MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 4 | Issue 1 Article 10

1978

Government—Open Meeting Law and the Attorney-Client Privilege—Minneapolis Star & Tribune Co. v. HRA, ____ Minn. ____, 251 N.W.2d 620 (1976)

Government—OPEN MEETING LAW AND THE ATTORNEY-CLIENT PRIVILEGE—*Minneapolis Star & Tribune, Co. v. HRA*, ___ Minn. ___, 251 N.W.2d 620 (1976).

In *Minneapolis Star & Tribune Co. v. HRA*,[1] the Minnesota Supreme Court held that the attorney-client privilege[2] was a valid exception to the Minnesota Open Meeting Law.[3] As a result of the decision, a public agency[4] would not be in violation of the Law when it meets in secret session with its attorney to discuss pending or prospective litigation.[5]

The court here developed the reasoning first expressed in dicta in *Channel 10, Inc. v. Independent School District No. 709*,[6] where the court analyzed the need for several possible exceptions to the Open Meeting Law, including one based on the attorney-client privilege. The *Channel 10* court suggested two possible bases for the privileged exception: the judicial power of the court to regulate the practice of law[7] and the principles of statutory construction.[8] The issue, however, was not resolved in *Channel 10* because it had not been litigated in the lower court and because the supreme court preferred to await "a case with a more detailed factual setting than is presented by this record."[9]

In *Minneapolis Star & Tribune*, the court was presented with such a case. A reporter for the *Minneapolis Star* newspaper was denied admission[10] to a meeting between the Minneapolis Housing and Redevelop-

1. ___ Minn. ___, 251 N.W.2d 620 (1976). The full text of the opinion also appears at 246 N.W.2d 448. However, because the opinion reported at 251 N.W.2d 620 also contains the order denying the petition for rehearing, it more completely reports the decision of the court. For this reason, this comment will refer to the text of the opinion as published in 251 N.W.2d 620.

2. *See* MINN. STAT. § 595.02(2) (1976) (attorney incompetent to testify about any professional communications made to client without client's consent). *See also id.* § 481.06(5) (attorney's duties include duty to "[k]eep inviolate the confidences of his client").

3. *Id.* § 471.705.

4. The Open Meeting Law applies to

> any state agency, board, commission or department when required or permitted by law to transact public business in a meeting, and the governing body of any school district however organized, unorganized territory, county, city, town, or other public body, and of any committee, subcommittee, board, department or commission thereof . . . .

Id. § 471.705(1). However, the Law does not apply to state agencies, boards, or commissions when exercising quasi-judicial powers in disciplinary proceedings. *Id.*

5. *See* ___ Minn. at ___, 251 N.W.2d at 626. For a discussion of the limitations of the court's holding, see notes 54-58 *infra* and accompanying text.

6. 298 Minn. 306, 215 N.W.2d 814 (1974).

7. *Id.* at 321-22, 215 N.W.2d at 825.

8. *Id.* at 322-23, 215 N.W.2d at 826.

9. *Id.* at 323, 215 N.W.2d at 826.

10. A violation of the Minnesota Open Meeting Law requires an express denial of entry; if the public is aware of the meeting, it is no violation if the agency does not actively solicit attendance. *See* Lindahl v. Independent School Dist. No. 306, 270 Minn. 164, 167-68, 133 N.W.2d 23, 26 (1965); *In re* Minneapolis Area Dev. Corp., 269 Minn. 157, 170, 131 N.W.2d

ment Authority and its attorney. The purpose of the meeting was to discuss strategy in litigation then pending in federal district court.[11] The newspaper commenced an action for injunctive and declaratory relief,[12] and also sought the imposition of civil penalties.[13] The trial court denied the relief and granted the HRA summary judgment on the grounds that the attorney-client privilege afforded an exception to the Open Meeting Law.

The supreme court affirmed. The statute authorizing the attorney-client privilege, the court held, was not impliedly repealed by the enactment of the Open Meeting Law,[14] which reads in part: "[e]xcept as otherwise expressly provided by statute, all meetings . . . shall be open to the public."[15] The legislature has indicated that it does not intend to repeal statutes by implication when a newer statute may be found to be compatible with a prior one.[16] The court also found a general legislative intent to extend the statutory attorney-client privilege to public agencies as well as to private clients.[17] The court, therefore, sought to strike a balance between conflicting public interests in preserving the adversary system of legal representation when the litigant is a public agency, and preserving the public's right to be informed about the deliberations or actions of public agencies.[18]

29, 39 (1964). *See also* Sullivan v. Credit River Township, 299 Minn. 170, 174-75, 217 N.W.2d 502, 505-06 (1974) (requirement of adequate notice is implicit in the statute because "[t]he mere fact that the meeting-room door is unlocked is not sufficient compliance with the directive of the statute").

11. The HRA had conducted a similar closed meeting prior to the one from which the reporter was excluded. ___ Minn. at ___, 251 N.W.2d at 621.

12. Prior to 1973, the Minnesota Open Meeting Law contained no sanctions for its violation. This prompted the court in Sullivan v. Credit River Township, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (1974) (citation omitted) to say "a statute which does not declare the consequences of a failure to comply may be construed as a directory statute . . . rather than mandatory. Violation of a directory statute does not result in the invalidity of the action taken." *But see* Channel 10, Inc. v. Independent School Dist. No. 709, 298 Minn. 306, 317, 215 N.W.2d 814, 823 (1974) (injunctive relief available because absent enforcement, the statute would be "a mere statement of policy"). The legislature added sanctions in 1973. *See* Act of May 24, 1973, ch. 680, § 1, 1973 Minn. Laws 1834 (codified as MINN. STAT. § 471.705(2)). With the addition of these sanctions, it may be argued that injunctive relief has been offset by a more appropriate remedy at law. *See* Channel 10, Inc. v. Independent School Dist. No. 709, 298 Minn. at 314 & n.4, 315-18, 215 N.W.2d at 821 & n.4, 822-23.

13. *See* MINN. STAT. § 471.705(2) (1976) (providing for up to a $100 civil penalty for each violation; if the same person violates the statute three times while employed with one agency, he "shall forfeit any further right to serve on such governing body . . . for a period of time equal to the term of office [he] was then serving").

14. ___ Minn. at ___, 251 N.W.2d at 625.

15. MINN. STAT. § 471.705(1) (1976).

16. *See id.* § 645.39 ("[A] later law shall not be construed to repeal an earlier law unless the two laws are irreconcilable.").

17. ___ Minn. at ___, 251 N.W.2d at 623.

18. *Id.*

The public's right to be informed about the deliberations of public agencies is of relatively recent origin in Minnesota.[19] The court has noted that the right is "precious" and the Open Meeting Law should be liberally construed to effect its end: "Unfortunately, our history is replete with instances of misdirected governmental actions when the people have not had an opportunity to voice their views in matters of great public concern."[20]

The rule of confidentiality of communication between the attorney and client is a well-established principle of the adversary system of legal representation. The Minnesota court has stated this rule is not based on any particular desire to protect the legal profession, but rather is founded on considerations of public policy.[21] If an attorney is to represent his client meaningfully, it is absolutely essential that he be informed of all the facts and circumstances of the case. Fear of disclosure would seriously inhibit communication between the attorney and the client, thereby adversely affecting the administration of justice.[22] The fact that the client is a public agency should not affect its right to be protected by this rule. Recognizing that confidentiality between an attorney and his client is a basic tenet of the adversary system, the *Minneapolis Star & Tribune* court sought to prevent the impairment of litigation in a situation where, if the privilege was not available to public agencies, the opposing party would be permitted to attend discussions between the agency and its attorney concerning strategy in pending litigation.[23] For example, if the agency and its attorney met in public to discuss a proposed settlement offer, the opposing party would be able to attend and discover what strategy was going to be used against him. The agency, of course, would have no right to attend meetings between the opposing party and its counsel. The lawsuit, therefore, would be weighted against the agency, and, because they may be the ultimate recipients of the fruits of it, or the bearer of its costs, against the public.

By finding the two statutes compatible through the balancing of these public interests, the court avoided resting its decision upon constitu-

19. The Open Meeting Law was enacted in 1957. *See* Act of Apr. 27, 1957, ch. 773, § 1, 1957 Minn. Laws 1043 (codified as MINN. STAT. § 471.705). The Minnesota Constitution does require that sessions of either house of the state legislature be open except when the members determine that the session requires secrecy. MINN. CONST. art. IV, § 14.

20. Sullivan v. Credit River Township, 299 Minn. 170, 176, 217 N.W.2d 502, 506-07 (1974).

21. *See* Channel 10, Inc. v. Independent School Dist. No. 709, 298 Minn. 306, 321-22, 215 N.W.2d 814, 825 (1974). *See also* Struckmeyer v. Lamb, 75 Minn. 366, 77 N.W. 987 (1899).

22. *See* Channel 10, Inc. v. Independent School Dist. No. 709, 298 Minn. 306, 321-22, 215 N.W.2d 814, 825 (1974); Struckmeyer v. Lamb, 75 Minn. 366, 368, 77 N.W. 987, 988 (1899) (privilege is "absolute necessity").

23. ___ Minn. at ___, 251 N.W.2d at 625.

tional grounds.[24] Under the Minnesota Constitution, the court is vested with the exclusive power to administer the practice of law.[25] The legislature has recognized this power,[26] but is precluded from interfering with it because of the constitutional separation of powers.[27] If the Open Meeting Law had been an attempt by the legislature to limit the application of the attorney-client privilege, the court might have struck it down as an unconstitutional invasion of the judicial power. The court, however, did not view the issue as one of a threatened usurpation of the judicial power by the legislature.[28] The question, rather, was how this power of the court to administer the practice of law was to be applied so as to balance conflicting public interests.[29] The imperative issue before the court was to "determine the proper place and scope of the attorney-client privilege within the system."[30]

By recognizing an attorney-client exception to the Open Meeting Law, the Minnesota Supreme Court has joined the majority of jurisdictions which have considered the problem. In twenty-three states the legislatures have written the exception into the statute.[31] In three

24. It has been suggested, however, that the effect of the decision was to create a unique judicial exception to the Open Meeting Law. *See* Holmes & Graven, *Of Open Meeting Laws, Attorney-Client Privileges and the Government Lawyer,* 33 BENCH & B. MINN. 25, 27 (Feb. 1977).

25. *See In re* Integration of Bar, 216 Minn. 195, 198-200, 12 N.W.2d 515, 517-18 (1943) (power to regulate legal profession is inherently a judicial power); MINN. CONST. art. VI, § 1 (judicial power); *id.* art. III, § 1 (separation of powers). *See also* Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973) (holding that a statute which transferred monies deposited in the supreme court for the regulation of the legal profession into the state's general fund was unconstitutional as an invasion of the separation of powers).

26. *See* MINN. STAT. § 480.05 (1976).

27. *See* Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973); MINN. CONST. art. III, § 1.

28. *See* ___ Minn. at ___, 251 N.W.2d at 623-24.

29. *See id.*

30. *Id.* at ___, 251 N.W.2d at 624.

31. *See* ARIZ. REV. STAT. § 38-431.03(A) (1974); CONN. GEN. STAT. ANN. §§ 1-18a, 1-21 (West Supp. 1977), *as amended by* Act of July 1, 1977, Pub. Act 77-609, 1977 Conn. Legis. Serv. 1308 (West); DEL. CODE tit. 29, § 10004(b)(4) (Supp. 1976); GA. CODE ANN. § 40-3303 (1975); HAWAII REV. STAT. § 92-5(3) (Supp. 1975); ILL. ANN. STAT. ch. 102, § 42 (Smith-Hurd Supp. 1977); LA. REV. STAT. § 42:6.1(A)(2) (West Supp. 1977); ME. REV. STAT. ANN. tit. 1, § 405(6)(E) (Supp. 1977); MASS. GEN. LAWS ANN. ch. 30A, § 11B (West Supp. 1977); *id.* ch. 34, § 9G; *id.* ch. 39, § 23B; MO. ANN. STAT. § 610.025(2) (Vernon Supp. 1976); NEB. REV. STAT. § 84-1410(1)(a) (1976); N.J. STAT. ANN. § 10:4-12(b)(7) (West 1976); N.Y. PUB. OFF. LAW § 95(1)(d) (McKinney Supp. 1976); N.C. GEN. STAT. § 143.318.3(a)(5) (1974); OHIO REV. CODE ANN. § 121.22(G)(3) (Page Supp. 1976); ORE. REV. STAT. § 192.660(2)(d) (1975); S.C. CODE § 1-20.3(b)(2) (Supp. 1975); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(e) (Vernon Supp. 1976); UTAH CODE ANN. § 52-4-5(1)(b) (Supp. 1977); VT. STAT. ANN. tit. 1, § 313(a)(1) (Supp. 1977); VA. CODE § 2.1-344(a)(6) (Michie Supp. 1977); WIS. STAT. ANN. § 19.85(1)(g) (West Supp. 1977); WYO. STAT. § 9-692.14(a)(iii) (Supp. 1975).

states,[32] courts have been asked to rule on the issue and two of them have found the exception valid.[33] In another, the exception was denied.[34]

The *Minneapolis Star & Tribune* court rejected[35] the reasoning of the Arkansas court in *Laman v. McCord.*[36] The Arkansas Freedom of Information Act lists within it specific exceptions,[37] not including an exception for attorney-client meetings. The *Laman* court found that the word "specifically" in the phrase "[e]xcept as otherwise specifically provided"[38] preceding the statute referred only to the enumerated exceptions. The court narrowly construed the Arkansas attorney-client privilege statute[39] to involve only a mere incompetence on the part of the attorney to testify about his client's communications.[40] The court held that the legislative mandate was absolute, and in the words of a concurring justice, "[i]t is not our function to look into the wisdom of this action or the advisability of the public purpose sought to be accomplished."[41] Thus the court rejected the privilege exception.

In Florida, under an open meeting law which precludes any exceptions unless provided for in the state constitution,[42] a lower court has found that the attorney-client privilege affords an exception.[43] The court based its decision on the constitutional grant to the Florida Supreme Court of the exclusive power to discipline attorneys.[44] The Florida Code of Professional Responsibility, promulgated by the Florida court, requires attorneys to keep inviolate the confidences of their clients. Since this requirement was set pursuant to the court's constitutional power, the Florida Legislature may not interfere.[45] If an attorney determines that he is under an ethical duty to advise or consult privately with an

32. *See* Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968); Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968); Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. App. 1969).

33. *See* Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968); Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. App. 1969).

34. *See* Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968).

35. ___ Minn. at ___, 251 N.W.2d at 625.

36. 245 Ark. 401, 432 S.W.2d 753 (1968).

37. *See* ARK. STAT. ANN. § 12-2805 (1968).

38. *Id.*

39. *Id.* § 28-601 (Supp. 1975).

40. 245 Ark. at 405, 432 S.W.2d at 756.

41. *Id.* at 407, 432 S.W.2d at 757 (Fogleman, J., concurring).

42. FLA. STAT. ANN. § 286.011(1) (West 1975).

43. Times Publishing Co. v. Williams, 222 So. 2d 470, 475-77 (Fla. App. 1969).

44. *Id.* at 475. The court divided the privilege into one for the client and one for the attorney. The public body client has no privilege to claim; the open meeting law acted as a public waiver of the privilege. But because the legislature may not interfere with an attorney's ethical responsibility, the attorney may claim his privilege when his obligations "clearly conflict" with the open meeting law. *See id.* at 475-76.

45. *See id.* at 475.

agency client about pending litigation, the Open Meeting Law does not operate to interfere with this obligation.[46] Although the Florida Supreme Court has not ruled on this issue, in another case on different issues[47] it has indicated it will not sanction exceptions to the Florida Government in the Sunshine Law unless the exception is explicitly guaranteed by the state constitution.[48]

The Minnesota Supreme Court preferred to follow the reasoning in *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors,*[49] where a California appellate court found the California open meeting law did not repeal by implication the attorney-client privilege as applied to legislative bodies.[50] Relying upon canons of statutory construction, the California court found there was a presumption against repeal by implication unless the statutes in question are so inconsistent that there is no possibility of concurrent operation, or unless there is clear evidence the legislature intended the newer statute to supersede the older.[51] Finding the two statutes in California "capable of concurrent operation if the lawyer-client privilege is not over-blown beyond its true dimensions," the California court upheld the exception.[52]

The Minnesota court was also concerned with the exception swallowing up the rule. Although it declined to draw more explicit guidelines, preferring to leave to interested persons such as public officials, media representatives, and attorneys, the development of informal guidelines,[53] the court stressed that the privilege did not apply blindly to any meeting between an agency and its attorney.[54] The court emphasized that the facts in this case were thoroughly considered before arriving at the decision. The HRA's involvement in "active and immediate litigation," and the necessity of the meeting in searching for a beneficial settlement were significant factors.[55] In its conclusion, the court stated that the exception "would almost never extend to the mere request for general legal advice or opinion by a public body."[56] In more definite terms, the court cautioned:[57]

46. *See id.* at 475-76.

47. Canney v. Board of Pub. Instruction, 278 So. 2d 260, 264 (Fla. 1973). The *Canney* court dealt with an exception based on a school board's acting in a quasi-judicial capacity and found that not to be an exception. *See id.* at 263.

48. *See id. See also* Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972) (meetings between agency and collective bargaining negotiator constitutionally exempt from law).

49. 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968).

50. *Id.* at 58, 69 Cal. Rptr. at 492.

51. *Id.* at 56, 69 Cal. Rptr. at 490.

52. *Id.* at 58, 69 Cal. Rptr. at 492.

53. ___ Minn. at ___, 251 N.W.2d at 62 (order denying petition for reargument). Guidelines were recommended in Holmes & Graven, *supra* note 24, at 29-31. *See also id.* at 32-38 (comments of Robert M. Shaw, Dean A. Lund, & Norton L. Armour).

54. ___ Minn. at ___, 251 N.W.2d at 626.

55. *Id.* at ___, 251 N.W.2d at 625.

56. *Id.* at ___, 251 N.W.2d at 626.

57. *Id.*

> We cannot emphasize too strongly that should this exception be applied as a barrier against public access to public affairs, it will not be tolerated, for this court has consistently emphasized that respect for and adherence to the First Amendment is absolutely essential to the continuation of our democratic form of government.

As the court stated in *Channel 10,* because "[o]pen meeting laws and their exceptions are a developing field of law,"[58] the full application of the exception for attorney-client meetings will be left to future cases for development.

Landlord-Tenant Law—THE DUTIES OF A COMMERCIAL LANDLORD TO INFORM AND PROTECT—*Vermes v. American District Telegraph Co.*, ___ Minn. ___, 251 N.W.2d 101 (1977).

Vermes v. American District Telegraph Co.[1] has important ramifications for Minnesota landlord-tenant law. The case presented questions about a landlord's duties to protect a tenant from crime and to inform a prospective commercial tenant of potentially objectionable features of the premises. The Minnesota Supreme Court held that a landlord has both these duties.

In 1968, the plaintiff leased space for his jewelry store on the first floor of a building owned by Apache Corporation. Apache did not disclose to the plaintiff that an equipment access room was located directly above the plaintiff's store and that the thin floor of this room formed the ceiling of the store. This construction design allowed easy entry from above into the store's vault. In 1971, the store was burglarized. The illegal entry was made through the insecure ceiling of the vault.

To recover losses sustained from the burglary, the plaintiff brought suit against Apache Corporation, the original lessor; American District Telegraph Company (ADT), the installer of the burglar alarm; and the Towle Company, the subsequent lessor. Using the Minnesota comparative negligence statute,[2] the jury allocated fault as follows: Apache, forty-eight percent; ADT, twenty-five percent; Vermes, seventeen percent; Towle, ten percent. Because the defendant Towle was less negligent than the plaintiff, it was not liable.[3] ADT and Apache, however, were both liable for the losses the plaintiff sustained from the burglary because the culpability of each exceeded that of the plaintiff.[4]

58. 298 Minn. at 323, 215 N.W.2d at 826.

1. ___ Minn. ___, 251 N.W.2d 101 (1977).

2. MINN. STAT. § 604.01 (1976).

3. *See id.* § 604.01(1).

4. *See* ___ Minn. at ___, 251 N.W.2d at 103. The supreme court reversed the judgment of the trial court against ADT. The court held that it was error to submit the