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Civil Procedure—Epilogue to a Farce: Reestablishing the Power of Minnesota's Open Meeting Law

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**CASE NOTE: CIVIL PROCEDURE—EPILOGUE TO A
FARCE: REESTABLISHING THE POWER OF
MINNESOTA’S OPEN MEETING LAW—
*PRIOR LAKE AMERICAN V. MADER***

Kevin C. Riach[†]

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“A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy. . . . [A] people who mean to be their own governors must arm themselves with the power which knowledge gives.”¹

I. INTRODUCTION

The above quote by James Madison² embodies the core

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1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 276 (J.B. Lippincott & Co. 1865), quoted in *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 n.5 (Minn. 2002).

2. Not surprisingly, this quote often appears in commentary and case law discussing open government issues. See e.g., David J. Barthel, *A Healthy Tan Is Better than Sunburn: Ohio’s “Sunshine Law” and Nonpublic Collective Inquiry Sessions*, 34 CAP. U. L. REV. 251, 252–53 (2005); Theresa M. Nuckolls, *Kansas Sunshine Law; How Bright Does It Shine Now? The Kansas Open Meetings Act*, 72 J. KAN. B. ASS’N 34, 45 (2003).

principles underlying Minnesota's open meeting law.³ Unfortunately, the need for "popular information" occasionally conflicts with the practical realities of running a government.⁴ The Minnesota Supreme Court recently resolved just such a conflict in *Prior Lake American v. Mader*, a case in which the protections of attorney-client privilege proved incompatible with the public interest in open government.⁵

The societal interests underlying attorney-client privilege and open government clash when public access to information compromises officials' ability to litigate effectively.⁶ Some commentators argue that it is unfair and economically inefficient to resolve this clash by construing public officials' use of attorney-client privilege more narrowly than private parties' use.⁷ The *Prior Lake* court rejected this argument.⁸ The court refused to develop a bright-line rule allowing public officials recourse to the privilege exception whenever litigation looms.⁹ Instead, the court validated the use of a case-by-case balancing test to determine when the privilege exception to the open meeting law is appropriate.¹⁰ Unfortunately, the court's use of this test depended on broad and

3. Minnesota's open meeting law is codified at Minnesota Statutes section 13D.01 (2004).

4. See MINN. STAT. § 13D.05 subdiv. 3 (2004) (listing six specific exceptions where the practical concerns of running the government outweigh the public's interests in open meetings).

5. *Prior Lake*, 642 N.W.2d at 731.

6. See *Minneapolis Star & Tribune Co. v. Hous. & Redevelopment Auth.*, 310 Minn. 313, 323, 251 N.W.2d 620, 625 (1976) ("A basic understanding of the adversary system indicates that certain phases of litigation strategy may be impaired if every discussion is available for the benefit of opposing parties who may have as a purpose a private gain in contravention to the public need as construed by the agency.").

7. "Attorneys representing government actors need to be placed on equal footing with attorneys representing private clients who seek to further their clients' individual interests." Marion J. Radson & Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799, 820-21 (2001). See generally Todd A. Ellinwood, "In the Light of Reason and Experience": *The Case for a Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291, 1292 (2001) (arguing for an expansion of the privilege to avoid disadvantaging government attorneys and, as a result, exposing the public to excess cost).

8. "[U]nlike persons in private life, a public agency . . . has no autonomous right of confidentiality in communications relating to governmental business." *Prior Lake*, 642 N.W.2d at 737 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 cmt. b (1998)).

9. *Id.* at 738.

10. *Id.*

undefined policy rationales and thus gave practitioners little guidance on how to counsel their government clients to remain in compliance with the law.

This note begins with an abridged history of the conflict between attorney-client privilege and open government.¹¹ It follows this discussion with an examination and analysis of *Prior Lake's* resolution of this conflict.¹² This note concludes that the *Prior Lake* resolution provides an effective analytic framework for courts, but does not help legal practitioners determine when they may close meetings under the privilege exception.¹³

II. HISTORY

A. *Open Meeting Laws*

Open meeting laws (or “sunshine laws”) require that government bodies and agencies open their meetings to the public and provide the public with notice as to when those meetings will be held.¹⁴ They are a modern phenomenon; most open meeting laws were enacted during the 1950s as a result of organized advocacy by journalists and civic groups.¹⁵ Before 1952, Alabama was the only state that had enacted an open meeting law.¹⁶ By 1962, twenty-six other states had followed suit.¹⁷ Today, all fifty states and the District of Columbia have open meeting statutes of one form or another.¹⁸ These laws reflect the view that open government promotes honest, efficient, and informed decision making and inspires public confidence.¹⁹ Typically, these laws

11. See *infra* Parts II, III.

12. See *infra* Parts IV, V.

13. See *infra* Part VI.

14. See Teresa D. Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1165 (1993). See also John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719, 719 (2004).

15. See Note, *Open Meeting Statutes: The Press Fights for the “Right to Know,”* 75 HARV. L. REV. 1199, 1199 (1962) [hereinafter *Right to Know*].

16. *Id.* at 1199–1200. Florida enacted an open meeting statute in 1905, but it applied only to city councils. See Peter H. Seed, *Florida's Sunshine Law: The Undecided Legal Issue*, 13 U. FLA. J.L. & PUB. POL'Y 209, 215 (2002).

17. *Right to Know*, *supra* note 15, at 1199.

18. See Pupillo, *supra* note 14, at 1167.

19. See Note, *The Minnesota Open Meeting Law After Twenty Years—A Second Look*, 5 WM. MITCHELL L. REV. 375, 377 (1979) [hereinafter *Minnesota Open Meeting*].

apply to municipal bodies and public agencies but not state legislatures.

The general trend in the development of state open meeting laws has been one of statutory enactments book-ending periods of judicial interpretation. Courts have tended to narrowly construe the laws' requirement of openness. These narrow constructions have in turn inspired legislatures to amend the laws, broadening the laws' applicability and minimizing or eliminating judicially created exceptions to their mandates.²⁰ Legislatures have also instituted various notice and reporting requirements designed to guarantee some measure of transparency even when meetings could be closed.²¹ These new statutory provisions have led to further litigation that has forced courts to revise or refine their earlier rulings.²²

Twenty-five states have incorporated "purpose statements" into their open meeting laws.²³ These purpose statements evince the

Law].

20. See Pupillo, *supra* note 14, at 1176–77. See generally Peter G. Guthrie, Annotation, *Validity, Construction, and Application of Statutes Making Public Proceedings Open to the Public*, 38 A.L.R. 3d 1070 (2006).

21. Pupillo, *supra* note 14, at 1170–73. For instance, Minnesota's open meeting law requires the posting of irregularly scheduled meeting notices on a public bulletin board, as well as mailings to any person who has requested notice of meeting times and places, even when the meeting is to be closed. MINN. STAT. § 13D.04, subdvs. 2, 5 (2004). It also requires officials to describe for the record why the meeting is to be closed, and the subject to be discussed in the closed meeting, before adjourning into a closed session. § 13D.01, subd. 3.

22. See *Roberts v. City of Palmdale*, 853 P.2d 496, 503–05 (Cal. 1993) (interpreting amendments to the "Brown Act," California's open meeting law); *Sch. Bd. of Duval County v. Fla. Publ'g Co.*, 670 So. 2d 99 (Fla. Dist. Ct. App. 1996) (interpreting what was then Florida's new statutory attorney-client privilege exception); *McKay v. Bd. of City Comm'rs*, 746 P.2d 124, 125–26 (Nev. 1987) (listing a number of statutory exemptions enacted over the history of the open meeting law, and then applying the new legislatively created government privilege exception); *Markowski v. City of Marlin*, 940 S.W.2d 720, 726 (Tex. App. 1997) (interpreting Texas' then recently enacted attorney-client privilege exception); see also Gerald A. Daniel, Jr., *Some Time in the Shade: Giving the Public's Legal Counsel Some Relief Under Alabama's Sunshine Law*, 9 T.G. JONES L. REV. 55, 72 (2005) (explaining how Alabama's new open meeting legislation derives from recent case law); Nuckolls, *supra* note 2, at 37 (asserting that the Kansas legislature refined the statutory definition of "meeting" in reaction to a Kansas Supreme Court decision); Seed, *supra* note 16, at 218–60 (charting the interplay between statutory enactments and judicial interpretations of the "per se board rule").

23. ALASKA STAT. § 44.62.312 (2006); CAL. GOV'T CODE § 54950 (West 2006); IDAHO CODE ANN. § 67-2340 (2006); 5 ILL. COMP. STAT. ANN. § 120/1 (West 2005); IND. CODE ANN. § 5-14-1.5-1 (West 2006); IOWA CODE ANN. § 21.1 (West 2006); KAN. STAT. ANN. § 75-4317 (2005); KY. REV. STAT. ANN. § 61.800 (LexisNexis 2005); LA.

policy interests buttressing the laws, and tend to be written in broad and sweeping abstractions.²⁴ They often refer to the principle of popular sovereignty—the idea that governments (and their decisions) achieve legitimacy through the consent of the governed.²⁵ Purpose statements also often refer to what one commentator labeled “the normative concept of transparency.”²⁶ This concept is embodied in language such as that found in Pennsylvania’s open meeting law, which reads, “the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formation and decision-making of agencies is vital to the enhancement and proper functioning of the democratic process.”²⁷ The legislatures’ reliance on this “normative concept” to justify open government reveals an assumption that citizens will actually make use of “popular information” to ensure effective and

REV. STAT ANN. § 42:4:1 (2006); MD. CODE ANN., STATE GOV’T § 10-501 (LexisNexis 2004); MISS. CODE ANN. § 25-41-1 (2006); MO. ANN. STAT. § 610.110 (West 2006); NEV. REV. STAT. ANN. § 241.010 (LexisNexis 2005); N.Y. PUB. OFF. LAW § 100 (McKinney 2006); N.C. GEN. STAT. ANN. § 143-318.9 (West 2006); OKLA. STAT. ANN. tit. 25, § 302 (West 2006); OR. REV. STAT. ANN. § 192.620 (West 2003); 65 PA. CONS. STAT. ANN. § 702 (West 2006); R.I. GEN. LAWS § 42-46-1 (2005); TENN. CODE ANN. § 8-44-101 (2006); UTAH CODE ANN. § 52-4-102 (2006); VT. STAT. ANN. tit. 1, § 311 (2003); WASH. REV. CODE ANN. § 42.30.010 (West 2006); W. VA. CODE ANN. § 6-9A-1 (LexisNexis 2006); WIS. STAT. ANN. § 19.81 (West 2003). *See also* Pupillo, *supra* note 14, at 1185 n.137.

24. For example, the Mississippi purpose statement reads, in part:

It [is] essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy

MISS. CODE ANN. § 25-41-1 (2006). The Oklahoma legislature justified its law with a shorter but no less abstract statement: “It is the public policy of the State of Oklahoma to encourage and facilitate an informed citizenry’s understanding of the governmental processes and governmental problems.” 25 OKLA. STAT. ANN. tit. 25, § 302 (West 2006).

25. California legislators wrote an exceptionally strong statement of purpose into their open meeting law:

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is good for them not to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

CAL. GOV’T CODE § 54950 (West 2006).

26. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 885 (2006).

27. 65 PA. CONS. STAT. ANN. § 702 (West 2006).

efficient governance.²⁸

Perhaps sensing that “transparency” is a weak foundation for the right to open government, commentators have urged courts to locate that right in the firmer ground of the First Amendment, but to no avail.²⁹ Courts have instead deferred to legislatures and grounded open meeting law decisions in the abstract policy rationales noted above.³⁰ The choice of a policy foundation over a constitutional foundation has implications when courts weigh enforcement of open meeting laws in the face of contradictory statutes or common law rules. In general, the result of this process has been hesitant and inconsistent enforcement by the courts.³¹

Most open meeting laws contain exceptions that allow agencies to close meetings when specific criteria have been satisfied.³² One common exception allows for closed meetings where the government’s attorney-client privilege might otherwise be compromised.³³

B. *The Government Attorney-Client Privilege*

Use of the attorney-client privilege dates back to the sixteenth century.³⁴ Though the basic function of the attorney-client privilege has not changed much since its inception, its policy justifications have evolved. Originally meant to protect the attorney’s oath by precluding him from testifying against a client, it

28. Professor Fenster writes, “[as] a descriptive concept claimed to be at the core of democracy, transparency fails to consider the tensions it conceals. It assumes too much of the state, of government information, and of the public” Fenster, *supra* note 26, at 892.

29. *Right to Know*, *supra* note 15, at 1204.

30. *Id.* See also *Minnesota Open Meeting Law*, *supra* note 19, at 380.

31. See Pupillo, *supra* note 14, at 1176.

32. See *Minnesota Open Meeting Law*, *supra* note 19, at 400–10. See also Jay M. Zitter, Annotation, *Pending or Prospective Litigation Exception Under State Law Making Proceedings by Public Bodies Open to the Public*, 35 A.L.R.5th 113 (1996). Common exceptions include employee disciplinary proceedings, criminal investigations, meetings to discuss land acquisitions or labor contracts, and meetings of quasi-judicial bodies, as well as meetings pertaining to pending or ongoing litigation. *Id.*

33. Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 504 (2002). Four states contain no attorney-client privilege exception to their open meeting law: Arkansas, Maryland, Massachusetts, and Nevada. In these states, all meetings between municipal government officials and their attorneys must be open to the public. *Id.* at 504, 550 n.174.

34. Patricia E. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality*, 35 URB. LAW. 283–84 (2003).

now serves primarily to promote full communication and disclosure by clients to their attorneys.³⁵

Two sets of rules protect confidential communications between attorneys and clients: 1) evidentiary rules prohibiting use of information covered by the privilege; and 2) ethical rules barring disclosure of privileged information.³⁶ Both rule sets embody the notion that effective representation depends on full and frank communication between lawyer and client.³⁷ The U.S. Supreme Court located a broad policy grounding in this principle and used it to justify extension of the privilege to corporate clients.³⁸ The Court wrote in *Upjohn Co. v. United States* that effective representation of individuals (and by extension corporations) ultimately “serves public ends.”³⁹

The common-law evidentiary privilege, as used in United States courts, traditionally applied to natural persons and corporations, but not governments.⁴⁰ Before 1963, only two jurisdictions recognized the government attorney-client privilege.⁴¹ At that time, neither the Model Rules of Evidence nor the Uniform Rules of Evidence supported it.⁴² But both the Model Rules and the Uniform Rules eventually addressed the question of government privilege. The drafters of Proposed Model Rule 503 expanded the definition of “client” to include the government.⁴³ Though Congress never codified Proposed Rule 503, courts throughout the country used it to justify common-law expansion of the privilege to include government clients.⁴⁴ The drafters of Uniform Rule 502 proposed a government privilege with a narrower scope than that of Proposed Rule 503.⁴⁵ Rule 502 allowed for application only when privileged communication concerned a pending claim, action, or investigation, the disclosure of which would “seriously impair” the government’s ability to proceed in the

35. See Ellinwood, *supra* note 7, at 1192. See also Salkin, *supra* note 34, at 284.

36. Radson & Waratuke, *supra* note 7, at 802.

37. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2 (2006). See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); Salkin, *supra* note 34, at 288.

38. *Upjohn*, 449 U.S. at 389–90.

39. *Id.* at 389.

40. FED. R. EVID. 501; Radson & Waratuke, *supra* note 7, at 800.

41. Leslie, *supra* note 33, at 476.

42. *Id.*

43. *Id.* at 479.

44. *Id.*

45. *Id.* at 480.

public interest.⁴⁶ Uniform Rule 502 did not have the impact of Proposed Rule 503.⁴⁷ Courts and state legislatures generally drew the government privilege more broadly.⁴⁸ As it stands today, the evidentiary privilege generally protects from disclosure communications between attorneys and their government clients related to legal advice, but not communications related to policy or political advice.⁴⁹

Commentators have argued both for and against expansive use of the evidentiary privilege to protect government entities. Commentators in favor of expansive use argue that uninhibited dialogue between government officials and attorneys promotes efficient decision making and provides an incentive to acknowledge and correct possible misconduct.⁵⁰ Arguments against expansive use include the potential for dishonesty and “total denial of information to citizenry about the operations of their government.”⁵¹

In addition to the evidentiary bar to disclosure, the American Bar Association’s Model Rules of Professional Conduct establish ethical boundaries to protect the privilege.⁵² Specifically, Rule 1.6 bars attorney disclosure of information related to representation of a client.⁵³ Rule 1.13 extends the privilege to public entities and operates concurrently with the other Rules of Professional Conduct, including Rule 1.6.⁵⁴ Comment 9 to Rule 1.13 states:

The duty defined in this Rule applies to government organizations. Defining precisely the identity of the client

46. *Id.*

47. *Id.*

48. *See id.*

49. *See* Salkin, *supra* note 34, at 285. For a detailed breakdown of the elements of common-law attorney-client privilege, see 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 at 542 (McNaughton rev. 1961).

50. *See generally* Ellinwood, *supra* note 7. *See also* Salkin, *supra* note 34, at 288.

51. 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5475 at 127 (1986).

52. One commentator identifies the three ethical duties adhering to private practitioners as “loyalty, confidentiality, and zeal.” Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 958–59 (1991). While these terms are somewhat abstract, courts and ethicists have been able to define them with enough clarity for private practitioners to have reasonable guidance in solving ethical problems. The government attorney, however, has been burdened with a fourth ethical duty: serving the public interest. *Id.* at 967. As this casenote asserts, the “public interest” is a term so malleable as to be almost meaningless. *See infra* pp. 689–92.

53. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002).

54. *Id.* R. 1.13.

and prescribing the obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. . . . [W]hen the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that [a] wrongful act is prevented.⁵⁵

The Advisory Committee apparently recognized the tensions inherent in the duty of an attorney serving a government client. Comment 9 seems to suggest government attorneys should err on the side of disclosure, given the difficulty in determining whose interests predominate in such a situation: the government organization or the public it ostensibly represents. The balancing test suggested by Comment 9 operates somewhat like a fuse—if the public interest in disclosure is powerful enough, the duty to maintain confidentiality shuts down. Deciding when to remove this duty requires a complex calculation. This calculation inevitably reveals deep-seated values about the nature of government and how to determine the “public interest.”

Generally, courts have found that fidelity to the “public interest” narrows the scope of government attorneys’ duty to maintain confidentiality. One commentator has noted several differences between ethical standards applied to government attorneys and those applied to private practitioners.⁵⁶ He concludes that these differences arise from the government attorneys’ uniquely acute duty to serve the “public interest.”⁵⁷ Given the nebulous nature of this animating value, any bright-line rules controlling application of the government attorney-client

55. *Id.* R. 1.13 cmt. 9.

56. See Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow From Civil Government Lawyers’ General Duty To Serve The Public Interest*, 42 BRANDEIS L.J. 13, 67 (2003). Professor Berenson charts several primary differences between government attorneys and private practitioners as suggested by the courts: government attorneys have 1) a greater duty to provide information to the courts and opposing parties, both during discovery and in situations resembling a civil version of *Brady v. Maryland*, 373 U.S. 83 (1963); 2) a higher threshold for pleading, implicating issues of fairness, and justice; 3) a lower threshold for what litigation tactics are permissible; 4) a narrower scope of confidentiality afforded to their clients; and 5) wider latitude in pursuing cases that might otherwise create a conflict of interest. *Id.* at 16, 18–19, 47. The last difference seems inconsistent with the others in that it allows government lawyers more latitude than private practitioners. Professor Berenson suggests, however, that all these differences have the common thread of privileging the public interest over the interests of individual parties. *Id.* at 67–69.

57. *Id.* at 68–69.

privilege appear doomed to generate incoherent and inconsistent results.

Thus, despite extensive evidentiary and ethical rules, the contours of government attorney-client privilege remain hazy at best.⁵⁸ It even remains unclear as to whom the privilege attaches: the particular official engaged in the privileged discussion, the government agency employing that official, the government as a whole, or the public.⁵⁹ The relevance of this distinction becomes apparent when one seeks to determine which policy rationale underlies the asserted privilege and how that rationale balances with the policy rationales supporting open government.⁶⁰ The Restatement (Third) of Law Governing Lawyers § 97 asserts, in any case, that “no universal definition of the client of a government lawyer is possible. . . . Those who speak for the governmental client may differ from one representation to another. The identity of the client may also vary depending on the purpose for which the question of identity is posed.”⁶¹

Some commentators argue it is futile to debate what constitutes the government client. Robert P. Lawry highlights the futility of this question by invoking Lord Brougham’s oft quoted principle of advocacy: “[a]n advocate, by the sacred duty which he owes the client, knows, that in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER.”⁶²

58. See Ellinwood, *supra* note 7, at 1291.

59. *Id.* at 1315.

60. *Id.*

61. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 97 cmt. c (2000). Comment c goes on to note, “[f]or many purposes, the preferable approach on the question presented is to regard the prospective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation.” *Id.*

62. Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625, 628 (1979) (quoting Lord Brougham’s speech in defense of Queen Caroline before the House of Lords in 1820). The Lord Brougham quote continues:

To save that client by all expedient means—to protect that client at all hazards and costs to all others, and amongst others to himself—is the highest, and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting *them*, if need be, to the wind, he must go on reckless of consequences, if his fate it should unhappily be, to involve his country in confusion for his client’s protection.

Id. at 628 n.17.

The tail of this quote illuminates quite clearly the conundrum of the government attorney: what to do when the duties of a patriot and those of an advocate are

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Lawry argues fixing a definition of “THAT CLIENT” will eventually inhibit a government attorney’s ethical function because that function is uniquely susceptible to internal contradictions. He writes:

Under the present Code of Professional Responsibility, if the client can be identified as a single human being, the answers to the following questions are identical and can be automatically deduced from mere identification of the client: (1) Who shall the lawyer take direction from in matters to be decided “by the client”? (2) Whose “interests” is the lawyer trying to foster or protect? (3) Whose “confidences” is the lawyer obliged to respect. . . ? For the government lawyer, however, the answer to each of these three questions is not necessarily the same. Even within a single question, the answer may differ from situation to situation.⁶³

According to Professor Lawry, a government attorney should proceed in reverse-order, asking those three crucial questions first in any given situation and through a balancing of the answers determine whose interests predominate.⁶⁴

The ambiguous nature of the government client is compounded by the unintelligibility of the “public interest.” As noted above, courts and commentators suggest that government attorneys’ normal ethical duties are circumscribed by their special duty to act in the public interest. But government attorneys are ill suited to determine the public interest, as their job is simply to implement measures calculated to meet the public interest. It is the officials or agencies served by the attorney who determine what practically constitutes the “public interest.” An attorney whose concept of the public interest clashes with the interest advanced by those elected officials puts himself in the position of contradicting the wishes of the majority. And, as Judge Easterbrook points out, “public interest” is an empty term unless it is being used as a euphemism for the aggregated personal interests of the majority:

[T]here is no virtuous way to aggregate private wills into collective decisions. People of good will have no common

simultaneously inseparable and at odds?

63. *Id.* at 631–32.

64. See generally Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 *FED. B. J.* 61 (1978) (proposing a method by which government attorneys can determine the true identity of their client).

ground around which to rally! They have their own conceptions of the public interest but no way to insist that the collective choice necessarily reflect their views. We are doomed by the logic of majority voting to aggregate private preferences rather than to find a public good.⁶⁵

Judge Easterbrook's argument leads him to conclude: "when faction dominates the creation of laws, judges cannot interpret laws to serve the public interest."⁶⁶ In other words, legislative intent articulates the "aggregate of private preferences" and not the "public interest." Through this formulation, Judge Easterbrook unmasks judges' attempts to justify their decisions by appealing to the common good. He reveals those decisions to be motivated by judges' personal values rather than by a judicial aggregation of values held by individual members of the community.⁶⁷

In the arena of government attorney-client privilege, therefore, decisions about when to honor the privilege appear to rise from personal interests and values, not the "public interest." Whether it is an attorney trying to determine when to honor the privilege, or a judge trying to determine whether to sanction the attorney's actions, the decision maker's personal values ultimately animate the decision.⁶⁸

C. Sacramento: *The Prototypical Clash*

Soon after state open meeting laws became commonplace, conflicts arose between their provisions and the protections guaranteed by the government attorney-client privilege.⁶⁹ These

65. Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1339 (1994).

66. *Id.* at 1346.

67. *See id.*

68. See Note, *Conflicts of Interest and Government Attorneys*, 94 HARV. L. REV. 1413-15 (1981) ("One of the principal purposes of government is to provide a set of instructions that analyze and define the public interest. No individual attorney can hope to perform this task on his own. . . . In many situations, there will be little distinction between the goal of effective representation of the government "client" and that of good government in and of itself. When there is a conflict, however, it is the lawyer's duty, not just as a lawyer, but also as a public citizen, to choose the path more beneficial to the latter goal."). The author of the note fails to catch the paradox of the above quote: attorneys cannot be unable to define the "public interest" yet also be expected to act on that "public interest." The point remains, however, as Judge Easterbrook established, that an individual's conception of the "public interest" is nothing but his or her personal values cloaked in a lofty abstraction.

69. See generally Jay M. Zitter, Annotation, *Attorney-Client Exception Under State*

conflicts led to litigation. The history of this litigation has been that of courts ostensibly struggling to balance the values underlying open government with those underlying the government privilege.⁷⁰ The courts' struggles rise from the indeterminate and protean nature of those values, as well as the inevitable personal biases noted by Judge Easterbrook in the previous section. The seminal California case *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*⁷¹ provides a clear example of how a court's difficulty in defining the "public interest" can hamstring it when it seeks to balance open government with the government privilege.

The *Sacramento* court sought to resolve a conflict between the state open meeting law and the state's attorney-client privilege statute.⁷² The court balanced the policy interests behind the two statutes by precluding arbitrary or unnecessary invocations of privilege that would defeat the purpose of the open meeting law.⁷³ The case proved influential on other state courts, and particularly on Minnesota courts.⁷⁴

The *Sacramento* court held that meetings of a county board of supervisors with their attorneys could be properly closed, despite California's existing open meeting law (commonly called the "Brown Act").⁷⁵ The court based its decision on what it perceived to be the values underlying the open meeting law.⁷⁶ It wrote, "the right to disclosure is an attribute of citizenship."⁷⁷ It further suggested that interpreting the law required "inquiry into [its]

Law Making Proceedings by Public Bodies Open to the Public, 34 A.L.R. 5th 591 (1995) (comparing cases discussing this issue from thirty-three different states).

70. *Id.* See also Zitter, *supra* note 32, at 113.

71. 69 Cal. Rptr. 480 (Cal. Ct. App. 1968), *superseded by statute*, CAL. GOV'T CODE § 11126(e) (West 2006) (effective 1987), *as recognized in* *Funeral Sec. Plans, Inc. v. State Bd. Of Funeral Dirs. and Embalmers*, 18 Cal. Rptr.2d 39 (Cal. Ct. App. 1993).

72. *Id.* At the time *Sacramento* was decided, California's open meeting law did not contain an exception for meetings which might implicate the attorney-client privilege. *Id.* at 488. The legislature provided that exception with the enactment of section 11126(e), which sets forth extensive but specific guidelines as to the type of situations which trigger the attorney-client privilege exception. CAL. GOV'T CODE § 11126(e).

73. *Sacramento*, 69 Cal. Rptr. at 492.

74. See Radson & Waratuke, *supra* note 7, at 813–16.

75. *Sacramento*, 69 Cal. Rptr. at 492.

76. *Id.* at 491.

77. *Id.* at 484.

objective.”⁷⁸

The California Legislature’s purpose statement prologue to its open meeting law stated, in part: “[t]he people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”⁷⁹ Thus, the statute set forth a clear definition of representation to guide California courts in determining when to allow exceptions to the rule of open government.

The *Sacramento* court used this definition as the rationale for its decision, at one point writing that “[t]here is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.”⁸⁰ In this instance, the court expressed a view that the “public interest” value justifying open government was consonant with the stated rationale behind the open meeting law: personal sovereignty includes the right to observe the decisional process of one’s representative.

The court next defined what it viewed as the “public interest” value underlying the government attorney-client privilege:

The privilege against disclosure is essentially a means for achieving a policy objective of the law. The objective is to enhance the value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value.⁸¹

The *Sacramento* court was thus set to pit one “public interest” against another, in an attempt to synthesize the true public interest.

At this point in its decision, the court began to wrestle with synthesis. First, it stated, “[g]overnment should have no advantage in legal strife; neither should it be a second-class citizen. . . . ‘There is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential

78. *Id.* at 485.

79. CAL. GOV’T CODE § 54950 (West 1997) (effective 1953).

80. *Sacramento*, 69 Cal. Rptr. at 487.

81. *Id.* at 489.

legal advice is banned.”⁸² Here, the court appeared to favor the public interest in confidentiality. But the pendulum swung back quickly:

As ex-lawyers, judges have been exposed to conditioning experiences which might induce inflation of the privilege’s value. Actually it poses competing values. Professor Wigmore has observed that its benefits are indirect and speculative; that, as a testimonial privilege, it is worth preserving but is nevertheless an obstacle to the investigation of the truth.⁸³

In this passage, the court clearly expressed its anxiety at defining the public interest, worrying over “conditioning experiences” which might bias its conception of the broader public good. The court continued to hedge, “[i]n counterthrust to the values expressed in the ‘right to know’ slogan, [the privilege] permits an undeniable quantum of secrecy and, in overreaching hands, a potential tool of evasion.”⁸⁴ This comment appeared to zero out the scales by introducing a new undefined term—“overreaching hands”—that supplanted the “public interest.”

The court then returned to the refuge of legislative intent: “[i]mplicit in [the privilege’s] abrogation by implication is the assumption that the California Legislature indulged in a knowing choice between these two competing interests; that it adopted the Brown Act with unmistakable intent to abolish the values inherent in the lawyer-client privilege of local boards of government.”⁸⁵

Finally, the court abandoned its early attempts to determine the “public interest” and found that the open meeting law can operate concurrently with the government privilege, as long as the privilege is not “overblown beyond its true dimensions.”⁸⁶

The court concluded by returning to the point from which it started, stating: “[n]either the attorney’s presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest.”⁸⁷ As to what constitutes the public interest, or who is to

82. *Id.* at 490 (quoting *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 62 Cal. Rptr. 819, 821 (Cal. Ct. App. 1967)).

83. *Id.* at 491 (*citing* 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2291, at 554 (John T. McNaughton ed., 1961)).

84. *Id.*

85. *Id.*

86. *Id.* at 492.

87. *Id.*

define that interest, the court was mute.

The California Legislature later superseded *Sacramento*, enacting statutes which set forth specific exceptions to the open meeting law, including one permitting closed meetings in the event of pending litigation.⁸⁸

III. THE MINNESOTA OPEN MEETING LAW

Minnesota is one of the many jurisdictions that adopted the balancing test approach advanced by the *Sacramento* court.⁸⁹ The Minnesota Legislature enacted the state's original open meeting law in 1957.⁹⁰ In its first incarnation, Minnesota's open meeting law did not contain a statement of purpose or a notice provision, did not define the term "meeting" as used in the statutory text, and did not contain a specific exception for meetings which involved privileged communications.⁹¹ These gaps have been filled over time by decisions from Minnesota courts and by further legislation.⁹²

The Minnesota Supreme Court first addressed the conflict between government attorney-client privilege and the open meeting law in *Channel 10, Inc. v. Independent School Dist. No. 709*.⁹³ *Channel 10* involved an action brought by a television station contesting school-board bylaw exceptions to the open meeting law.

88. See CAL. GOV'T CODE § 11126(e) (West 2006); see also *Roberts v. City of Palmdale*, 9 Cal. Rptr. 2d 501, 505 n.7 (Cal. Ct. App. 1992) (noting the legislative history to date of California Code provisions allowing exceptions to the open meeting law in the case of pending litigation).

89. See *Minnesota Open Meeting Law*, *supra* note 19, at 405–06; see also PETER N. THOMPSON, MINN. PRAC. EVIDENCE § 501.04, at 246. (3d ed. 2001).

90. *Minnesota Open Meeting Law*, *supra* note 19, at 381. See Act of Apr. 27, 1957, ch. 773, 1957 Minn. Laws 1043 (codified as amended at MINN. STAT. § 13D.01 (2004)).

91. MINN. STAT. § 471.705 (1957), amended by MINN. STAT. § 13D.01 (2004). See *Minnesota Open Meeting Law*, *supra* note 19, at 384–405.

92. See, e.g., *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274 (Minn. 2004) (construing the law in favor of public access and applying the law to the proceedings of the state university system); *Berglund v. City of Maplewood*, 173 F. Supp. 2d 935 (D. Minn. 2001), *aff'd sub nom. Zick v. City of Maplewood*, 50 Fed. Appx. 805 (8th Cir. 2002), *cert. denied*, 539 U.S. 965 (2003) (establishing that a banquet honoring city council members did not qualify as a meeting under the open meeting law); *Channel 10, Inc. v. Indep. Sch. Dist. No. 709*, 298 Minn. 306, 215 N.W.2d 814 (Minn. 1974) (declining to recognize a number of exceptions to the open meeting statute); see also Marshall H. Tanick, *Clouds Descend on the Minnesota Sunshine Laws*, 58 HENNEPIN LAW., July–Aug. 1989, at 9.

93. *Channel 10*, 298 Minn. at 306, 215 N.W.2d at 814.

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One of the bylaw exceptions permitted closed meetings where the board needed to discuss pending litigation. The trial court ruled this exception was in the public interest.⁹⁴ At the time *Channel 10* was decided, no statutory attorney-client privilege exception specific to the open meeting law existed.

On appeal, the Minnesota Supreme Court took the trial court to task for its reliance on the “public interest,” writing:

[T]he trial court should not have used the public interest as a factor in determining which acts should be enjoined since that determination should be a policy decision for the legislature. The wisdom of the open meeting law may be debated in the public arena but our role is to enforce the statute according to its terms. If it doesn't work in the public interest, the legislature is the branch of government that should change it.⁹⁵

Despite this chastisement, the *Channel 10* court found itself in the same quandary as the *Sacramento* court: unable to reach a decision without reference to the public interest, but with no guide to determine just what that interest was and a vague unease about the task in general.

The court initially noted that the government attorney's ultimate client was not the school board but the public at large.⁹⁶ The court then speculated, “[w]here tort claims against the school district are being discussed by and between the school board and its attorney, disclosure might not be in the best interests of the public nor in the best interests of the administration of justice.”⁹⁷

The court quoted from the *Sacramento* decision, and also mentioned an Arkansas case that barred the privilege exception outright.⁹⁸ At that point, the court appeared no closer to a decision than when it started.⁹⁹ The court ultimately concluded, given the

94. *Id.* at 308, 215 N.W.2d at 822. The trial court wrote, “Inasmuch as the Board . . . are adversaries to other interests in some of their considerations, it must be obvious that the Board should have the advantage afforded their adversaries in the matter of confidential discussion with their attorneys over litigation” *Id.* at 317, 215 N.W.2d at 823.

95. *Id.* at 317, 215 N.W.2d at 823.

96. *Id.* at 322, 215 N.W.2d at 826.

97. *Id.*, 215 N.W.2d at 826.

98. *Id.* at 323, 215 N.W.2d at 826. The court quotes from a passage in *Sacramento* in which the court tries to define the public interest in confidentiality and the public interest in open government. See *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal. Rptr. 480, 492 (Cal. Ct. App. 1968).

99. *Channel 10*, 298 Minn. at 323, 215 N.W.2d at 826.

novelty of the issue, that it should employ restraint.¹⁰⁰ It suggested courts use a case-by-case balancing test to determine when the privilege exception is appropriate.¹⁰¹ This suggestion was the seed from which the *Prior Lake* decision ultimately emerged.¹⁰² It further determined that in the case at bar, the pending litigation exception was too broad.¹⁰³ The decision about what would be an appropriate closing could only be made if available facts showed which choice would most benefit the public interest.¹⁰⁴

The supreme court first applied the *Channel 10* balancing test in *Minneapolis Star & Tribune Co. v. Housing & Redevelopment Authority (HRA)*.¹⁰⁵ Unlike *Channel 10*, *HRA* generated sufficient facts to actually apply the test.¹⁰⁶ *HRA* involved a meeting that was closed to discuss pending litigation against the Housing and Redevelopment Authority that environmental activists had filed.¹⁰⁷

The *HRA* court relied extensively on the *Sacramento* decision in formulating its solution.¹⁰⁸ The court acknowledged that its task required “a delicate balancing of public interests.”¹⁰⁹ It did not shy away from this task—querying, for instance, whether closed meetings would truly benefit the “public.” But the court never explicitly set forth what it felt was the particular “public interest” in this case. It relied instead on boilerplate language invoking the principles of “democracy” and the “adversary system.”¹¹⁰

The *HRA* court ultimately held that the “active and immediate” nature of the pending litigation justified application of the privilege.¹¹¹ At the time, the action was pending in federal district court; the closed meeting was necessary to prevent unfair strategic advantage to the private parties involved in the

100. *Id.*, 215 N.W.2d at 826.

101. *Id.*, 215 N.W.2d at 826.

102. *See Minneapolis Star & Tribune Co. v. Hous. & Redev. Auth. (HRA)*, 310 Minn. 313, 321–23, 251 N.W.2d 620, 624–25 (Minn. 1976). The *Prior Lake* decision ultimately incorporated this principle from *HRA*. *Prior Lake*, 642 N.W.2d at 738.

103. *Channel 10*, 298 Minn. at 323, 215 N.W.2d at 826.

104. *Id.*, 215 N.W.2d at 826.

105. *HRA*, 310 Minn. at 313, 251 N.W.2d at 620; *Channel 10*, 298 Minn. at 306, 215 N.W.2d at 814.

106. *HRA*, 310 Minn. at 313, 251 N.W.2d at 620; *Channel 10* 298 Minn. at 306, 215 N.W.2d at 814.

107. *See HRA*, 310 Minn. at 314, 251 N.W.2d at 621.

108. *Id.* at 320–21, 251 N.W.2d at 624; *see also Note, Open Meeting Law and the Attorney-Client Privilege*, 4 WM. MITCHELL L. REV. 250, 255 (1978).

109. *HRA*, 310 Minn. at 323, 251 N.W.2d at 625.

110. *Id.* at 323, 251 N.W.2d at 625.

111. *Id.* at 324, 251 N.W.2d at 626.

litigation.¹¹² But by allowing closed meetings convened to discuss settlement possibilities, the court implied that economic interests can trump “democratic” interests when the threat against those economic interests is sufficiently clear. This unstated but apparent preference is revealing. It suggests that the court believes preservation of economic rights to be the primary goal of our political system, without saying so outright.

But the court hedged against wide application of the privilege. It wrote that the privilege exception should be “invoked cautiously and seldom in situations other than in relation to threatened or pending litigation.”¹¹³ This approach muddied the waters by not defining “threatened or pending litigation”¹¹⁴ and led to conflicting decisions which *Prior Lake* ultimately resolved.

Two major Minnesota Court of Appeals decisions followed from *HRA*. The first was *Northwest Publications, Inc. v. St. Paul*.¹¹⁵ In *Northwest Publications*, the court applied the balancing test used in *HRA*.¹¹⁶ The case involved a petition for writ of mandamus to open a city council meeting previously scheduled to be closed.¹¹⁷ The meeting was to be closed so the council could discuss with its lawyers the legal ramifications of a proposed nude-dancing ordinance.¹¹⁸ The court concluded that legal advice as to the possibility of litigation over a proposed ordinance did not justify application of the attorney-client privilege exception.¹¹⁹ The court wrote:

112. *Id.* at 323, 251 N.W.2d at 625.

113. *Id.* at 324, 251 N.W.2d at 626. Strangely enough, in its dicta, the *HRA* court also made passing reference to the generally rejected First Amendment grounds for the right to open government. Later decisions by Minnesota courts did not adopt this policy basis for the open meeting law. *See* Tanick, *supra* note 92, at 23.

114. *Compare* James S. Holmes & David C. Graven, 33 BENCH AND BAR MINN., Feb. 1977, at 25–38 (the authors engage in a written colloquy with lawyers from *HRA* in an attempt to sort out the implications for practitioners), *with* CAL. GOV'T CODE § 11126(e) (West 2005) (this section of California's open meeting law sets forth in clear detail what constitutes pending litigation for the purpose of applying the attorney-client privilege exception to the law).

115. *Northwest Publ'ns, Inc. v. St. Paul*, 435 N.W.2d 64 (Minn. Ct. App. 1989).

116. *Northwest Publ'ns, Inc.*, 435 N.W.2d at 64; *HRA*, 310 Minn. at 323, 251 N.W.2d at 625.

117. *Northwest Publ'ns, Inc.*, 435 N.W.2d at 65.

118. *Id.*

119. *Id.* at 67. In distinguishing from the *HRA* decision, the *Northwest Publications* court noted that in *HRA* the litigation had been commenced, where in the present case it was merely a possibility (albeit a likely possibility given the hostile stance taken by stakeholders in the decision). *Id.*

It is not clear that closure of public meetings reduces the risk of future litigation In some situations, the only feasible way to avoid litigation may be to abandon enactment of controversial proposals. The decision whether to adopt or abandon a proposal, however, is just the sort of decision which should be made openly.¹²⁰

Once again, without stating it outright, the court seemed to weigh not just the public interest in general, but the public *economic* interest. Thus, the *Northwest Publications* court seems to suggest that where the threat to the economic interest is unclear, or the best manner in which to protect the economic interest is too difficult to divine, courts should defer to the presumption of openness present in the open meeting law.

In 1990, on the heels of the *Northwest Publications* decision, the Minnesota Legislature amended the open meeting law to include an attorney-client privilege exception.¹²¹ The amended statute provided minimal guidance to the courts. The new exception read, “meetings may be closed if the closure is expressly . . . permitted by the attorney-client privilege.”¹²²

*Star Tribune v. Board of Education, Special School*¹²³ was the first case to apply this new statutory privilege exception. The *Star Tribune* court interpreted the exception as consistent with the contours of the privilege as developed in *HRA*.¹²⁴ But the court held, seemingly contra *Northwest Publications*, that the privilege exception operated when a public agency needed legal advice regarding “specific acts and their legal consequences,” even if litigation had not been explicitly threatened.¹²⁵ In doing so, it seemed to reach a different conclusion about what clarity of economic threat justified closed meetings.

Star Tribune involved a mandamus petition filed in the wake of a closed school board meeting.¹²⁶ The board closed the meeting to

120. *Id.*

121. *See id.*

122. MINN. STAT. § 471.05, subdiv. 1(d)(e) (1998) (current version at MINN. STAT. § 13D.01 (2004)). In 2000, the Minnesota Legislature renumbered chapter 471 as chapter 13D. MINN. STAT. § 13D.01 (2004).

123. 507 N.W.2d 869 (Minn. Ct. App. 1993).

124. *Minneapolis Star & Tribune Co. v. Hous. & Redev. Auth. (HRA)*, 310 Minn. 313, 323, 251 N.W.2d 620, 625 (Minn. 1976); *Star Tribune*, 507 N.W.2d at 871.

125. *Star Tribune*, 507 N.W.2d at 871; *Northwest Publ'ns, Inc.*, 435 N.W.2d at 68. 872.

126. *Star Tribune*, 507 N.W.2d at 870.

discuss financial mismanagement by the district superintendent.¹²⁷ When the meeting reopened, the board announced its suspension of the superintendent.¹²⁸ The board then scheduled a future closed meeting to discuss possible litigation against the superintendent.¹²⁹ The *Star Tribune* newspaper obtained a writ of mandamus from the trial court that ordered the follow-up board meeting to be open, unless litigation had “actually commenced.”¹³⁰ The board promptly appointed an investigator to obtain information on the superintendent’s misdeeds and make recommendations to the board.¹³¹ The board determined that this step “commenced” litigation. It then held several closed meetings, which eventually resulted in settlement with the superintendent.¹³² The board also appealed the writ of mandamus, arguing that the trial court misinterpreted the new statutory privilege exception to the open meeting law.¹³³ The *Star Tribune* court concluded that because legal action was “imminent or threatened,” government privilege should apply.¹³⁴ The court wrote, “[a] meeting may be closed pursuant to the attorney-client exception when a governing body seeks legal advice concerning litigation strategy, but not when the discussion focuses on the underlying merits that might give rise to future litigation.”¹³⁵ Once again, the court had somehow calculated the public interest but given no guidance as to how or why it reached its decision.

So, the *Star Tribune* and *Northwest Publications* courts disagreed on what constituted “threatened litigation” sufficient to trigger the attorney-client privilege exception.¹³⁶ More broadly, the two courts differed on how to balance the public interest in openness against the public interest in government privilege. Their disagreement demonstrated the difficulty in implementing a law that calls for judicial interpretation of the “public interest” every time the law is enforced. Tellingly, neither *Northwest Publications* nor *Star Tribune*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 871.

136. *See Star Tribune*, 507 N.W.2d at 869 and *Northwest Publ’ns, Inc. v. St. Paul*, 435 N.W.2d 64, 68 (Minn. Ct. App. 1989).

addressed the trouble government attorneys might have using those decisions as guides about when to close meetings.

IV. THE *PRIOR LAKE* DECISION

A. *Facts*

On February 7, 2000, the Prior Lake City Council held an open meeting to consider a conditional use permit (CUP) application filed by Ryan Contracting Co.¹³⁷ The council also considered a petition for an environmental impact study that sometimes accompanied CUP applications.¹³⁸ At the meeting, city staff members recommended the council approve the CUP and deny the petition.¹³⁹ The council members then heard testimony related to the application and petition.¹⁴⁰ When the testimony finished, Mayor Wes Mader introduced into the discussion a letter that had been sent to the City by Ryan Contracting, threatening litigation should the City deny its application or grant the petition for an environmental impact study.¹⁴¹ Mayor Mader then suggested the council retire into a closed executive session so the council members could discuss the matter with their attorney.¹⁴² With one of the council members disagreeing, the rest of the council adjourned into the closed meeting without him.¹⁴³

The *Prior Lake American* is a newspaper published in Prior Lake, Minnesota.¹⁴⁴ It brought a declaratory judgment action

137. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 732 (Minn. 2002).

138. *Id.* The record does not reflect who petitioned for the environmental impact study. *Id.* at 732 n.2.

139. *Id.* at 732.

140. *Id.*

141. *Id.* at 732–33. The letter expressly mentioned litigation, stating, “Ryan Contracting may seek legal action to ensure proper handling and compliance of this matter, as well as legal action to recover lost revenues and/or costs incurred as a result of actions by the city of Prior Lake.” *Id.* at 733.

142. *Id.* The meeting minutes show some debate over whether or not to enter into the closed session, with the Mayor’s argument that the “threat of litigation” allowed closure eventually winning the day. *Id.*

143. *Id.* When the open meeting reconvened, the Mayor and another council member made statements for the record explaining why they chose to hold the closed session. *Id.* at 733–34. They apparently felt that publicly discussing the matter with their attorney would compromise their ability to be frank and might affect them negatively in any future litigation. *Id.* They eventually granted the petition for the environmental impact study. *Id.* at 734.

144. *Id.* at 731.

asking the court to find that the Prior Lake City Council violated the Minnesota open meeting law when it closed its February 7, 2000, meeting.¹⁴⁵ The district court granted the city council's motion for summary judgment.¹⁴⁶ It held that because the council demonstrated there was a specific threat of litigation, the attorney-client privilege exception to the open meeting law applied.¹⁴⁷

The *Prior Lake American* appealed, and the Minnesota Court of Appeals affirmed the trial court decision.¹⁴⁸ The court of appeals found support in *Star Tribune's* holding that the privilege could operate even when litigation was imminent but not commenced.¹⁴⁹ It further noted that *Northwest Publications* was no longer dispositive, since it had been decided before the statutory enactment of the open meeting law's attorney-client privilege exception.¹⁵⁰ The *Prior Lake American* appealed to the Minnesota Supreme Court.

B. Reasoning

The supreme court's *Prior Lake* decision can be divided into two parts. First, the court reaffirmed the use of the *HRA* balancing test to settle conflicts between attorney-client privilege and the open meeting law.¹⁵¹ Second, it refined the category of "threatened" litigation first proposed in *HRA* and held this category subject to the *HRA* balancing test.¹⁵² But it noted that application of the privilege exception in situations of "threatened litigation" requires a more substantial showing of the need for confidentiality than in situations of "pending" litigation.¹⁵³

The supreme court began its analysis by reiterating the policy purposes of the open meeting law:

The Open Meeting Law serves several purposes: (1) "to

145. *Id.*

146. *Id.* at 734.

147. *Id.* In reaching its decision, the district court applied the *HRA* balancing test and concluded that the need for confidentiality in this situation outweighed the public's right to access. *Id.*

148. *Prior Lake Am. v. Mader*, No. C7-00-1909, 2001 WL 379090, at *1 (Minn. Ct. App. Apr. 17, 2001).

149. *Id.* at *2. The court of appeals wrote: "[i]n response to a threat from the contractor, [the city council] needed timely legal advice on specific acts and their consequences. That need justified the application of the exception." *Id.*

150. *Id.*

151. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 736 (Minn. 2002).

152. *Id.* at 736, 738. See *Minneapolis Star & Tribune Co. v. Hous. & Redev. Auth. (HRA)*, 310 Minn. 313, 323, 251 N.W.2d 620, 625 (Minn. 1976).

153. *Prior Lake*, 642 N.W.2d at 736, 738.

prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning [public bodies'] decisions or to detect improper influences"; (2) "to assure the public's right to be informed"; and (3) "to afford the public an opportunity to present its views to the [public body]."¹⁵⁴

It rooted these policies in the principle that a well-informed public is the bedrock of a successful democracy.¹⁵⁵ It then located the origins of the *HRA* balancing test in *Sacramento*, quoting at length from both cases.¹⁵⁶ The supreme court noted repeatedly during this discussion that courts have traditionally shied away from an "unfettered" application of the privilege exception.¹⁵⁷

Finally, the court dismissed Respondent's argument that the exception should apply *whenever* litigation is threatened.¹⁵⁸ In doing so, it stated that Minnesota's statutory privilege exception comports with the *HRA* balancing test and the *HRA* test should be used when applying the exception.¹⁵⁹ The court applied a canon of construction that invests ambiguous statutory terms with meanings acquired through repeated prior judicial use.¹⁶⁰ In constructing the statute, the court did not "discern any intent" on the part of the legislature to abrogate the privilege exception as defined in *HRA*.¹⁶¹ The court concluded, "attorney-client privilege is . . . constrained by the Open Meeting Law."¹⁶² In other words, the privilege exception to the open meeting law should be construed more narrowly than the general attorney-client privilege. Proper reduction of the privilege's scope must be determined on a case-by-case basis, since the precise interest supporting the privilege differs from case to case.

Once the court had established the relevance of the *HRA* test,

154. *Id.* at 735 (quoting *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1, 4 (Minn. 1983)).

155. *Id.*

156. *Id.* at 736.

157. *Id.*

158. *Id.* at 738.

159. *Id.* at 737-38.

160. "Words and phrases which have acquired an established meaning by judicial construction are deemed to be used in the same sense in a subsequent statute relating to the same subject matter." *Id.* at 737, (quoting *Minn. Wood Specialties, Inc. v. Mattson*, 274 N.W.2d 116, 119 (Minn.1978)).

161. *Id.*

162. *Id.* at 737-38.

it applied that test to the circumstances of *Prior Lake*.¹⁶³ In contrast with *HRA*, *Prior Lake* involved threatened litigation related to a governmental decision that had not yet been made.¹⁶⁴ The court worried that if a public body closes its meetings when deliberating whether or not to take some action, even if litigation is a possible result of their decision, the closure will prevent the public from providing input and exercising oversight.¹⁶⁵ Thus, the public's interest in open meetings when a decision is being contemplated appears more significant than its interest in open meetings when the consequences of a prior decision are being discussed.¹⁶⁶ This conception of the public interest is consistent with that suggested by previous Minnesota open meeting law decisions, in that it appears to place a premium on the public's economic interests.¹⁶⁷

The *Prior Lake* court did not claim that the privilege exception will never operate prior to a substantive decision. But it noted that invoking the privilege under those circumstances is "fraught with peril."¹⁶⁸ The court held that since the *Prior Lake* city council invoked the privilege exception unnecessarily during its decision-making process, the exception should not apply.¹⁶⁹

In his dissent, Justice Gilbert also applied the *HRA* test, but arrived at a different result.¹⁷⁰ He felt the policy interest of keeping this particular meeting open did not outweigh the need for the council to receive confidential advice from its attorney.¹⁷¹ He claimed the majority ignored the facts of the case and surreptitiously applied a bright-line rule precluding the privilege exception unless litigation has actually been commenced.¹⁷² Justice Gilbert suggested that use of this bright-line rule would ultimately

163. *Id.* at 738.

164. *Id.* at 741.

165. *Id.* at 741–42.

166. *Id.* See Leslie, *supra* note 33, at 486–90 and text accompanying for arguments supporting the position that pre-conduct legal advice to public officials should not be covered by the attorney-client privilege.

167. For instance, in *Channel 10*, the court noted while discussing the public interest that, "[w]here tort claims against the school district are being discussed by and between the school board and its attorney, disclosure might not be in the best interests of the public." *Channel 10, Inc. v. Indep. Sch. Dist. No. 709*, 298 Minn. 306, 322, 215 N.W.2d 814, 826 (1974). One can infer here that the term "best interests" actually refers to "economic interests."

168. *Prior Lake*, 642 N.W.2d at 741.

169. *Id.* at 742.

170. *Id.* (Gilbert, J., dissenting).

171. *Id.* at 743.

172. *Id.*

discourage individuals from seeking government office and could result in increased legal costs to the public.¹⁷³ To support his position, Justice Gilbert invoked the potentially negative economic consequences of narrowing the privilege exception. For instance, he wrote:

When there is a real threat of litigation relating to their decisions, [public officials] should be allowed to seek legal counsel. This fundamental proposition is particularly compelling when, as here, the threatened litigation includes claims for damages against the city itself Without legal advice, the council may fail to take proper legal considerations into account in making its decision and unwittingly expose its taxpayer constituents to potentially millions of dollars of damages. . . . [I]f a mistake is made and the city unknowingly or unwittingly makes a legal blunder because of its inability to consult with its attorney in private, the taxpayers are the ones who really lose.¹⁷⁴

While Justice Gilbert's application of the *HRA* test did not carry the day, he did explicitly provide an economic rationale for his conception of the public interest.¹⁷⁵ Ironically, the extra analysis provided in his dissent gives practitioners more guidance than the majority opinion; it listed specific economic factors, including the threat of money damages and the potential impact on taxpayers.¹⁷⁶

V. ANALYSIS OF THE *PRIOR LAKE* DECISION

The Minnesota Supreme Court took a positive step in *Prior Lake* by constricting the attorney-client privilege exception to the open meeting law. Both elements of its decision were crucial to reestablishing the force of the open meeting law: the reaffirmation of the *HRA* balancing test (which had been imperiled by the *Star Tribune* decision), as well as the refinement of the "threatened" litigation category.¹⁷⁷ Furthermore, its ruling preserved the

173. *Id.* at 745.

174. *Id.* at 743, 745.

175. *Id.* at 745.

176. *Id.* at 743–45.

177. *See* Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510, 517 (Minn. 1983) ("Legislative history suggests that the Open Meeting Law was enacted to prevent public bodies from dissolving into executive session on important but controversial matters, and to insure that the public has an opportunity both to detect improper influences and to present its views."). *See also* Tanick, *supra* note

supposition that the government attorneys' real client is the public, and not the officials who represent the public—a supposition necessary to ensure honest and efficient government.¹⁷⁸ Unfortunately, the court did not take the final and necessary step of stating explicitly the values it weighed in making its determination. Its decision provides courts with a tool to use when resolving similar conflicts. Unfortunately, it did not provide practitioners with effective guidance in how to know when a closed meeting is acceptable.

The *HRA* balancing test is the best way to ensure efficient use of the privilege exception.¹⁷⁹ It encourages government agencies to weigh the need for absolute confidentiality against the public's interest in open deliberations before closing a meeting. Since officials know that they will not be sued under the open meeting law if they meet publicly, it encourages them to err on the side of openness.¹⁸⁰ A bright-line test allowing for invocation of privilege whenever litigation is threatened, or even mentioned, would inevitably result in unnecessary use of the privilege.

Furthermore, unconditional extension of the privilege to pre-conduct legal advice—advice given before the government takes action that could induce litigation—would have severely compromised the policy purposes of the open meeting law.¹⁸¹

92, at 9. Writing in 1989, Mr. Tanick lamented, “The Minnesota Open Meeting Law was once regarded as the most expansive legislation of its kind in the country for maximizing oversight of the workings of government [But the] Sunshine laws are no longer so luminescent.” *Id.* Mr. Tanick was undoubtedly cheered by the *Prior Lake* ruling.

178. This is a contentious position that is hotly debated by commentators. See Ellinwood, *supra* note 7, at 1315–17; Leslie, *supra* note 33, at 479; Salkin, *supra* note 34, at 301–02; WRIGHT & GRAHAM, *supra* note 51, § 5475.

179. It is useful to compare the *HRA* test with tests from more restrictive jurisdictions. For instance, Florida courts so narrowly construe their attorney-client privilege exception that they acknowledge the results generate uncertainty but refuse to alter their approach. See Radson & Waratuke, *supra* note 7, at 812–13.

180. Unfortunately for advocates of open government, enforcement of open meeting laws has proved difficult and often ineffective. The author of *Minnesota Open Meeting Law* surveyed the enforcement mechanisms available in Minnesota—injunctions, invalidation of government actions, criminal penalties and fines—and concluded that officials' willingness to conduct open meetings depends as much on their perceived moral duty to the public as to the coercive power of the law. *Minnesota Open Meeting Law*, *supra* note 19, at 419.

181. See Leslie, *supra* note 33, at 490–91. Professor Leslie suggests that extension of the privilege to pre-conduct legal advice may encourage noncompliance since it gives a client an advantage in knowing how to decrease the

Almost any government decision can create the opportunity for litigation. The potential for litigation is but one of the factors public officials consider when making decisions.¹⁸² It would be naïve to think officials could engage in discussions about the costs and benefits of proceeding with a decision in the face of litigation without considering other policy and political factors.¹⁸³ If the public is not privy to those discussions, it cannot effectively supervise the use of its resources or assess the wisdom of its representatives.¹⁸⁴ By constricting the privilege exception to its absolute minimum scope when applied to pre-conduct legal advice, the *Prior Lake* court preserved citizens' ability to guarantee effective government.

Unfortunately, *Prior Lake* fails to give legal practitioners effective guidance. The court left a number of very important questions unanswered. For instance: How does one determine the public interest? What if the person making that determination is an attorney whose usual function is to serve elected officials specially charged with acting in the public interest? What if the attorney's and official's conceptions of the public interest clash? How is the attorney to proceed? Most importantly, how will an attorney know when a closed meeting will survive judicial scrutiny? Justice Gilbert's dissent at least gives practitioners some touchstone as to how the court goes about calculating the public interest. Government lawyers, government clients, and the public at large

odds of detection of misconduct and minimize the potential sanctions that might result. *Id.* (citing Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 29-30 (1998)).

182. In its amicus brief, the League of American Cities makes the standard argument that if a government attorney is forced to discuss the strengths and weaknesses of a public agency's legal position, the government will be disadvantaged in future litigation. Brief for League of Minnesota Cities as Amicus Curiae Supporting Respondents at *13, *Prior Lake Am. v. Mader*, 642 N.W.2d 729 (Minn. 2002) (No. C7-00-1909), 2001 WL 34677566. But it is unlikely, given the liberal discovery rules available, that much of what could be communicated in an abstract discussion of potential liability would be protected or would benefit the government if kept secret.

183. In *Prior Lake*, the supreme court noted that the record did not reflect the content of the city council's closed Feb. 7, 2000, meeting, but it seemed dubious that what occurred behind closed doors contributed in any way to "litigation strategy" or was limited to strictly legal advice. *See Prior Lake Am. v. Mader*, 642 N.W.2d 729, 740 (Minn. 2002).

184. "When the public is only allowed to witness the final outcome of deliberations, the public is denied access to governmental decision-making because the reasoning behind the final outcome is not disclosed." Pupillo, *supra* note 14, at 1179.

will benefit if in similar future decisions the majority specifies the component parts of the public interests it balances.

VI. CONCLUSION

Before *Prior Lake*, the attorney-client privilege exception threatened to defang Minnesota's open meeting law.¹⁸⁵ Now, the *HRA* balancing test is well established and courts will not likely allow the privilege to operate during decision-making except in extreme situations. Two open meeting law cases decided since *Prior Lake* confirm that *Prior Lake* protected the public interest without compromising the government's ability to address prospective litigation.¹⁸⁶ One case aggressively promoted the public interest in open meetings;¹⁸⁷ the other case protected a city council's ability to use the privilege exception when appropriate.¹⁸⁸ Together, they show that the *Prior Lake* test is an effective tool Minnesota courts can use to decide when the privilege exception should operate. The fact that two similar cases arose right on the heels of *Prior Lake* also shows, however, that *Prior Lake* failed to set forth guidelines specific enough that practitioners can rely on them to stay out of court.

185. See *Prior Lake*, 642 N.W.2d at 742.

186. *Free Press v. County of Blue Earth*, 677 N.W.2d 471 (Minn. Ct. App. 2004) (reiterating the narrow application of the attorney-client privilege exception to the open meeting law and requiring a municipality to state specific grounds for using the privilege to close a meeting); *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435 (Minn. Ct. App. 2005) (using the *Prior Lake* balancing test, the court held the attorney-client privilege exception operated where city council denied parade permit and applying organization threatened litigation and took several affirmative steps toward filing suit).

187. See *Free Press*, 677 N.W.2d at 477. The court wrote, "Narrow construction of exceptions to the open meeting law advances the legislative purpose to support broad public access to the decisions of public bodies." *Id.*

188. See *Brainerd Daily Dispatch*, 693 N.W.2d at 443.