

NO. A05-1293

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State of Minnesota  
**In Supreme Court**

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Hoyt Properties, Inc. and Hoyt/Winnetka, LLC,  
*Respondents,*

v.

Production Resource Group, LLC,  
Haas Multiples Environmental Marketing and Design, Inc.,  
d/b/a Entolo-Minneapolis and Entolo, Inc.,  
*Appellants.*

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**BRIEF OF AMICUS CURIAE MINNESOTA TRIAL LAWYERS ASSOCIATION**

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## INTEREST OF MINNESOTA TRIAL LAWYERS ASSOCIATION

MTLA is a Minnesota non-profit corporation with approximately 1,200 trial lawyer members in private practice throughout Minnesota. MTLA members represent injured persons in many types of civil disputes--personal injury, employment injury, family law, business breakups and commercial disputes. Among its objectives is to promote the administration of justice for the public good, to uphold and honor the dignity of the profession of law and to uphold and defend the principles of the Constitution of the United States, including the right to trial by jury.

MTLA has no interest in the particular dispute between these business litigants<sup>1</sup>, and will not address most of the issues raised by the parties in this appeal. MTLA's interest in connection with this appeal is primarily a public one: to address the role of professionalism in the practice of law, the obligation of honesty and truthfulness on the part of lawyers engaged in litigation, including settlement of litigation, and the legal framework for remedying any breaches of those obligations.

Amicus MDLA's suggestion that MTLA's participation in this matter is because its members seek a "broadening of attacks on the finality of settlements" (Amicus MDLA Brief, p. 1) is erroneous. In fact, injured plaintiffs have an equal or greater need for security in the finality of a settlement which has been negotiated in good faith, largely because plaintiffs are frequently vulnerable individuals involved in litigation either directly or indirectly with large, financially powerful, corporate entities, including insurance companies.

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<sup>1</sup> No part of this Brief was authored by counsel for any party, and no person or party other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

## ARGUMENT

I. Counsel's role in the settlement process is integral to the dispute resolution system.

Counsel's participation in the settlement process is critical, and that means counsel for all parties or "both sides," not just defense counsel. Settlement discussions occur in a myriad of contexts, including personal injury claims, marriage dissolution actions, business disputes, employment claims and criminal cases. The duties and obligations of counsel are the same no matter what type of dispute is at issue, or which party counsel represents.

Settlements are, of course, encouraged and favored. Heinz v. Vickerman Const., 306 N.W.2d 888, 890 (Minn.1981); Weikert v. Blomster, 213 Minn. 373, 376, 6 N.W.2d 798, 799 (1942). In fact, courts strive to uphold the validity of a settlement or release. Rogalla v. Rubbelke, 261 Minn. 381, 112 N.W.2d 581 (1961). However, a settlement agreement is treated as a contract. TNT Properties, Ltd. v. Tri-Star Developers, LLC, 677 N.W.2d 94, 100 (Minn.App. 2004).

Counsel's role during settlement is subject to a certain amount of tension because the process often involves a give and take discussion concerning what mediators call the "strengths and weaknesses" of each other's case. Recognition of that inevitable tension is nothing new. The topic was explored by this Court in Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947)(concerning an attorneys role in a malicious prosecution action). This Court examined the role of an attorney not only as an agent of his client, but also as an officer of the court, supra 224 Minn. at 240, 28 N.W.2d at 791, saying:

Out of his status as an officer of the court arise duties that are public as distinguished from the purely private duties owed to his client (footnote 9 omitted). An attorney at law is an officer of the court. His public duty consists in his obligation to aid the administration of justice; his private duty, to faithfully, honestly, and conscientiously represent the interests of his client. \* \* \* **Whenever the duties to his client conflict with those he owes to the public as an officer of the court in the administration of justice, the former must yield to the latter** (emphasis added).

Today, attorneys are under an obligation to zealously represent the interests of the client (Preamble, ¶2, Minn.R.Prof.Cond.). However, a lawyer is also under concomitant obligations to refrain from making false statements to a tribunal (Rule 3.3, Minn.R.Prof.Cond.) and refrain from making a false statement of fact or law to others (Rule 4.1, Minn.R.Prof.Cond.). As the comment to Rule 4.1, Minn.R.Prof.Cond., points out, there is generally no “affirmative duty to inform an opposing party of relevant facts,” but there is an obligation to avoid “misleading statements or omissions that are the equivalent of affirmative false statements.”

The comments to Rule 4.1, Minn.R.Prof.Cond., note that this tension is apparent in negotiation proceedings, saying:

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. **Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.** (Emphasis added).

This tension has been recently explored in a thoughtful, thorough analysis of a lawyer's obligation under Rule 4.1 in the context of settlement negotiations, and

particularly during “caucused mediation.” ABA Formal Opinion 06-439 (attached as an Addendum), issued on April 12, 2006, specifically addresses a “Lawyer’s Obligation of Truthfulness when Representing a Client in Negotiation: Application to Caucused Mediation.” Appellants briefly mention this Opinion in their Brief (Appellant’s Brief, p. 33), but gloss over its true significance in the context of this case. The conclusion of the authors of the Formal Opinion was that:

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person.” Addendum at p.8.

In reviewing the history of this issue, the authors of the Formal Opinion recognized the tension between an attorney’s obligation to the client and the attorney’s obligation to refrain from making false statements, pointing out that remarks in the nature of “posturing” or “puffing” have historically been treated differently “and must be distinguished from false statements of material fact.” Id. at p.1.

In analyzing the issue of an attorney’s obligation of Truthfulness in Negotiation, the author of the opinion noted, Id. at p. 4:

Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.

The Opinion’s authors analogized to the situation of an attorney making a false statement to a judge during settlement discussions, saying, Id. at pp.4-5:

\* \* \* For example, we stated in Formal Opinion 93-370 that, although a lawyer may in some circumstances ethically decline to answer a judge’s questions concerning the limits of the lawyer’s settlement authority in a civil matter, the lawyer is not justified in lying or engaging in

misrepresentations in response to such an inquiry. We observed that:

[w]hile . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. **The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent** (emphasis added). [Footnotes omitted].

Furthermore, the authors of the Opinion pointed out that Plaintiff's counsel are subject to similar rules, saying Id. at p.5:

**\* \* \* In contrast, we stated in Formal Opinion 95-397 that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact.** Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1... (emphasis added). [Footnotes omitted].

It is important to note that the ABA Formal Opinion distinguished those false misrepresentations from statements that an attorney may make regarding negotiating goals or willingness to compromise. The opinion states, Id. at p.6:

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's

“bottom line” position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatement of the strengths or weaknesses of a client’s position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1. [Footnotes omitted].

In its conclusion, the ABA Opinion noted that there was no difference between caucused mediation and other settlement forums. Id. at p.8. The Opinion concluded that “Except for Rule 3.3, which is applicable only to statements before a ‘tribunal,’ the ethical prohibitions against lawyer misrepresentations apply equally in all environments.” Id. at p. 8.

The authors of the opinion went on to emphasize:

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client’s position, which otherwise would not be considered statements “of fact” are not conveyed in language that converts them, even inadvertently, into false factual representations. Id. at p.8.

II. Applicability to the instant matter

A. The statements in this case are either mixed questions of law and fact, or of fact, or both.

Amicus MTLA will not repeat the parties’ arguments regarding the character of the statements at issue in the present case. The spirited debate between the parties over whether counsel’s statement is solely an opinion of law (Appellant’s Brief, pp.17-28) or a statement of fact or mixed question of law and fact (Respondent’s Brief, pp.22-25, 32-34) illustrates the problem of trying to characterize the nature of the statement, as opposed to focusing on what was communicated. The debate, rather than focusing upon the label to be attached to the statement, should instead focus on whether or not

the statement communicated false factual information. Nelson v. Taff, 499 N.W.2d 685, 688 (Wis. App. 1993); Prosser, The Law of Torts, § 107 at 725. There is therefore merit to the proposition that the distinctions between a statement of law and a statement of fact, for this purpose, be abolished. That would be consistent with how Rule 4.1, Minn.R.Prof.Cond., treats an attorneys' duty of candor ("a lawyer shall not knowingly make a false statement of fact or law").

The statement in this case, despite PRG's entreaties to the contrary, has two prongs. Appellant PRG wants to lump them together as a single statement of counsel's opinion on the law. Clearly, however, the statement of PRG's counsel is more than that<sup>2</sup>. Counsel said at least two things: "There isn't anything." And then he went on to say "PRG and ENTOLO are totally separate." (App, 205). Even if the first part of the comment, "there isn't anything," is construed as a legal opinion (when really it is a mixed question of law and fact), the second part ("PRG and ENTOLO are totally separate") was gratuitously offered by Appellant's counsel to further amplify, buttress and support the conclusion. The evidence before the District Court and the Court of Appeals is that at least this portion of the representation is simply wrong. (Respondent's Brief, pp. 10-14).

It is clear that the second portion of the statement was added to reassure Hoyt that the underlying facts supported the assertion that there "isn't anything", i.e. no facts supporting, the piercing legal theory. While defense counsel was under no obligation to make that second statement (he could have remained silent), once he volunteered to

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<sup>2</sup> MTLA understands that there is a fact dispute about what was said and whether or not Hoyt justifiably relied upon such statements. Resolution of factual disputes is for the jury, not for summary judgment. *Rathburn v. W.T. Grant Co.*, 300 Minn. 223, 230, 219 N.W.2d 641, 646 (1974); *Hamilton v. Ind. Sch. Dist. No. 114*, 355 N.W.2d 182, 184 (Minn. App. 1984).

address the factual underpinnings of his conclusion, he was obliged to state the truth. L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 380 (Minn. 1989)(affirmative misrepresentation by attorney subjects counsel to fraud claim). “To tell half a truth is to conceal the other half.” Newell v. Randall, 32 Minn. 171, 173, 19 N.W. 972 (1884).

Clearly, whether counsel’s statement is taken as a whole, or as two discrete parts, it conveys information “of a factual nature,” or “implies knowledge of the facts,” concerning how PRG operates Entolo. It is that part of the communication which is significant, whichever legal standard is applied to determining its effect in this case.

B. The consequences of misrepresentation are clear in Minnesota.

The authors of ABA Formal Opinion 06-439 noted that an attorney’s false statements during a settlement negotiation have resulted in professional discipline, Id. Addendum at p.5, litigation sanctions, Id. at p.6, civil lawsuits against the lawyers, Id. at p.5, “and the setting aside of settlement agreements (footnote 16).” Id. at p.6.

The issue before this Court is not whether or not Appellants Production Resource Group et al. do or do not have a legal malpractice action against their attorney. The issue before this Court, based upon the factual setting of this appeal, is whether or not a release secured by a false misrepresentation of fact, or a mixed question of fact and law, may be set aside and an underlying lawsuit reinstated. Hence, the issue before the Court is quite narrow.

This Court has long held that a cause of action for misrepresentation exists in Minnesota. Davis v. Re-Trac Mfg. Corp., 276 Minn.116, 149 N.W.2d 37 (1967)(listing elements of misrepresentation claim). The duty is imposed by common law, and is not a matter of contract. Prosser, Law of Torts, 3d ed., Ch. 18, p. 634 (“Tort actions are

created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily on social policy, and not necessarily upon the will or intention of the parties”). Proof of reliance may be “inferred from the conduct of the plaintiff.” Davis, 276 Minn. at 118, 149 N.W.2d at 39. A contract may be set aside if induced by fraud or misrepresentation. Simonson v. BTH Properties, 410 N.W. 2d 458 (Minn.App. 1987). So may a release. Norris v. Cohen, 223 Minn. 471, 477-478, 27 N.W.2d 277, 281 (Minn. 1947) (wrongful concealment of facts is sufficient grounds to set aside a release).

The misrepresentation may be communicated by an agent for a party. Davis, 276 Minn. at 117, 149 N.W.2d at 39 (“defendant, acting through its agents”). An attorney is an agent of a client. Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780, 791 (Minn. 1947). An attorney “who makes affirmative misrepresentations to an adversary . . . may be liable for fraud.” L & H Airco, supra 446 N.W.2d at 380. There is no reason to apply a different standard where the relief sought is rescission of a settlement agreement based upon an affirmative misrepresentation by an attorney agent. In fact, in an analogous situation, a settlement agreement has been vacated. This Court in Spaulding v. Zimmerman, 263 Minn. 346, 116 N.W.2d 704 (Minn. 1962), vacated an order approving settlement on behalf of a minor when it was subsequently discovered that defense counsel were aware that the minor was suffering from an aortic aneurism which may have resulted from the motor vehicle collision at the time the settlement was entered into and presented to the Court for approval, but did not disclose that fact to the Court. This Court upheld the vacating of the settlement in 1962, even though the Rules of Professional Responsibility in effect at the time apparently

provided no ethical requirement that defense counsel inform the plaintiff or his counsel of that factual situation. Id., 116 N.W.2d at 710.

In contrast, we now have both Rules 3.3 and 4.1, Minn.R.Prof.Cond. Minnesota also has well developed law holding that factual misrepresentations are actionable and may be the basis of setting aside a settlement or release agreement. Norris v. Cohen, supra; L & H Airco, Inc. v. Rapistan Corp., supra; Danelski v. King, 314 N.W.2d 818 (Minn. 1971)(concealment or misrepresentation of fact sufficient grounds to set aside release).

As highlighted in ABA Formal Opinion 06-439, an attorney may not lie or misrepresent about a factual matter either to the court or to other persons merely because the attorney is an advocate for a party. Id. Addendum at p.4. Rather, “the proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.” Id. at p.5. Similarly, the proper response when asked a question involving a factual matter at issue in a case during settlement discussions is not to lie or misrepresent, but to decline to answer if the attorney does not wish to acknowledge the correct fact.

Sometimes, as noted in Spaulding, supra 116 N.W.2d 704, an attorney is under an affirmative duty to disclose, such as when the Court is asked to approve a settlement on behalf of a minor. Similarly, as illustrated in ABA Formal Opinion 06-439, a Plaintiff’s attorney representing a client who has died is under an affirmative duty to “promptly notify opposing counsel and the court of that fact.” Addendum at p.5.

In the instant case, PRG’s counsel was not under an affirmative duty to respond to Hoyt’s inquiry regarding the “piercing the corporate veil” claim. However, once the

attorney chose to respond, he was under a duty imposed by operation of Minnesota law to refrain from lying or misrepresenting facts. L & H Airco, supra 446 N.W.2d at 380; Simonson v. BTH Properties, supra 410 N.W.2d at 460-461. One who speaks must say enough to prevent his words from being misleading. Newell v. Randall, supra 32 Minn. at 171, 19 N.W. at 972. While the legal issue of what does and does not constitute “piercing the corporate veil” may be a complex question of law, there is nothing complex about whether or not underlying factual information exists concerning whether or not a corporation did or did not follow corporate formalities. For example, either there are corporate minutes or there aren’t. Either there is a separation in checking accounts, savings accounts, accounts receivable, accounts payable, business operations, or there isn’t. Saying they “are totally separate” at least implies there were such facts, when the evidence is to the contrary. (See, Respondent’s Brief, pp. 10-14).

III. Public policy supports truthful factual statements during settlement discussions to minimize ongoing litigation and ensure the finality of settlements.

As a matter of public policy, lawyers should be required to either decline to answer inquiries about facts, or tell the truth when responding to such inquiries. Such a requirement not only increases the professionalism of the practice, but also assists in showing to the public that there is integrity in the legal dispute resolution process.

Five years ago (on January 11, 2001), this Court adopted Professionalism Aspirations recommended by the Minnesota State Bar Association. The Aspirations were adopted, in part, to address issues of lawyer civility and the public’s perception of the functioning of our legal system. Those Aspirations provide, in part, that “A lawyer owes personal dignity, integrity, and independence to the administration of justice.”

Professionalism Aspirations, Standard I. With respect to candor, the Commentary to Professionalism Aspiration I states:

**B. Honesty.** We will conduct our affairs with candor and honesty. Our word is our bond. (Emphasis in original).

With respect to the dual roles of attorneys, Professionalism Aspirations Standard II says:

“. . . In fulfilling our duties to each client, we will be mindful of our obligation to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.”

Those duties of candor and truthfulness extend to the “pursuit of the resolution of legal issues.” Commentary to Professionalism Aspirations III. Above all, as the Preamble to the Professionalism Aspirations states:

We, the judges and lawyers of Minnesota, have a special responsibility for the quality of justice. **We have taken an oath to conduct ourselves in an upright and courteous manner with fidelity to the court and the client, promising no falsehood or deceit** (emphasis added). \* \* \*

The following standards reflect our commitment to professionalism. \* \* \* They are designed to raise public confidence in the legal profession and the justice system through the promotion and protection of professionalism and civility.

Permitting lawyers to misrepresent underlying facts during settlement discussions, and then binding another party to that settlement agreement based upon a misrepresented fact, undermines the public’s perception of the fairness and integrity of the legal system. How can the public have confidence in a system that enforces tainted settlements?

Upholding honesty and candor in settlement negotiations will not hinder the finality of settlements. Rather, it will do the opposite. Settlements based upon honest disclosure of information will not result in more efforts to set them aside, rather no effort will ever be filed. No amount of “buyer’s remorse” can undercut and set aside a settlement that is based upon truthful statements and truthful disclosure of information. Contrary to MDLA’s assertion, skepticism and suspicion are more likely to arise if lawyers are permitted to misrepresent factual matters during settlement discussions in order to obtain enforceable settlements for which there is subsequently clear evidence that an untruth was communicated. It is truth which encourages settlements, not untruths. It is truth that encourages respect for the legal system; not actions based on untruths.

MDLA’s suggestion that a party should only rely on formal discovery during discussions about settling a litigated matter is also contrary to the goals of encouraging settlements, mitigating litigation expenses, reducing delay in payments and reducing the burden placed upon the court system. See, Schmidt v. Clothier, 338 N.W.2d 256, 260 (Minn. 1983); Professionalism Aspirations, Standard I (encouraging resolution of human and societal problems in an efficient manner). Requiring that formal discovery finish in every litigated matter before serious settlement negotiations may be undertaken only increases expenses, delays future payments and imposes an additional burden on the court system to address discovery issues before settlement discussions occur. In fact, settlement discussions occur at all stages of litigation, including before suit is started. The disclosure of information can be as simple as the liability limits available to the defendant, or the medical condition of the plaintiff. Or, like this case, it can be an

informal exchange of information about underlying factual matters pertinent to drawing a legal conclusion (i.e. should a settlement of a part of a claim also involve the release of another party). It would also tie the hands of mediators, because the mediator would not know whether or not he or she could rely upon the factual representations of counsel, hence the mediator's effort to assist settlement would be stymied.

Public policy strongly supports attorneys being candid to the tribunal (Rule 3.1) and candid to others (Rule 4.2), to preserve the integrity of the dispute resolution system and the professionalism of the bar and to produce well-grounded settlement agreements that are not subject to subsequent litigation.

#### IV. The Test for Reliance Should Be No Different Because One Party is an Attorney

Appellant PRG argues, essentially, that the Court should hold, as a matter of law, that Hoyt could not have relied upon adverse counsel's factual misrepresentations because Hoyt is an attorney. This Court should reject that as a standard, and permit the reliance issue to go to the jury.

Reliance may be "inferred from the conduct of the plaintiff." Davis v. Re-Trac Mfg. Co., 149 N.W.2d at 39. Here, Hoyt agreed to insert a release of PRG into the settlement in reliance on counsel's representation. He subsequently signed a written settlement agreement and release document with that release language in it. He made no independent investigation of counsel's factual assertion that the two companies "are completely separate." As this Court said in Davis v. Re-Trac, supra 149 N.W.2d at 39:

**But where, as here, a party to whom a representation has been made has not made an investigation adequate to disclose the falsity of the representation, the party whose misstatements have induced the act cannot escape liability by claiming that the other party ought not to**

**have trusted him.** Greear v. Paust, 192 Minn. 287, 256 N.W. 190, and cases cited. (Emphasis added).

In the instant case, on summary judgment, there is sufficient evidence upon which to conclude that Hoyt relied upon counsel's misrepresentation when agreeing to include a release of PRG in the settlement agreement. Whether or not that reliance was justified, considering all the facts and circumstances of this transaction, is for the jury.

### **CONCLUSION**

The Court of Appeals' decision should be affirmed because the law should encourage attorneys to be truthful and honest in their communications with each other, including opposing parties and the court. As noted in paragraph 12 of the Preamble to the Minnesota Rules of Professional Conduct:

The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.

The Court of Appeals opinion establishes no new law in Minnesota, but reaffirms and applies existing law that attorney's misrepresentations of fact may be the basis, if proven, for rescission of a settlement agreement. Settlements are encouraged by the honest and truthful disclosure of information, not by game playing. The integrity of the civil justice system, and the public perception of that system, is dependant upon an honest exchange of information. If the public doesn't trust the system, settlement agreements will not be as easily obtained, nor will the public refrain from challenging them. Settlements are encouraged, not discouraged, by a truthful exchange of factual information. MTLA respectfully requests that this Court affirm the Court of Appeals.

Dated: October 27, 2006.

Respectfully submitted,

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ASSOCIATION

**CERTIFICATE OF COMPLIANCE**

Pursuant to Minnesota Rule of Civil Appellate Procedure 132.01 subd. 3, the undersigned hereby certifies, as counsel for *Amicus Curiae* Minnesota Trial Lawyers Association, that this brief complies with the type-volume limitation as there are 4,411 words of proportional space type in this brief. This brief was prepared using Microsoft Word 2002.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).