

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Kenneth Brown and Robert Banks,  
individually and on behalf of the  
State of Minnesota,

*Respondents,*

vs.

Cannon Falls Township, a political  
subdivision of the State of Minnesota;  
Gary Hovel, an individual;  
Lawrence D. Johnson, an individual; and  
Keith Mahoney, an individual,

*Appellants.*

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**BRIEF OF AMICUS CURIAE**  
**MINNESOTA ASSOCIATION OF TOWNSHIPS**

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## **INTEREST OF AMICUS CURIAE**

### **MINNESOTA ASSOCIATION OF TOWNSHIPS**

The Minnesota Association of Townships (MAT) is a nonprofit organization representing 1,787 Minnesota townships and more than 9,000 township officers. MAT provides research, training, legislative representation, and a variety of other services for these members.<sup>1</sup>

MAT's activities are recognized throughout Minnesota law. See, e.g., Minn. Stat. § 6.78 (2004) (authorizing MAT involvement in State of Minnesota Office of the State Auditor best practices reviews); Minn. Stat. § 103F.761, subd. 1 (2004) (authorizing MAT participation on Minnesota Pollution Control Agency rulemaking and funding group); Minn. Stat. § 174.52, subd. 4(a) (2005) (authorizing MAT participation on Minnesota Department of Transportation funding group); Minn. Stat. § 274.014, subd. 2 (2005) (authorizing board of equalization training in conjunction with MAT meetings); Minn. Stat. § 299N.02, subd. 1 (2005) (authorizing MAT participation in membership selection for Minnesota Board of Firefighter Training and Education); Minn. Stat. § 353.01, subd. 2d(b)(1) (2005) (permitting MAT employees to participate in the Minnesota Public Employees Retirement Association); Minn. Stat. §

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<sup>1</sup> MAT created the Minnesota Association of Townships Insurance and Bond Trust, which operates the group self-insurance program providing coverage to Cannon Falls Township in this case.

366.01, subd. 3 (2004) (authorizing individual town membership in MAT); Minn. Stat. § 471.982, subd. 3 (2004) (exempting MAT's self-insurance pool from certain reporting requirements).

This wide-ranging involvement with and on behalf of Minnesota towns permits MAT to offer a broad perspective on the impact that the present case will have on local government throughout the state.

### **STATEMENT OF THE ISSUES, CASE, AND FACTS**

MAT concurs with Appellants' statement of the issues, case, and facts.

### **ARGUMENT**

#### **I. INTRODUCTION**

Appellants have raised a number of legal issues in their brief. MAT supports those arguments and believes that Appellants have made a convincing case for each of them. Of those, however, the issue dealing with reliance on advice of counsel is of particular concern to MAT and will therefore be the focus of this brief.

#### **II. RELIANCE ON COUNSEL NEGATES A FINDING OF INTENT TO VIOLATE THE OPEN MEETING LAW**

A public official cannot be removed from office for violating the Minnesota Open Meeting Law without an intent to commit the violation. Minn. Stat. § 13D.06, subd. 4(d) (2004); see generally Minn. Stat. Ch. 13D (codifying

the statutes referred to herein as the “Open Meeting Law”). This reflects the appropriate deference required by our system of separation of powers. Cf. White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 175 (Minn. 1982) (in zoning matters, “court's authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked.”) Indeed, our state constitution recognizes the narrow circumstances in which elected officials may be removed from office before their terms have run, limiting this to situations in which they have committed “malfeasance or nonfeasance in the performance of their duties.” Minn. Const. Art. 8, § 5. The statutory requirement of intent in the Open Meeting Law displays the legislature’s codification of these common law and constitutional principles for application in situations such as the case at hand.

Given that intent is a necessary prerequisite to justify an attorney fees award or removal from office under the Open Meeting Law, it is necessary to examine the impact of Appellants’ reliance on the advice of counsel. For decades, courts have realized that reliance on advice of counsel can negate a finding of intent to violate a statute. Closest to home, the Minnesota Supreme Court has held that a criminal defendant’s reliance on his attorney’s advice may be sufficient to show that he lacked the requisite intent to commit a crime. State v. Jacobson, 697 N.W.2d 610, 615-16 (Minn. 2005). Appellate courts

elsewhere have reached the same conclusion in a whole host of areas in which intent is a predicate of liability. See, e.g., SEC v. Steadman, 967 F.2d 636, 642-43 (D. C. Cir. 1992) (reliance on advice of counsel prevents finding of intent in securities fraud case); Allen v. U.S. Fid. & Guar. Co., 109 N.E. 1035, 1038 (Ill. 1915) (county treasurer's reliance on attorney's advice negated finding of intent to embezzle funds); Uebelacker v. Cincom Sys., Inc., 549 N.E.2d 1210, 1223 (Ohio Ct. App. 1988) (reliance on attorney's advice is complete defense to malicious prosecution claim).

Like many of the situations in which an advice of counsel defense has been successfully raised, Open Meeting Law issues arise from a complicated statute that is often difficult to interpret and apply. The Open Meeting Law has been the subject of repeated court decisions and attorney general opinions. See generally Minn. Stat. Ch. 13D (West 2005). It is, in fact, so complex that in 2003 (subsequent to the events at issue in this litigation) the Minnesota Department of Administration was given express authority by the legislature to provide written guidance on its application. 2003 Minn. Laws 1st Sp. Sess., Ch. 8, Art. 2, §§ 1, 2 (codified at Minn Stat. § 13.072 (2004)).

Against this backdrop must be measured the reality of local government in Minnesota. There are exceedingly few full-time elected local government officials in Minnesota. Townships in particular are typically resource-poor,

grassroots entities. According to the most recent report from the Minnesota State Auditor, the 1,790 towns in Minnesota had combined total expenditures in 2004 of approximately \$234 million, most of which went to fire protection and road and bridge maintenance and repair. Minn. State Auditor, Minnesota Township Finances, 2004 Revenues, Expenditures, and Debt, 1, 5, 7 (2005). That is less than one-half of that year's total expenditures for the city of Minneapolis *alone*. Minn. State Auditor, Minnesota City Finances, 2004 Revenues, Expenditures, and Debt, "The State Auditor's Big Book of Cities", Table 15, page 70 (2005). Town officers are public servants in the classic sense of the word. In addition to making policy, managing their communities, and dealing with the myriad complaints and problems that face every elected official, they often personally plow snow and grade roads, and all of this for remuneration that may reach \$12 per hour or \$50 per monthly meeting. See, e.g., <http://www.livoniatownship.org/March.html> (viewed January 25, 2006); <http://eurekatownship-mn.us/board.html> (viewed January 25, 2006).

Moreover, there is no expectation, and certainly no requirement, that a member of a town, city, county, or school board have specialized prior training in order to run for office. Local officials include farmers and truckers and bankers, all of whom can and do come equipped with their own education and experiences. Those skills are ideal for developing policy and making informed

decisions about the issues that they confront every day: how often to gravel a road, the level of assessments to charge for a sewer project, whether to adopt a subdivision ordinance. Those skills are not, however, a replacement for the training necessary to write and interpret complicated laws. For that, they must turn to a lawyer.

Again, the legislature recognizes this. Like other local governments, town boards have unquestioned authority to hire an attorney. Minn. Stat. § 366.01, subd. 7 (2004) (town board “may employ an attorney for town business including the prosecution or defense of actions at law or other proceedings in which the town may be interested.”) In short, when a town board needs legal advice, it does what most organizations do. It hires a lawyer.

Unfortunately, when Cannon Falls Township retained an attorney to assist it, acting both sensibly and in accordance with Minnesota law, its decision resulted in disaster for the town supervisors. As the result of the district court’s conclusion that the town attorney had a “common sense conflict of interest” and was therefore giving “tainted” opinions, the supervisors found themselves publicly humiliated and thrown out of office for the sin of following their attorney’s advice. See App. to Appellants’ Br. p. A-99. Appellants’ brief thoroughly documents why there is no factual basis to believe that the Cannon Falls Township attorney actually had a conflict and that argument need not be

repeated here. At a broader level, though, the district court's decision poses a grave threat to the ability of local governments to rely on their lawyers.

As any elected official knows, there are an enormous number of statutes that govern virtually every facet of public life. Failure to take an oath of office in a timely fashion can result in a forfeiture of office. Minn. Stat. § 351.02 (2004). Violation of statutory contracting procedures may be a gross misdemeanor. Minn. Stat. § 471.87 (2004). Noncompliance with orders of the State Auditor's Office can lead to "a fine of \$3,000, or imprisonment in the Minnesota Correctional Facility-Stillwater for one year." Minn. Stat. § 6.53 (2004). Willfully withholding from the public information about a dispute involving a local government is a misdemeanor, unless the local government's attorney determines that the dispute is a "pending civil legal action," in which case disclosing the information is a misdemeanor. Minn. Stat. §§ 13.09, 13.39 (2004). The list could go on for pages. The point is that in many situations there is simply no way for the average local official to be certain what he or she must do, may do, or cannot do without asking a lawyer.

Once that official has taken the step of consulting an attorney, he or she expects to be able to rely on that advice, as is appropriate, absent overwhelming evidence that there is no justification for that reliance. That expectation is firmly grounded in the Minnesota Rules of Professional Conduct.

First and foremost, a client can expect competent representation. Minn. R. Prof. Conduct 1.1. A client can expect loyalty. Minn. R. Prof. Conduct 1.7, comment 1. A client can expect disclosure of potential conflicts and that appropriate steps will be taken to avoid them. Minn. R. Prof. Conduct 1.7. A client can expect a lawyer to “exercise independent professional judgment and render candid advice.” Minn. R. Prof. Conduct 2.1. Beyond that, a governmental entity can expect an even higher level of diligence and consultation in areas where a potentially wrongful official act may occur. Minn. R. Prof. Conduct 1.13, comment 8. The thing a client does not reasonably expect is banishment from public service.

Indeed, the district court’s decision turns the Rules of Professional Conduct on their head. Clients have never had the burden of ensuring that their lawyers meet their obligations as attorneys. In fact, the Minnesota Rules of Professional Conduct preamble is specifically entitled “A Lawyer’s Responsibilities.” Minn. R. Prof. Conduct, Preamble. Similarly, the Rules nowhere purport to make clients responsible for evaluating and avoiding conflicts, as exemplified by Minn. R. Prof. Conduct 1.7, comment 2 which states, in part:

Resolution of a conflict of interest problem under this rule requires the *lawyer* to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the

representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

(Emphasis added). See also Minn. R. Prof. Conduct, Scope (“Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.”)

The district court’s decision in this case, however, has the effect of making clients responsible for second-guessing the quality of the legal advice they receive and for independently evaluating their attorneys’ conflict checking procedures. Fundamentally, the decision makes clients responsible for enforcing the very rules that are designed to protect them and exposes them to liability if they fail to do so. This is a mirror image of the purpose of the rules, violations of which lead to sanctions designed “not to punish the attorney, but rather ‘to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys.” In re Vaught, 693 N.W.2d 886, 890 (Minn. 2005) ((citing In re Oberhauser, 679 N.W.2d 153, 159 (Minn. 2004) (citing In re Daffer, 344 N.W.2d 382, 385 (Minn. 1984)). The district court decision leads to a result both counterintuitive and counter to many years of precedent.

Finally, the district court's decision goes beyond its authority. "[T]he important responsibility for the regulation and discipline of attorneys is exclusive to" the Minnesota Supreme Court and "only [that] court has authority to adopt rules of professional conduct." In re Panel File No. 99-42, 621 N.W.2d 240, 244 (Minn. 2001). The decision on appeal here creates a de facto set of poorly-defined, subjective common law rules that supplant the universal and carefully considered Rules adopted by the Supreme Court. In addition, that decision leads to the ironic conclusion that when a lawyer's compliance with the Minnesota Rules of Professional Conduct is insufficient to avoid a conflict, it is the client who pays the price. This inappropriate result ill-serves lawyers, their clients, and all constituents of Minnesota local governments.

## CONCLUSION

If left standing, the district court decision in this case would drastically alter the attorney-client relationship for local governments. It would force those officials who most rely on their attorneys to be the most skeptical of the advice they receive. It would hold clients liable for the purported wrongdoings of their lawyers. It would transcend settled notions of what rules govern the attorney professional conduct and substitute amorphous concepts of “common sense” and situational ethics. Ultimately, it would place an intolerable burden on many of the very people who are working the hardest to preserve our system of local government. For the reasons set forth in this brief, the Minnesota Association of Townships respectfully requests that this Court reverse the district court’s decision.

Respectfully submitted,

MINNESOTA ASSOCIATION  
OF TOWNSHIPS

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