion. The Minnesota Supreme Court has in prior cases allowed rehearing to "explain and clarify an earlier decision." Thus, while a motion for rehearing may not be used to reargue the outcome of the case, it may be a useful means of allowing a dissatisfied litigant to challenge only the form of the decision that was issued.

If litigants decide, after receiving order opinions, that they do not understand the order opinion (i.e., because it did not contain sufficient reasoning), then the litigants should have an opportunity to bring a motion for reconsideration. The motion would ask the court to reconsider the decision to render an order opinion, and explain what was not understood or adequately addressed in the order opinion. The litigant, through this motion, would be allowed to question the court's decision that the law is so clear or that the fact situation so ordinary. It would allow the litigant an opportunity to perhaps have the order opinion changed to an unpublished or published opinion, so that the litigant may obtain more information from the court as to why it decided the way it did.

Allowing the party an opportunity to obtain more information could prove beneficial in two ways: (1) more information would give attorneys more guidance, enabling them to better explain the outcome to their clients, which would in turn satisfy the clients; and (2) it could reduce appeals to the supreme court, since a more sufficient explanation would likely satisfy the client that the law is well-established and that an appeal to the supreme court would prove futile. Finally, adopting specific guidelines which allow for reconsideration of a panel's decision to issue an order opinion will encourage uniformity among the panels regarding publication decisions.

E. Reform Publication and Citation Rules

Today, as advances in technology allow for storage and retrieval of an enormous amount of information, this should have some impact on the "shall not be published and shall not be cited" language appearing in Rule 136.01. Part of the reasoning behind the creation of these

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325. See MINN. CIV. APP. P. 140.01; see also Herr & Vasaly, supra note 319 at 656. The authors state that the Minnesota Rules provide "no mechanism for review of the publication decision . . . , and no formal mechanism allows any input from the parties on the question of publication." Id.

326. Herr & Vasaly, supra note 319, at 647.
limitations was that there was not enough storage space for volumes and volumes of reporters containing the same law. As a result, the decision was made that only those decisions with precedential value need be published and placed on the library shelves. The "no-citation rule" then followed because not all practitioners would have access to the unpublished decisions. Today's technology, however, affords the storage space to make available for viewing all decisions of the court. Thus, since most opinions are already "published" in some sense of the word, it is time for the courts and legislature to allow more liberal citation rules for unpublished opinions.  

The most attractive solution would be to permit citation of all unpublished decisions, or at least to permit citation of unpublished decisions when no better precedent is available. The best suggestion for unpublished order opinions, however, is to allow these decisions to be cited as persuasive authority like other unpublished decisions in Minnesota. If neither of these approaches is appealing, the least the legislature or supreme court should do is amend the Rules to include one more exception to the exceptions already enumerated in the Rule; that being involvement of related facts.  

327. See Merritt, supra note 178, at 1393 (stating that "[i]n the Sixth Circuit, where Lexis and Westlaw publish every opinion issued and where such opinions may be cited as authority, the problem [of accountability] seems minimal" (footnote omitted)).  
328. See generally Thomas G. Field, Jr., Access to and Authority to Cite Unpublished Decisions of the PTO, 33 IDEA J.L. & TECH. 153 (discussing access to unpublished decisions and stating that the "most appealing compromise we have seen is the system used in the Tenth Circuit. That court permits free citation of unpublished opinions, provided that a copy is served on opposing counsel."); see also Dunn, supra note 68, at 146 (claiming that "free citation of unpublished decisions will allow litigants to bring to the courts' attention erroneous [publication] decisions . . . [and it] forces close consideration—and reconsideration—of all decisions. Unrestrictive rules best assure quality judicial decisions, reported and unreported"); Render, supra note 23, at 164 (stating the "abolition of the no-citation rule could help eliminate the idea that non-publication is a rug under which judges sweep whatever they wish never to see the light of day").  
329. See Stienstra, supra note 59, at 513 (discussing the Fourth and Sixth Circuits' rules disfavoring citation unless no better precedent available).  
330. See Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 800-01 (Minn. Ct. App. 1993). The court of appeals held that unpublished opinions "are not precedential. Minn. Stat. § 480A.08, subd.3(c) (1992). At best, these opinions can be of persuasive value." Id. at 800; see also Weaver, supra note 58, at 491 (contending that "if an unpublished opinion contains an argument which a litigant or court finds persuasive, the unpublished opinion should be citable for the purpose of setting out the argument").  
331. See 5TH CIR. R. 47.5.3. This rule states:

Unpublished opinions are precedent. However, because every opinion believed to have precedential value is published, an unpublished opinion should normally be cited only when it (1) establishes the law of the case, (2) is relied upon as a basis for res judicata or collateral estoppel, or (3) involves related facts. If an unpublished opinion is cited, a copy shall be attached to
In conclusion, the suggestions set forth above are aimed at correcting the erroneous perceptions regarding the court of appeals, and at bringing about a more accurate perspective on what the appellate court is trying to accomplish through its use of order opinions. Most importantly, all order opinions should be easily accessible for review since it is the public eye that polices the quality of these decisions. In addition, the court should develop a system so that there is a periodic review of this appellate practice.332

VII. CONCLUSION

Former Chief Judge Peter S. Popovich stated, “Freedom is something you have; justice is something you work for.”333 In the same vein, the appearance of justice must be worked for even harder than justice itself. The Minnesota Court of Appeals strives to keep the promises it made to the citizens of Minnesota who voted for the creation of an intermediate court—to issue a written opinion stating the court’s reasoning in every case—despite its limited budget and heavy docket. However, as former Chief Judge Popovich stated, “The hallmark of a successful court system is like that of any business—service, efficiency, and quality. Where the business serves the public rather than seeking to make a profit, public confidence is critical.”334 As the court of appeals continues to strive to be as efficient as possible, it cannot lose sight of the fact that it may be doing a disservice to the public if the quality of its written decisions declines. Furthermore, as long as the court continues to be perceived as mysterious and confusing, the public’s confidence in the system and in its moral authority will decrease.335

The Former Chief Judge Popovich also stated that “[t]he chief judge must recognize the mission of the court is defined not only by the court, but by the expectations of the bar, the media, the legislature, the executive, and the public.”336 Meeting the expectations of all these groups, however, is an extremely challenging feat. One way to meet these expectations is to ensure that the court of appeals satisfies the appearance of justice test, since appearances will almost always

each copy of the brief.

Id.

332. See 1ST CIR. R. 36.2.(b)7 (stating that “[p]eriodically the court shall conduct a review in an effort to improve its publication policy and implementation”).
335. See Harris, supra note 2, at 789 (stating that an “accurate public perception of the system is basic to our form of government and to confidence in its laws”); see also Markey, supra note 7, at 373 (noting that the judiciary’s ability to render justice “depend[s] on its lifeblood: respect for its moral authority, the only authority it has”).
336. JUDICIAL TRADITION, supra note 95, at 95.
prevail over the reality of the situation. In reality, the court’s use of order opinions is a useful and necessary tool to manage its caseload. Unfortunately, the laws under which the court of appeals must operate when deciding to issue an order opinion are confusing and unsatisfactory. Therefore, order opinions create the perception that quality justice is not being received.

Although the court will probably never rid itself of the “quality vs. quantity” debate in today’s litigious society, it appears that the time has come for a re-evaluation of one of the steps taken to increase the court of appeals’ efficiency, the use of order opinions. Although not many would dispute that the court needs to have some type of abbreviated format, and that not all decisions need to be officially published in law books, many claim that the supreme court or the legislature needs to enact specific guidelines for the court of appeals to follow. Such guidelines would make the practice of disposing of appellate cases by order opinions less mysterious and less confusing to the legal consumer, so that he or she will feel as if justice is being done. Furthermore, such guidelines will affect the judicial discretion of the judges on the court, allowing the legal consumer to perceive that the decision to issue an order opinion was given thorough and thoughtful consideration.

Finally, unpublished order opinions are not secret opinions, they simply are perceived as secret because they are difficult to obtain and examine, and because there are no clear rules or procedures that the legal consumer can use to completely understand the process. Critics of the court’s practice are not seeking an absolute end to this practice, but they are seeking to ensure that justice is being rendered, and more importantly that justice appears to be rendered. As one author commented, “[I]f we succeed in using every resource, including technology, to continue the delivery of justice and the preservation of liberty in a free society, [Learned] Hand may one day say to us, ‘Well done.’”

Kerri L. Klover

337. See Markey, supra note 7, at 385. Chief Judge Markey states that “[i]n virtually every instance of reasonably asserted conflict between unethical appearances and ethical realities, appearances must win.” Id.

### IX. Appendix

#### Table 1: Court of Appeals Statistics

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Note: * 1990 order opinions include 193 commitment cases.