**No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly**

Report and Recommendation to the MSBA Regarding Unpublished Decisions by the Minnesota Court of Appeals

MSBA Judiciary Committee and MSBA Court Rules and Administration Committee
May 10, 2017

**RESOLVED**: That the MSBA request the Minnesota Court of Appeals:

1. Amend:
2. Special R. Prac. Minn. Ct. App. 4 to replace “unpublished” with “nonprecedential”;
3. Special R. Prac. Minn. Ct. App. 4 to eliminate the obligation to provide nonprecedential (unpublished) opinions to other counsel while retaining the obligation to provide nonprecedential (unpublished) opinions to pro se parties; and
4. In light of the declining number of published opinions, consider designating more of its opinions as precedential and published under Special R. Prac. Minn. Ct. App. 4.

**REPORT**

The Judiciary Committee and the Court Rules and Administration Committee were prompted to examine unpublished decisions in light of an [article](http://mnbenchbar.com/2016/12/unpublished-opinions/) written by Hon. David Lillehaug that was printed in Bench & Bar magazine in December of 2016. In the article, Justice Lillehaug offered the following suggestions:

*“First, the Legislature should repeal section 480A.08, subd. 3, as an infringement on the judicial branch’s authority. The Legislature should not be, and should not want to be, in the business of telling the courts when and how to issue and apply their own opinions.*

*Second, the Court of Appeals should try to issue more precedential opinions. Simply put, it cannot be that 92 percent of its opinions involve no significant legal issues. Likely an initial target of doubling the percentage of decisions as precedential would not materially affect the management of a large case load. The Minnesota Court of Appeals is a strong, vibrant institution with 19 well-qualified judges. We suspect that most judges on a panel invest their time and careful attention in each case regardless of whether the opinion is to be published or not. And Court of Appeals policy is that every opinion is reviewed by at least nine judges, including the chief judge, and by experienced Court of Appeals staff attorneys.*

*Third, the Advisory Committee on the Minnesota Rules of Appellate Procedure might consider a rules change whereby unpublished Court of Appeals opinions deemed especially significant by the bar could be upgraded to precedential status. A subcommittee could promptly review unpublished Court of Appeals opinions as they are issued. The subcommittee could petition the Court of Appeals to change the designation to precedential.*

*Fourth, because all Court of Appeals decisions are available online to all attorneys, the designations “published” and “unpublished” should be changed to “precedential” and “non-precedential.” Finally, the rule that special notice need be given when a non-precedential decision is cited should be stricken.”*

The Judiciary Committee sent the article to all MSBA sections with a request for comments. The Committee received responses from three sections (see Appendix A), which were generally supportive of Justice Lillehaug’s suggestions.

The Judiciary Committee and the Court Rules Committee met jointly to discuss unpublished decisions on March 30, 2017, and on May 10, 2017. Justice Lillehaug and Chief Appellate Judge Edward Cleary were invited to the March 30 meeting to speak and answer questions.

Some Committee members agreed with Justice Lillehaug that the statute related to criteria for publishing decisions is an infringement on separation of powers. However, since the court adopted an appellate rule similar to the statute, the first priority would be to amend the rule and perhaps later pursue similar amendments to statute. . Additionally, Committee members determined that a potential recommendation to amend or repeal the statute is in the purview of the Legislative Committee rather than the Judiciary/Court Rules Committees.

The suggestion that the Court of Appeals try to issue more precedential opinions is one that a majority of Committee members agreed with, and is contained in the second part of the resolution. The main reason behind the recommendation are the statistics noting the dwindling number of published decisions over the years (see Appendix B). In certain areas of practice, such as housing law, the percentage of published decisions is even lower, at 5%. Even in narrow areas of the law, it would be helpful to practitioners if there were more published decisions. Conflicting unpublished decisions pose difficulties for attorneys advising their clients, while published decisions provide clarity as to the state of the law.

The Committee considered the possibility of requesting a rule change to upgrade certain Court of Appeals decisions to precedential status, but in the end was dissuaded of the efficacy of this approach based on Judge Cleary’s concern that the court’s processes would slow considerably if unpublished decisions were converted to published decisions. Such an endeavor would likely require an expansion of judges and court staff to consider all the appeals requesting a change in status from unpublished to published and perform the corresponding administrative work.

The first part of the Committee’s recommendation recognizes the fact that, in reality, “unpublished” opinions is a misnomer in that they are readily available online, although pro se parties may have difficulty accessing them. For this reason, the proposed changes preserve the requirement that copies of nonprecedential opinions be provided to pro se parties.

**Appendix A**

From: Margaret Erickson [mailto:erickson.margaret@gmail.com]
Sent: Monday, March 27, 2017 8:49 AM
To: Nancy K. Mischel
Subject: Re: Judiciary Committee - response needed by 3/24

Nancy:

The MSBA Family Law Section, in its March 11 meeting, voted to support Justice Lillehaug's recommendations. There were 21 "aye" votes, no "nays" and 4 abstentions. Added to the motion was a condition that we want the "nonprecedential" opinions to remain accessible online, as "unpublished" opinions currently are.

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From: Mavis J. Van Sambeek [mailto:mvansambeek@lindquist.com]
Sent: Friday, February 17, 2017 1:20 PM
To: Nancy K. Mischel
Subject: Probate and Trust Law Section Comments Re Unpublished Opinions

Hello, Nancy.

I am the chair of the Probate and Trust Law Section Council.  Because many of the decisions issued by the Court of Appeals concerning probate and trust law issues are designated unpublished, we have discussed the four recommendations made by Justice Lillehaug.  We wish to provide our comments to the Judiciary Committee.

We agree with the First, Second and Fourth points but we do not support the proposal to have the bar involved in determining which unpublished opinions should be upgraded.

Please let me know if further amplification is desired by the members of the Judiciary committee.

Sincerely,

Mavis

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From: Alan Thiel [mailto:alancthiel@earthlink.net]
Sent: Saturday, January 28, 2017 4:33 PM
To: Jennifer L. Carter; Nancy K. Mischel
Cc: Matthew J. Foli; Jennifer L.J. Gilk; Kevin J. Dunlevy; Eric P. Johnsrud
Subject: Re: Section Chairs Community : Seeking Comments Regarding Unpublished Opinions

Dear Ms. Mischel:
The issue of unpublished court opinions was discussed at the RPLS Council meeting this morning. The results of that discussion were as follows: the general consensus was that the concept of unpublished opinions is problematical as it is currently applied in Minnesota; there were no objections expressed to the proposals set out below; and, the RPLS would defer to the MSBA Judiciary Committee with respect to this issue.  Thank you.
Regards,
Alan Thiel, Chair
Real Property Law Section

**Appendix B**

**Unpublished Opinion Statistics**

**May 10, 2017**

From L. McDonough, *To Be or Not to Be Unpublished: Housing Law and the Lost Precedent of the Minnesota Court of Appeals*, 35 HAMLINE L. REV. 1, 22 (2012), on Westlaw at 35 HAMLR 1.

In 1988, the court issued 706 unpublished and 611 published opinions. *See* Kerri L. Klover, *Comment, “Order Opinions”—the Public’s Perception of Injustice*, 21 WM. MITCHELL L. REV. 1225, 1243 (1996).

In 1994, the court issued 1007 unpublished opinions, 307 unpublished order opinions, and only 374 published opinions. *See id.*

In 2005, of the 1484 opinions, 1286 were unpublished. *See* David F. Herr & Haley N. Schaffer, *Suggestions from the Practicing Bar: Things Practitioners Wish the Court of Appeals Would Do Differently*, 35 WM. MITCHELL L. REV. 1286, 1288–89 (2009).

In 2010, there were 2322 appeals filed, with 1271 unpublished opinions, 128 unpublished order opinions, 727 cases disposed by unpublished dismissal or order, and 196 published opinions. E-mail from Kyle Christopherson, Commc’ns Specialist, Court Info. Office, Minn. State Court Adm’r’s Office, to author (Aug. 15, 2011, 17:00 CST) (on file with author).

**Over this period, the percentage of published opinions has decreased from 46% in 1988, to 22% in 1994, to 13% in 2005, to only 8% in 2010.**

**In 2009, of the 38 appeals concerning landlord and tenant rights, only 2, or 5%, were published. Reversals accounted for 20 of the decisions, for a reversal rate of 53%.** Westlaw research conducted by the author on November 8, 2011. The search contained landlord and tenant appeals, including commercial and residential disputes and appeals from subsidized housing assistance cases.

*Information compiled by:*

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