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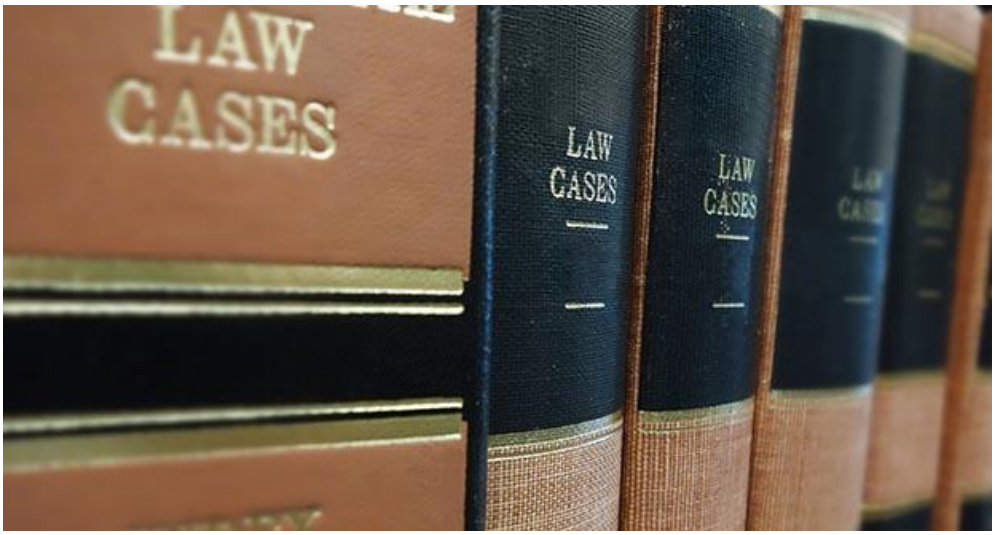

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Briefly: Asking for publication

By: Eric J. Magnuson February 23, 2021

We wrote a while ago about the Legislature's repeal of the statutory requirement that counsel provide the court and opposing counsel with copies of unpublished court of appeals opinions in advance of relying upon them. Eric Magnuson, David Herr, and Erica Holzer, "Clearing Up Confusion Over Unpublished Opinion Copies" (Minnesota Lawyer June 2020). We also wrote in more detail about the substance of the rule changes that were made to address the subject. Eric Magnuson and Geoffrey Kozen, "New Rules for Nonprecedential Opinions" (Minnesota Lawyer August 2020).

Because it's an issue that impacts every submission to the district and appellate courts, we thought it important to call one more development to the attention of the practicing bar.

To recap, Minnesota Rule of Civil Appellate Procedure 136.01 was amended effective August 1, 2020, to provide detailed criteria for determining the form of the court's opinion. The amended rule provides for three forms of opinion: precedential, nonprecedential, or order opinion. The amended rule also removes references to "unpublished" opinions and deletes the bar to citation of nonprecedential opinions. Rule 136.01, subd. 1(c), as amended in 2020, expressly permits nonprecedential opinions to be cited as persuasive authority. These changes were made to implement the amendment of Minn. Stat. Ann. § 480A.08, subdivision 3, also effective on August 1, 2020. The amendment to the statute removes the former requirement that copies of unpublished opinions be provided to the other parties at least 48 hours before the use or citation of the decision.

Last year's changes regarding nonprecedential opinions were not the end of the line. Effective January 4, 2021, the Minnesota Court of Appeals amended its Special Rules of Practice, https://www.revisor.mn.gov/court_rules/rule/apspec-toh/, to address specifically the process by which the court decides which opinions will be precedential, and which will be nonprecedential.

As the introduction to the Special Rules makes clear, those rules are informational for the practitioner. 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." They are also subject to revision at any time by the court, without notice, which may explain why the order amending the rules came out without a lot of fanfare, and is hard to find. For those of you interested, it is available on the Minnesota Appellate Courts Case Management System (https://macsnc.courts.state.mn.us/ctrack/publicLogin.jsp), file number ADM10-8010.

For the most part, the court will simply apply the criteria set forth in Rule 136.01. However, the new special rule makes it clear that it is the panel hearing the argument that makes the decision on publication.

Rule 4 now states:

"RULE 4. Opinions

"Opinions state the nature of the case and the reasons for the decision. The panel will decide at its conference whether to issue a precedential opinion. The decision on the form of the written opinion is guided by Minn. R. Civ. App. P. 136.01, subd. 1(b). Opinions designated as nonprecedential, opinions previously designated as unpublished, and order opinions may be cited for persuasive value or as authorized by rule 136.01.

"If any counsel intends at an oral argument to refer to an opinion that was not previously cited in a party's brief, counsel must give written notice to the court and other counsel at least 48 hours before the oral argument. If unpublished or nonprecedential opinions are cited in a brief or other written submission, copies must be provided to any self-represented litigants, to counsel, or to the court only if specifically requested."

In our earlier articles, we discussed the new provision of Rule 128 that counsel may ask in their opening brief that any decision be designated precedential. Rule 128.02, Subd. 1(f) allows, but does not require, a formal brief to include a statement as to the type of opinion—precedential, nonprecedential, or order opinion—that the party believes the court should issue. This statement, if included, should specify the reasons justifying the form of opinion, and the rule requires that those reasons address the factors set forth in Rule 136.01, subd. 1(b). Because those factors are not the exclusive factors that might justify a particular form of opinion, other factors may be argued.

Of course, this presents a quandary for the respondent's lawyer. It's counterintuitive to argue that a decision affirming what you think is a clear victory is somehow important enough to warrant being made precedential. On the other hand, you don't want to diminish the possibility of further review by the Minnesota Supreme Court if you lose by labeling the case as a run-of-the-mill no-brainer. All in all, it's hard to make a good call on precedential/nonprecedential until you know what the court has to say.

One might think that the best time to ask for a determination of whether a decision should be deemed precedential or nonprecedential is right after the decision has been issued. But by then, the decision on the form of the opinion has already been made, and the court of appeals does not entertain requests that it change its mind. Once the court of appeals has decided an issue, even if it is not dispositive of the appeal, the court will not re-examine that decision when considering the merits of the appeal. In re Estate of Sangren, 504 N.W.2d 786, 791 (Minn. Ct. App. 1993) ("This court has already addressed this issue at special term. Thus, even if the Estate's cross-appeal has merit, it is the equivalent of a motion to reconsider which is prohibited by Minn. R. Civ. App. P. 140.01."). See also Ryan Contracting, Inc. v. JAG Invs., Inc., 609 N.W.2d 642 (Minn. Ct. App. 2000), rev'd on other grounds, 634 N.W.2d 176 (Minn. 2001) (overruled on other grounds by, Mavco, Inc. v. Eggink, 739

N.W.2d 148 (Minn. 2007)) (merits panel refused to consider issues already dismissed by court's special term panel).

The Supreme Court also takes the view that a request to publish an opinion designated to be unpublished constitutes an impermissible request for reconsideration by the court of appeals. See Sawyer v. Curt & Co., 1991 WL 160333 (Minn. 1991). There, while a petition for further review was pending, the court of appeals received an informal request to reconsider its original determination that its opinion not be published. Its subsequent order directing publication was filed after the denial of the petition for further review. This, the Supreme Court said, exceeded the jurisdiction of the court of appeals. "It is our view that the court of appeals was divested of its jurisdiction to reconsider the publication decision or any other aspect of its original decision by the filing of the petition for further review. . . . Such a result is consistent with the spirit of Minn. R. Civ. App. P. 140.01 which precludes the filing of a petition for rehearing in the court of appeals and authorizes further action, upon petition, only by the Supreme Court." The Supreme Court vacated the order directing publication.

But what about a request for a change in publication submitted to the court of appeals and ruled on before a petition for review is even filed, much less ruled on? The court of appeals itself has said that its decisions do not become final, effective, and enforceable until the period for the Supreme Court to take action has passed. Holmberg v. Holmberg, 578 N.W.2d 817, 824 (Minn. Ct. App. 1998) ("Our decision will not be final until the period for a petition for review to the Supreme Court has passed or any proceedings therein have been resolved.") It seems as though the jurisdictional issue seen by the Supreme Court in Sawyer might be avoided, but there is still the issue of the prohibition on rehearing and reconsideration.

In the past, the Minnesota Supreme Court has frequently granted review of unpublished decisions of the court of appeals, notwithstanding the fact that these decisions are nominally not precedential, when important legal issues are presented. See Minnesota Practice: Appellate Rules Annot. §117.3. There should be no difference in that practice simply because the decisions are now "nonprecedential" rather than "unpublished." But it is still easier to make a case for further review when a court of appeals' decision is binding precedent in other cases.

The persuasive value of an opinion, published or not, may well depend not so much on whether it affirms or reverses the lower court, but rather on how the appellate court decides the case, especially where the court decides the case on novel grounds or on issues not expected by the parties. It would seem to make much more sense to give the lawyers a chance once a decision has been issued to present their arguments for and against precedential status. Petitions for further review don't have to be filed until 30 days after the court of appeals issues its opinion, so there would be plenty of time for the court to hear from the lawyers on precedential or nonprecedential treatment of the decision. A seven-day window to submit arguments for and against precedential status would seem workable. Having a panel wait to make the decision regarding the precedential status of an opinion until it receives some meaningful input from counsel makes sense.

In the end, however, beauty – and precedent – may have to remain in the eye of the beholder. For now, we all need to get used to the new rule, and see if there is actually a problem that needs to be fixed.

ABOUT ERIC J. MAGNUSON