SAINT PAUL LEGAL LEDGER
MINNESOTA LAWYER

The Minnesota Judicial Center stands in the Capitol complex in St. Paul.

Briefly: Who makes the law in Minnesota?

By: Eric J. Magnuson July 20, 2021

Until recently, if you asked most lawyers, some judges, and certainly the Minnesota Supreme Court, which judges make law in Minnesota, the answer would have been simple. The Supreme Court. The common wisdom is that the Minnesota Court of Appeals is an error-correcting court, and not a lawmaking court. And the trial courts are, as former Minnesota Supreme Court Justice and now federal Judge Joan Ericksen once said, error-creating courts.

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The discussion probably would've been short and sweet. The Minnesota Supreme Court has unequivocally said that it makes the law in Minnesota, and Court of Appeals' opinions do not. In Willis v. County of Sherburne, 555 N.W.2d 277, 282 (Minn. 1996), the Supreme Court said that decisions of the Court of Appeals "do[] not represent a definitive statement of the law in Minnesota."

In the same vein, the Supreme Court has noted that the Court of Appeals is not a court of "last resort" with respect to statutory construction. Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc., 637 N.W.2d 270, 276 (Minn. 2002). Minn. Stat. Ann. § 645.17(4) provides that when a court of last resort has construed the language of a statute, in enacting subsequent laws on the same subject matter, the Legislature intends the same construction to be placed the new language. The Supreme Court specifically held that this statute does not apply to a Court of Appeals' interpretation of the statutory provision. Id.

The 8th U.S. Circuit Court of Appeals has also held that it is not bound to follow the decisions of the Minnesota Court of Appeals, and that those decisions should be followed only when they are the best evidence of state law. BancInsure, Inc. v. Highland Bank, 779 F.3d 565 (8th Cir. 2014).

But the times, they are a-changing. I recently wrote three columns chronicling the changes in how Court of Appeals' decisions previously designated as published or unpublished are treated. See Eric Magnuson, David Herr, and Erica Holzer, "Clearing up confusion over unpublished opinion copies," Minnesota Lawyer (June 15, 2020); Eric J. Magnuson and

Geoffrey H. Kozen, "New rules for nonprecedential opinions," Minnesota Lawyer (August 10, 2020); Eric J. Magnuson, "Asking for publication," Minnesota Lawyer (February 23, 2021). I also wrote about the Court of Appeals' recent declaration that its opinions become the law the minute they are issued, with no waiting time for the Supreme Court to weigh in. See, Eric J. Magnuson, "What is precedent, and when does it arise?" Minnesota Lawyer (March 5, 2021).

All of this might have been fodder for nothing more than a dry academic discussion of stare decisis and judge-made law. However, the issue was drawn into sharp focus recently when the Court of Appeals declared, in an opinion designated as precedential, that there is no such thing as a common-interest privilege in Minnesota. That declaration is now ostensibly the law in Minnesota.

Energy Policy Advocates v. Ellison, 2021 WL 2200414 (EPA) involved the Attorney General's refusal to produce documents to a public-interest organization seeking the documents under Minnesota's Government Data Practices Act (MGDPA). The court's decision addressed several types of documents, and much of the opinion relates to questions of whether certain documents truly involved "individuals" under the MGDPA. There were several categories of documents containing communications between the Attorney General and lawyers for other states or government entities. The Attorney General maintained that those communications involved privileged information protected by the common-interest doctrine. These included: (1) communications between the Attorney General's office and attorneys general from other states concerning proposed or existing multi-state litigation; (2) communications with the federal Department of Natural Resources and other state attorneys general involving a potential joint amicus brief to the U.S. Supreme Court; and, (3) communications with other states relating to pending antitrust litigation.

The common-interest doctrine allows privileged information to be disclosed to a third party without waiving privilege if the parties share a common legal interest and the disclosure is for the purpose of developing a common legal strategy. The Restatement (Third) of the Law Governing Lawyers § 76 (2000) expressly embraces the privilege:

If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68- 72 that relates to the matter is privileged as against third persons.

That's the law that most practitioners in Minnesota thought applied to their cases. It is a principle that has been used in thousands of cases over the years. So it was no surprise that the trial court agreed with the Attorney General that the documents at issue were protected by the common-interest doctrine. But the Court of Appeals reversed, asserting that the common-interest doctrine has not been recognized in Minnesota:

"Respondents may rely on the common-interest doctrine in response to a data practices request only to the extent that the application of the doctrine is authorized by section 13.393. That statute provides, in relevant part, that the data of 'an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility.' Minn. Stat. § 13 .3 93. The attorney-client privilege is codified in a statute and is protected by a rule of court. See Minn. Stat. § 595.02, subd. 1(b); Minn. R. Civ. P. 26.02(d). But the common-interest doctrine is not embodied in a statute or a rule. The common-interest doctrine might be considered a 'professional standard' if it were recognized by law, but—as [attorney general concedes]—it has not been recognized in Minnesota. The rules of professional conduct provide that 'a lawyer shall not knowingly reveal information relating to the representation of a client,' Minn. R. Prof.

Conduct 1.6(a), except in eleven enumerated circumstances, but none of the enumerated exceptions incorporates the common-interest doctrine, see Minn. R. Prof. Conduct 1.6(b).

"Respondents urge this court to recognize the common-interest doctrine for the first time, but we decline the invitation to do so. As we have stated many times, 'the task of extending existing law falls to the Supreme Court or the Legislature, but it does not fall to this court.' Tereault v. Palmer, 413 N.W.2d 283, 286 (Minn. App. 1987), review denied (Minn. Dec. 18, 1987). Because the common-interest doctrine is not recognized in Minnesota, its application is not authorized by section 13.393. Accordingly, the common-interest doctrine is not an exception to the disclosure requirements of the MGDPA. Thus, the district court erred by applying the common-interest doctrine."

Slip. Op. at 25-26.

Technically, the Court of Appeals might not have really "made" the law when it said the common-interest privilege was not recognized in Minnesota, and that it would not take that step. Still, there are two major flaws with the Court of Appeals' conclusion.

First, the court was just wrong. The common-interest privilege has been recognized in this state for 80 years. In Schmitt v. Emery, the Minnesota Supreme Court said:

"Where an attorney furnishes a copy of a document entrusted to him by his client to an attorney who is engaged in maintaining substantially the same cause on behalf of other parties in the same litigation, without an express understanding that the recipient shall not communicate the contents thereof to others, the communication is made not for the purpose of allowing unlimited publication and use, but in confidence, for the limited and restricted purpose to assist in asserting their common claims. The copy is given and accepted under the privilege between the attorney furnishing it and his client. For the occasion, the recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents." 211 Minn. 547, 554, 2 N.W.2d 413, 417 (1942).

While that part of the Schmitt decision recognizing the initial privilege of the witness statement in question was later overruled in Leer v. Chicago, M., St. P. & P. Ry. Co., 308 N.W.2d 305, 309 (1981) (holding that a statement by an employee who is a mere witness is not the statement of the client), the recognition of the common-interest privilege has never been recanted by the Minnesota Supreme Court.

Schmitt is found nowhere in the Court of Appeals' opinion, and apparently was not cited to the court by the parties. The fact that the parties fail to cite the controlling legal authority in a case is no excuse for a wrong decision. The Minnesota Court of Appeals and the Minnesota Supreme Court have both recognized the obligation of the appellate courts to correctly decide an issue even if it is not adequately briefed by the parties. See Jerry Mathison Const., Inc. v. Binsfield, 615 N.W.2d 378 (Minn. Ct. App. 2000) (citing State v. Hannuksela, 452 N.W.2d 668, 673 n.7 (Minn. 1990). In Binsfield, the Court of Appeals observed that it had an obligation to decide cases in accordance with existing law regardless of counsels' oversights. 615 N.W.2d at 381. And the Minnesota Supreme Court said the same thing in Hannuksela, in no uncertain terms: "[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." 452 N.W.2d 674 n.7.

As I noted above, there is a second troubling aspect to the Court of Appeals' decision. When it said that it couldn't make the law — that it is up to the Supreme Court to make new law, and all the Court of Appeals was doing was declaring that there wasn't any law recognizing the privilege in this state as yet — it was, in fact, making the law.

Precedent means that lower courts are bound to follow a particular decision. And by making its opinion precedential, the Court of Appeals did, in fact, make the law regarding the common-interest privilege. Some will argue that the district courts and the Court of Appeals itself are now bound to reject any claims of common-interest privilege.

That is a monumental development. Parties to litigation who seek to collaborate in prosecuting or defending against certain claims may well have their confidential strategies laid bare to the world because they're not protected by privilege or by the work product doctrine.

The impact of the decision goes far beyond the particular case. Because the Court of Appeals decided that its opinion was precedential, and because the Court of Appeals has decided that its opinions become binding precedent as soon as they are issued, even if the Minnesota Supreme Court ultimately steps in and fixes things, it could take a year or more to get a different answer. The Supreme Court would have to grant a petition for further review, the parties would have to brief the issue, the court would hold arguments, and then issue an opinion. In the intervening months, however, the law in Minnesota would arguably be what the Court of Appeals declared it to be (more accurately not to be), and the district courts would just as arguably be required to follow it. And there is the rub.

The fact that the Court of Appeals has said a rule of law is so does not mean you can rely on it — the Supreme Court may decide in the next case that the Court of Appeals got it wrong. In Saric v. Stover, 451 N.W.2d 65 (Minn. Ct. App. 1990) the Court of Appeals held that language directing the entry of judgment rendered a district court order denying a motion for a new trial nonappealable. It took the Minnesota Supreme Court eight years to reject that holding as "contrary to the provisions of the Rules of Civil Appellate Practice." Marzitelli v. City of Little Canada, 582 N.W.2d 904, 906 (Minn. 1998). And counsel for the appellant in Marzitelli, who had relied on the Court of Appeals' interpretation of the appellate rules, found that his client's appeal, filed in the time allowed by Saric, was suddenly filed too late.

In another example, the Court of Appeals considered judicial proceedings with regard to arbitrations to be special proceedings. See Mely v. State Farm Ins. Co., 530 N.W.2d 216, 217 (Minn. Ct. App. 1995). However, in Pulju v. Metropolitan Property & Cas., 535 N.W.2d 608 (Minn. 1995), the Minnesota Supreme Court rejected this conclusion, concluding that it was "contrary to the cumulative discussions of the nature of special proceedings" contained in Chapman v. Dorsey, 230 Minn. 279, 283, 41 N.W.2d 438, 440–41 (1950), and Willeck v. Willeck, 286 Minn. 553, 554, 176 N.W.2d 558, 559 n.1 (1970)." Pulju, 535 N.W.2d at 609. The point is that even when the Court of Appeals says it is making the law, it does not have the final word.

Sometimes the Court of Appeals doesn't even follow its own decisions. In In re Rodriguez, 506 N.W.2d 660 (Minn. Ct. App. 1993), a panel of the Court of Appeals expressly rejected a prior panel's decision on a nearly identical issue with regard to a mental health commitment issue, "preferring to follow instead the views expressed" by the dissenting judge in the earlier case. 506 N.W.2d at 663. In Fair Isaac Corp. v. Gordon, the Court of Appeals stated that it "may overrule its own precedent if there is a compelling reason to do so." A16-0274 (Minn. Ct. App. filed Dec. 27, 2016), rev. granted March 28, 2017, appeal dismissed August 21, 2017.

Fortunately, the Attorney General has filed a petition for further review by the Minnesota Supreme Court. And the significance of the decision is underscored by the fact that the Minnesota State Bar Association, the Minnesota Association for Justice, and the Minnesota Defense Lawyers Association have filed a joint request for leave to appear as amici supporting the recognition (or perhaps resurrection) of the common-interest privilege. The extraordinary collaboration of these three organizations, representing the breadth of

litigation practice in the state, should send a clear message to the Supreme Court about the need to grant further review in this case.

This article is not intended to argue for or against the common-interest privilege and its application in EPA. That's a substantive and evidentiary issue beyond the scope of a column dealing with appeals.

But from my perspective, EPA most clearly points out the pitfalls of the confluence of two recent developments — the express denomination of certain Court of Appeals opinions as precedential, and the declaration by the Court of Appeals that precedent arises immediately, regardless of whether the Minnesota Supreme Court is ever asked to review an opinion designated as precedential.

So what's a lawyer to do? First, be careful about what you say to anyone who is not your client. Second, consider whether you have a good faith basis to resist application of EPA until the Supreme Court has weighed in. As I said in my March column, "What is precedent, and when does it arise?", the Court of Appeals itself has said that when the Supreme Court grants further review of a decision of the Court of Appeals, that decision has only "minimal precedential value." Fabio v. Bellomo, 489 N.W.2d 241, 247 n.1 (Minn. Ct. App. 1992). Based on that and the clear statements of the Minnesota Supreme Court about who makes the law in Minnesota, it seems like you have a pretty good argument that it's not over until it's over, and the Supreme Court has spoken.

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