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The Commission to Investigate the Possible Removal of Scott County Attorney, R. Kathleen Morris

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THE COMMISSION TO INVESTIGATE THE POSSIBLE REMOVAL OF SCOTT COUNTY ATTORNEY, R. KATHLEEN MORRIS

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On March 8, 1985, a Petition to Remove Scott County Attorney R. Kathleen Morris from office was filed with the Governor of Minnesota.[1] The Petition was signed by Cindy Lee Buchan, who had been a defendant in a child sex abuse case in Scott County.[2] While Minnesota law requires only a single signature on a petition,[3] this petition contained approximately 3000 supporting signatures.

Scott County is located south of the Minneapolis-Saint Paul metropolitan area. In 1983 and 1984 the Scott County Attorney, R. Kathleen Morris, charged twenty-four persons with child sexual abuse. Of the twenty-four charged, one pled guilty and was used as a State's witness, and later was sentenced to prison. Two of the defendants were acquitted in a much-publicized trial in September of 1984. Ms. Morris dismissed all charges against the remaining twenty-one defendants on October 15, 1984.

The charges aimed at Ms. Morris in the removal Petition included allegations that she caused the arrest of citizens while

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1. *See* Petition to Remove R. Kathleen Morris From the Office of Scott County Attorney (March 8, 1985) [hereinafter Petition to Remove].

2. *See id.* at 5.

3. Minn. Op. Att'y Gen. No. 475-B (Sept. 26, 1945).

knowing there was insufficient probable cause to justify the issuance of criminal complaints, and that she caused the forcible removal of children as young as eighteen months of age from their parents' home, while knowing there was insufficient probable cause establishing the necessity of the children's removal.[4] The Petition also charged Ms. Morris with the development of false allegations by children of sexual abuse, the secreting and suppressing of evidence, the destruction of material evidence, the suborning of perjury, misrepresentations to the court, and intentional violations of court orders.[5]

The Minnesota Attorney General's Office reviewed this Petition and advised the Governor that the Petition in itself was sufficient to trigger the removal hearings pursuant to sections 351.03 and 351.04 of the Minnesota Statutes.[6] Section 351.03 provided that the governor may remove from office any county official who appears, upon competent evidence, to be guilty of malfeasance or nonfeasance, after first giving the official an opportunity for a hearing in his or her defense.[7] Section 351.04 required the governor to "appoint a special commissioner to take and report the testimony for and against [the county official] to be used on the hearing."[8]

It was the rare person in the State of Minnesota at this point who did not have an opinion about R. Kathleen Morris. The state population appeared to be about as evenly divided for and against Ms. Morris and her actions as it had ever been on any issue in the state. In a statewide poll taken by the Minneapolis Star and

4. Petition to Remove, *supra* note 1, at 1-2.

5. *Id.* at 2-4.

6. MINN. STAT. §§ 351.03-04 (repealed 1986). Section 351.03 of the Minnesota Statutes provided:

> The governor may remove from office any clerk of the supreme court or a district court, judge of probate, judge of any municipal court, justice of the peace, court commissioner, sheriff, constable, coroner, auditor, register of deeds, county attorney, county superintendent of schools, county commissioner, county treasurer, or any collector, receiver, or custodian of public moneys, when it appears to him by competent evidence, that either has been guilty of malfeasance or non-feasance in the performance of his official duties; first giving to such officer a copy of the charges against him and an opportunity to be heard in his defense.

Id. 351.03. Section 351.04 of the Minnesota Statutes provided: "When charges are made against any such officer, the governor shall appoint a special commissioner to take and report the testimony for and against him to be used on the hearing. Each witness shall subscribe his name to his testimony when the same is reduced to writing." *Id.* § 351.04. Subsequent to the proceedings involving Kathleen Morris, the Minnesota Legislature repealed 351.03 and -.04, and adopted a new procedure for the removal of elected county officials. *See id.* §§ 351.14-.23 (1986)(setting forth statutory scheme for removal of elected county officials). For a discussion of §§ 351.14-.23, see *infra* notes 131-34 and accompanying text.

7. *Id.* § 351.03. For the text of § 351.03, see *supra* note 6.

8. *Id.* § 351.04. For the text of § 351.04, see *supra* note 6.

Tribune, just before hearings commenced, there were few Minnesotans who had "no opinion" on this issue.[9] Additionally, Ms. Morris' attorney had raised the spectre of sexism, and cries of "witch hunt" could be heard from Ms. Morris' supporters. Not only would this hearing be a difficult legal case, but it was also rapidly becoming a politically explosive one.

As a female district court judge in a district north of the metropolitan area of Minneapolis-Saint Paul, I was far removed from the problems being encountered in Scott County until Governor Perpich requested me to serve as special commissioner pursuant to section 351.04 of the Minnesota Statutes.[10] I accepted the Governor's request to serve as special commissioner with some anxiety and concern, but with confidence that Ms. Morris would receive a fair hearing.

While pursuant to Minnesota state statutes only one commissioner may formally hear the charges and report to the governor on a petition to remove a county official,[11] the Governor appointed two other people to serve as assistants to the Commissioner.[12] The first was Julius Gernes, a highly respected county attorney for Winona County.[13] Mr. Gernes was a member of the Lawyer's Professional Responsibility Board and treasurer of the Minnesota County Attorney's Association. The second was Irene Scott, the first woman to become a partner in a major Minneapolis law firm.[14] Ms. Scott has been a practicing attorney since 1952 and was one of the original members of the State Ethical Practices Board.

Upon appointment of this Commission, the Governor stated he would leave the establishment of all times, dates, and procedures of the hearings to the Commission, and would look to me to make a clear recommendation to the Governor upon completion of the hearings. His final statement increased my anxiety. He stated, "I would expect to follow that recommendation."

The Governor asked the Attorney General to select legal counsel to present evidence to the Commission.[15] Attorney General Hubert H. Humphrey III did this by appointing an independent counsel, Kelton Gage, from Mankato, Minnesota. Mr. Gage was a former president of the Minnesota Bar

9. Minneapolis Star & Tribune, May 19, 1985, at 1A, col. 1.
10. *See* MINN. STAT. § 351.04 (1986). For the text of § 351.04, see *supra* note 6.
11. *See id.*
12. *See* Minn. Exec. Order No. 85-10 at 2 (1985).
13. *Id.*
14. *Id.*
15. *Id.*

Association. He had also served as a member of the Lawyer's Professional Responsibility Board, and as special counsel to the Board on Judicial Standards investigating charges of misconduct against judges.

The appointment of the Commission by the Governor was made on March 25, 1985.[16] We had to determine a variety of legal issues, as well as proper procedure and the proper type of hearing. The last recorded removal hearing in Minnesota was in 1941,[17] and, including that case, there had been only four removal cases since sections 351.03 and 351.04 of the Minnesota Statutes were passed in 1881.[18]

It was clear that we needed assistance to complete the necessary research. Initially, the Governor had anticipated that the Attorney General would appoint a special counsel who would work for the Commission. Since the special counsel was to present evidence,[19] however, we believed that the special counsel was in a somewhat prosecutorial role. Therefore, it seemed inappropriate to have Mr. Gage also advising the Commission. Since we were to be the factfinders, we decided we must remain at arm's length from Mr. Gage, dealing with him only in the presence of the attorneys for the Petitioner and for Ms. Morris.

Our need for a law clerk or attorney to serve us, however, was obvious, given all the research needed before we could even commence planning the hearing itself. The governor's office set up a fund for such a staff person. Kim Mesun, my law clerk, was then able to serve as a part-time attorney for the Commission.[20]

The procedural issues facing us were as difficult as they were numerous. Decisions had to be made regarding whether the hearing should be open or closed and whether the evidence should be presented in an adversarial style. We also had to determine whether administrative rules were sufficient or if the Minnesota Rules of Evidence should apply in order to obtain the statutory requirement of "competent evidence."[21] The scope of media coverage, including allowance of television cameras in the hearing,

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16. *Id.* at 3.

17. *See In re* Olson, 211 Minn. 114, 300 N.W. 398 (1941).

18. *See id.*; *In re* Mason, 147 Minn. 383, 181 N.W. 570 (1920); State *ex rel.* Martin v. Burnquist, 141 Minn. 308, 170 N.W. 201 (1918); State *ex rel.* Kinsella v. Eberhart, 116 Minn. 313, 133 N.W. 857 (1911).

19. *See* Minn. Exec. Order No. 85-10 at 2 (1985) (Attorney General to appoint counsel to organize and present evidence to the Commission).

20. Kim Mesun's immediate assignment included researching the Commission's subpeona power and the definitions of malfeasance, misfeasance and nonfeasance. She was also to complete briefs on all Minnesota removal cases.

21. *See* MINN. STAT. § 351.03 (repealed 1986) (governor can remove county officials upon competent evidence). For the text of § 351.03, see *supra* note 6.

would also be decided. An additional major concern was the question of discovery. We were already being asked what, if any, limitations would be set. For example, it was not clear whether discovery should be limited to statements made in the Petition or whether children should be deposed. Finally, we needed to establish some time table as the pressure was immense to begin this hearing as soon as possible.

To begin to answer some of the questions posed, we reviewed the Minnesota precedent dealing with removal procedures. The first case, *State ex rel. Kinsella v. Eberhart,*[22] involved a county attorney, John Kinsella. In *Eberhart* a petition for removal was filed against Kinsella, charging that he was guilty of malfeasance and nonfeasance.[23] Kinsella allegedly had refused and neglected to advise the county commissioners on certain matters and had failed to prosecute violations of the liquor law.[24] Furthermore, seven indictments had been returned against him for libel and circulating obscene literature.[25] After evidence was taken, the governor removed Kinsella from office.[26]

The Supreme Court of Minnesota reviewed the governor's actions and noted that the terms malfeasance and nonfeasance have no technical meaning.[27] The supreme court stated that conviction of a crime was not essential, and that general incompetency and neglect of duty constituted sufficient grounds for removal.[28] The court concluded that there was sufficient evidence to support Kinsella's removal from office.[29]

In 1918, the Supreme Court of Minnesota was again faced with whether a removal was proper in *State ex rel. Martin v. Burnquist.*[30] In *Burnquist* a petition was presented to the governor for removal of a county probate judge who, it was alleged, made antiwar and pro-Germany statements during the time that the United States was at war with Germany.[31] The court stated that the misconduct complained of must have some connection with the performance of the judge's official duties in order to remove him from office.[32] The court determined that the county probate judge's

22. 116 Minn. 313, 133 N.W. 857 (1911).
23. State *ex rel.* Kinsella v. Eberhart, 116 Minn. 313, 314, 133 N.W. 857, 858 (1911).
24. *Id.* at 321, 133 N.W. at 860.
25. *Id.*
26. *Id.* at 314, 133 N.W. at 858.
27. *Id.* at 322, 133 N.W. at 861.
28. *Id.*
29. *Id.*
30. 141 Minn. 308, 170 N.W. 201 (1918).
31. State *ex rel.* Martin v. Burnquist, 141 Minn. 308, 320, 170 N.W. 201, 202 (1918).
32. *Id.* at 322, 170 N.W. at 203.

statements had no relation to the performance of his duties, and therefore concluded that there was no basis for removal.[33]

The third and probably the most interesting of all the removal cases, *In re Mason,* [34] involved a petition to remove Hennepin County Attorney William Nash.[35] In *Mason* Nash was charged with receiving bribes and conspiring with persons to receive, transport, and conceal intoxicating liquor during the prohibition period.[36] Nash had been criminally charged in a United States federal court with this offense.[37] The removal petition was later amended to include additional allegations that Nash received a rather large bribe for using his official position to prevent someone from being brought before the Grand Jury of Hennepin County, and that he received an even larger bribe for seeing to it that four prostitutes would receive only fines and no prison sentences.[38]

After an extended hearing, the governor determined that the allegations were true and that the county attorney's conduct constituted malfeasance.[39] Therefore, the governor made an order removing Nash from the office of county attorney.[40] The Supreme Court of Minnesota reviewed the removal proceedings and determined that there was substantial evidence supporting the removal decision.[41] The court further determined that there was no statutory basis for not allowing more than one set of charges to be considered in the decision and no reason why the petition could not be amended to include additional charges which, if proved, would have a direct and material bearing on the removal question.[42] The court concluded that there was a substantial basis for the governor's decision, and therefore affirmed the removal decision.[43]

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33. *Id.* at 322-23, 170 N.W. at 203.
34. 147 Minn. 383, 181 N.W. 570 (1920).
35. *In re* Mason, 147 Minn. 383, 385, 181 N.W. 570, 571 (1920).
36. *Id.*
37. *Id.*
38. *Id.* at 385-86, 181 N.W. at 571.
39. *Id.* at 385, 181 N.W. at 571.
40. *Id.*
41. *Id.* at 390, 181 N.W. at 573. The Supreme Court of Minnesota noted that the removal power is granted to the governor by an act of the legislature, and thus is not an exercise of power which the state constitution vests in the governor as chief executive office of the state. *Id.* at 385. 181 N.W. at 571. Since the removal action is not an exercise of executive power by the governor, the action is subject to review by the court. *Id.* (citing State *ex rel.* Kinsella v. Eberhart, 116 Minn. 313, 320-21, 133 N.W. 857, 860 (1911)).
42. *Id.* at 387, 181 N.W. at 572. In addition to determing that more than one set of charges could be considered in the removal decision, the court determined that proof of offenses other than those charged in the petition which were similar in nature to the offenses charged was admissible to show a general scheme or course of conduct for purposes of corroboration. *Id.* at 390, 181 N.W. at 573.
43. *Id.* at 391, 181 N.W. at 573-74.

The most recent Minnesota removal case, *In re Olson,*[44] involved a petition to remove Scott County Sheriff Arthur Mesenbrink for nonfeasance in the performance of official duty.[45] In *Olson* Mesenbrink was charged with failure to prosecute violations of the gambling laws.[46] The governor removed Mesenbrink from the office of Sheriff of Scott County.[47] The Supreme Court of Minnesota reviewed whether there was a reasonable or substantial basis for the removal.[48] The court stated that a public office is created for the benefit of the public, and the duties imposed on the officeholder are functions and attributes of the office which must be performed.[49] The court determined that the sheriff had a duty to enforce the laws and that his failure to pursue open and notorious gambling violations was a substantial neglect of that duty.[50] The court concluded that the governor had a substantial basis for removing Mesenbrink from the office of sheriff, and therefore affirmed the removal order.[51]

There was not a great deal of consistency in the procedures followed in the four cases, but the adversarial nature was evident from the reading of three of the briefs found in the state archives. In each of the three cases the state attorney general acted as a prosecutor and the elected official had his own attorney who acted as a defense attorney. Both attorneys made arguments and conducted direct and cross examination.

Based upon the adversarial nature of the precedent previously discussed and today's standards of due process, the Commission determined that it would be fair to conduct the hearing in the milieu with which we were all familiar. Further, we determined that the Minnesota District Court Trial Rules and the Minnesota Rules of Evidence should apply, rather than the Administrative Rules. It appeared that this was the only way the requirement of section 351.03 of the Minnesota Statutes for "competent evidence" could be assured.[52]

After we determined which rules to apply during the removal process, we considered what standard of proof should be applied. Since this was a civil proceeding as opposed to a criminal

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44. 211 Minn. 114, 300 N.W. 398 (1941).
45. *In re* Olson, 211 Minn. 114, 115, 300 N.W. 398, 399 (1941).
46. *Id.* at 116, 300 N.W. at 399.
47. *Id.* at 115, 300 N.W. at 399.
48. *Id.*
49. *Id.* at 117-18, 300 N.W. at 400.
50. *Id.* at 119, 300 N.W. at 400.
51. *Id.*
52. *See* MINN. STAT. § 351.03 (repealed 1986) (allowing dismissal of county officials upon competent evidence of nonfeasance or malfeasance). For the text of § 351.03, see *supra* note 6.

proceeding, it was obvious that the standard need not be proof beyond a reasonable doubt. We looked to the Minnesota Rules of Board on Judicial Standards as well as the Minnesota Rules of Lawyers Professional Responsibility.[53] We determined that pursuant to both rules the clear and convincing standard is applied, as opposed to preponderance of the evidence.[54] Thus, considering the consequences of removal to be similar to that of disbarment, the Commission determined it should establish the use of the standard of clear and convincing evidence.[55]

As we began to set our time table for discovery, a prehearing conference, and the hearing date itself, we began to run into a variety of difficulties. Basically, the problems all seemed to stem from the fact that Ms. Morris had also been sued in federal court by some of the former defendants in the child sex abuse cases. The discovery in the federal civil lawsuits was proceeding at the same time we were trying to commence the removal hearing against Ms. Morris. Because the federal lawsuit was so complex, and because many other individuals besides Ms. Morris had been brought in as defendants, numerous potential witnesses were unwilling to give voluntary statements to Mr. Gage. Consequently, he applied to the Commission for subpoena power and the procedure for obtaining such subpoenas.

A telephone conference was held on May 6, 1985, wherein Mr. Gage argued for obtaining an order for issuance of subpoenas. Mr. Stephen Doyle, Ms. Morris' attorney, strongly argued against allowing subpoenas, stating that there was not authority under the law and that historically subpoenas had not been used in removal hearings. Mr. Doyle further argued that by having subpoena power, he would feel obliged to take depositions as well and that would further prolong the removal proceedings. Mr. Doyle also argued that the taking of depositions was really unnecessary, since the information had already accumulated and had been heard for a number of years in the media, and therefore there was no reason to go beyond what was already known.

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53. *See* MINNESOTA RULES OF BOARD ON JUDICIAL STANDARDS (1985); MINNESOTA RULES OF LAWYERS PROFESSIONAL RESPONSIBILITY (1985, amended 1987).

54. *See* MINNESOTA RULES OF BOARD ON JUDICIAL STANDARDS Rule 10(c)(2)(1985)(board has burden of proving by clear and convincing evidence the facts justifying action); MINNESOTA RULES OF LAWYERS PROFESSIONAL RESPONSIBILITY Rule 9(h)(1)(1985) (amended 1987)(panel of board should affirm admonition to lawyer if supported by clear and convincing evidence).

55. Subsequent to the hearings pertaining to R. Kathleen Morris, the Minnesota Legislature codified the "clear and convincing" standard for removal hearings. MINN. STAT. § 351.19 1 (2) (1986) (special master shall determine whether the petitioners proved by clear and convincing evidence the factual allegations of malfeasance or nonfeasance). For a discussion of the subsequently adopted removal proceedings, see *infra* notes 131-34 and accompanying text.

On May 8, 1985, I signed an order establishing a procedure for obtaining subpoenas by application to the Clerk of District Court for Ramsey County. The Commission relied upon rule 45.05 of the Minnesota Rules of Civil Procedure, which allows the clerk of the district court to issue subpoenas.[56] We also used as a basis an 1892 case which dealt with the temporary suspension of a county treasurer while the removal action was proceeding.[57] The court allowed the treasurer to obtain subpoenas to compel the attendance of witnesses on his behalf at the removal hearing.[58]

Furthermore, we found a 1942 Minnesota Attorney General's opinion which, although involving a hearing under the Veterans Preference Act before a county board, seemed to adequately address our specific subpoena problem.[59] As part of the discussion, the attorney general stated: "The right to a fair hearing implies the right to compel the attendance of witnesses. That right might become a mockery if the [Respondent] were not entitled to compel the attendance of witnesses.... If he has that right, of course the county board should have a corresponding right."[60] Another Minnesota Attorney General opinion in 1944 stated that a referee in a proceeding to remove a county sheriff had the power to compel the attendance of witnesses before him.[61]

On May 13, 1985, Ms. Morris and the Scott County Sheriff and Deputy Sheriffs served upon me an order to show cause, affidavit, notice of motion and motion, and a summons and complaint. The moving papers alleged that the order of Special Commissioner Olson permitting the use of subpoenas to compel witnesses to give testimony was contrary to law and contrary to the executive order.

The complaint by Ms. Morris and the deputies appeared to protest the power of subpoena only when related to compelling

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56. MINN. R. CIV. PRO. 45.05. Rule 45.05 provides as follows:

> At the request of any party, the clerk of the district court shall issue subpoenas for witnesses in all civil cases pending before that court, or before any magistrate, arbitrator, board, committee, or other person authorized to examine witnesses. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.

Id.

57. *See* State *ex rel.* Clapp v. Peterson, 50 Minn. 239, 244, 52 N.W. 655, 655 (1892).

58. *Id.* at 247, 52 N.W. at 656.

59. *See* Minn. Op. Att'y Gen. No. 85-F (Mar. 6, 1942), *reprinted in* Report of Attorney General-Minnesota No. 119 (1942).

60. *Id.*

61. *See* Minn. Op. Att'y Gen. No. 144-B-24 (Jan. 22, 1944), *reprinted in* Report of Attorney General-Minnesota No. 68 (1944). The basis for the opinion was a predecessor statute to the present Rules of Civil Procedure. *See id.; see also* MINN. STAT. § 596.01 (repealed 1974) (clerk shall issue subpoena to compel testimony of witnesses); MINN. R. CIV. PRO. 45 (1986) (subpoena shall be issued by clerk of court to command person to testify).

attendance at prehearing depositions as opposed to compelling attendance at the hearing itself. In her prayer for relief, Ms. Morris asked for an order temporarily restraining the Commission's counsel from proceeding with prehearing depositions, and quashing all subpoenas and deposition notices. She also requested that the order permanently enjoin the Commission from initiating any form of prehearing discovery procedures, and declare and adjudge that defendants' and Commission's counsel not have the power to order or authority to proceed with a prehearing discovery in proceedings initiated to remove Ms. Morris from office. Lastly, Ms. Morris requested an order declaring and adjudging that the defendants have no power or authority to cause subpoenas to be issued in connection with the prehearing depositions, or in connection with the compelling of witnesses to give testimony at the hearing itself.

The specific motion filed in Ramsey County District Court before the Honorable Harold Schultz on May 14, 1985, was brought by five witnesses who had been served notice for depositions by Mr. Gage. The movants sought to quash subpoenas which required them to give prehearing deposition testimony in connection with the proceedings to remove Ms. Morris from office. Judge Schultz, having heard all of the arguments of counsel, then ruled from the bench and denied the motion.

Judge Schultz not only denied the motions, but also denied a motion for the stay of the order pending the plaintiff's Petition for Writ of Prohibition. Certain witnesses seemed particularly concerned because they were also named defendants in seven pending civil damage actions in a multimillion dollar lawsuit brought by seven sets of ex-defendants in the Scott County criminal sex abuse cases. These defendants had filed summary judgment motions or dismissal motions upon the grounds of their qualified good faith immunity and, therefore, did not believe they should be subjected to the burden and expense of discovery procedures in the removal hearings prior to the adjudication of their motions in federal court.[62]

An interesting problem appeared when these matters were heard in district court, and in the supreme court of Minnesota. The question presented was who was to defend and argue the subpoena issue for the Governor and myself. It was determined

62. Ms. Morris and her attorneys immediately went to the Supreme Court of Minnesota for a writ of prohibition asking that the district court be restrained from enforcing the order of Judge Schultz. Subsequent to Judge Schultz's decision on May 14, 1985, Steven Doyle, Ms. Morris' attorney, was quoted by one of the local radio stations as saying, "It is horrendous that citizens can be forced to participate in what is essentially an administrative procedure."

that upon any substantive issue Mr. Gage should speak; however, the Attorney General's Office would address the actual issue of whether or not the Governor had the power to grant the Commission subpoena power.

The Supreme Court of Minnesota acted expeditiously in this matter and gave an oral decision denying the writ of prohibition within three days. While we were able then to get on with the pretrial discovery because of the oral decision, the final written decision was to cause us some trouble when it was finally issued on July 19, 1985.[63] However, more immediate problems were pressing.

On May 17, 1985, the Commission held its first prehearing conference.[64] It was to be an open meeting. Since we had no official office, the Anoka County Board of Commissioners graciously allowed us the use of their board room within the courthouse where I was chambered.

All parties were informed by the Commission that the Governor had been inclined in his executive order to require a recommendation within sixty days. Although he did not formally require a recommendation within sixty days, we were acutely aware of the desire of the Governor to have this matter completed as quickly as possible. However, since the subpoena issue had just been resolved, Mr. Gage felt he was unable to answer a number of questions that would normally be dealt with in a prehearing conference.[65]

We had originally scheduled the hearing to begin on June 3, 1985. As we discussed the matters at the prehearing conference, however, it became evident that depositions could not be completed by that date. We finally agreed upon June 7 as the new hearing date.

Since the Commission had already determined that the hearing should be open to the public, we discussed the parties' apprehensions regarding this decision. The primary concern focused on the use of children's names, and how to protect the identity of the children. The media was quite willing to voluntarily

63. *See* Bush v. Perpich, 370 N.W.2d 886, 887 (1985). The Commission encountered a problem as a result of the court's comments on the role of counsel appointed to assist the Commission. *See id.* at 188. For a discussion of the problem encountered by the Commission, see *infra* notes 118-22.

64. The persons present at the first prehearing conference were the following: Mr. Gage, independent counsel for the State of Minnesota; Mr. Doyle, attorney for Ms. Morris; Mr. Martin, attorney for Ms. Morris in the federal civil litigation; Wright Walling, an attorney appearing for and on behalf of nine children involved in the sex abuse cases; and Mark Kurzman, attorney for the petitioner, Cindy Lee Buchan.

65. At the pretrial conference, Mr. Gage was unable to specify whether there would be any allegations against Ms. Morris other than those contained in the Petition. Furthermore, he was unable to present a final witness list.

withhold reporting children's names. Our main problem, however, was with radio and television live coverage. At first we thought we would be able to use pseudonyms for the children's names, but then discovered that we were dealing with some approximately sixty different children, and pseudonyms would make it nearly impossible to conduct the hearing properly. That problem was not completely resolved until, during the hearing, the lawyers, as well as the witnesses, became very adept at warning the media before stating a name.

The issue was then raised whether Ms. Morris would be compelled to testify at the hearing. The Commission adopted the position that Ms. Morris had to respond to the subpoena since she would in any civil case. However, in response to specific questions she would be entitled to the right against self-incrimination pursuant to the fifth amendment of the United States Constitution.[66]

In discussing the procedure to be followed, we were able to locate three of the trial briefs from the four Minnesota cases on removal.[67] The Commission substantially followed the procedural approach set forth in those briefs. In each case, a lawyer from the Attorney General's Office presented the evidence for the petitioner. Further, in each case, the elected official involved was represented by at least one if not two or three attorneys who did their own cross examination as well as their own direct examination of witnesses called by themselves and the attorney general.

The next issue to be discussed was whether the Special Commissioners had the power to actually dismiss some charges in the Petition or, the entire Petition if it appeared that malfeasance could not be proven. We determined that the Special Commissioners did not have that power. The Commission was required pursuant to statute and the Governor's order to gather evidence and to then report to the Governor, giving recommendations.[68] According to the statute and our reading of the removal cases, the only one who could dismiss the Petition would be the Governor himself.[69] We did concur, however, that we should

66. *See* U.S. CONST. amend. V.

67. The brief that we were unable to locate was the one involving the sheriff of Scott County. *See In re* Olson, 211 Minn. 114, 300 N.W. 398 (1941). We discovered that the brief had been located by and was being used by Mr. Doyle's office.

68. *See* MINN. STAT. § 351.04 (repealed 1986) (Commissioner to take and report testimony). For the text of § 351.04, see *supra* note 6. *See also* Minn. Exec. Order No. 85-10 at 2 (1985) (Commissioner shall report to Governor its findings and recommendations).

69. *See* MINN. STAT. § 351.04 (repealed 1986). For the text of § 351.04, see *supra* note 6. *See generally In re* Mason, 147 Minn. 383, 181 N.W. 570 (1920); State *ex rel.* Martin v. Burnquist, 141 Minn. 308, 170 N.W. 201 (1918); State *ex rel.* Kinsella v. Eberhart, 116 Minn. 313, 133 N.W. 857 (1911).

discuss with the attorneys what evidence there was prior to the hearing, with the idea that Mr. Gage would not pursue some of the allegations if there were not facts sufficient to support a finding of malfeasance.

The question was raised whether the Commission intended to make a recommendation to the Governor, or, as statute required, take and report the testimony to the Governor.[70] Since the Governor's order asked for a recommendation, and since it hardly made sense for the Governor to read all of the hearing transcripts without benefit of the Special Commissioner and Assistant Commissioners' thoughts, we determined that we would give a recommendation. We further determined that if the three of us did not agree as to what those recommendations should be, each of us would write a separate report. We were, however,in hopes that we could reach unanimity in the recommendation. Finally, we strongly believed that the Governor should have the benefit of all of our expertise in this matter.

Another question discussed at the prehearing conference was whether there would be two hearings, one before the Commission, and a second one before the Governor consisting only of arguments by attorneys to the Governor. In at least two of the prior removal cases we were able to conclude from the supreme court briefs that the attorneys were allowed to make their arguments before the Governor prior to his final removal decision. We determined that the Governor's Office should make that choice, after receiving our recommendation. That, in fact, did not become an issue.

The media and its participation in these hearings was also the subject of much initial discussion. I had concluded earlier that this hearing must be as open a forum as possible. There was no question that the media would be attending. An undecided issue was whether cameras and recordings in general would be allowed in the hearing room. We considered the possibility that children would be testifying, and all of us agreed that the hearing would be closed if that were to occur. As it turned out, no children testified. Our biggest problem, however, was the inability during the initial hearings to keep the names of some of the children from being broadcast.

The special counsel for the Attorney General's Office had no objection to cameras in the hearing room, although he believed it would be easier to conduct the hearing without such distraction.

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70. *See* MINN. STAT. § 351.04 (repealed 1986) (commission to take and report testimony). For the text of § 351.04, see *supra* note 6.

Ms. Morris' attorney, on the other hand, was concerned about the presence of cameras. He feared that many witnesses would be compelled to testify about sensitive subjects, such as sexual conduct with their own or other children, or investigations of their alleged child sexual abuse. Because of this sensitive testimony, Mr. Doyle believed that cameras would adversely affect these witnesses.

The Commissioners, while recognizing the potential difficulties, believed strongly in the necessity of openness in the removal proceedings. We were convinced that the process by which we reached a recommendation would be as important as the recommendation itself. Therefore, it was extremely important for the people of Minnesota to understand that process so that they could better comprehend our final decision in this matter. In addition to holding the hearing in an open, public forum, the electronic media would allow Minnesotans to follow the hearing more easily.

The problem remained that witnesses might be more fearful because cameras were present. Also, we still had not resolved the potential problem of children's names being broadcast. The media had been very good about protecting the names of children up to this point. However, we were not sure that coverage could continue without means to prevent any slips on live coverage that might occur.

It should be noted that Minnesota does not generally allow cameras in the courtroom.[71] At the time of the hearing, however, courts were still experimenting by allowing cameras in certain types of cases. The Commission was not required to follow the supreme court ruling on cameras since this was not a court procedure. Nonetheless, the Commissioners agreed that, since we were using civil trial rules, perhaps we should follow the order of the Supreme Court of Minnesota with very few exceptions to ensure that the hearing would be fair and would not be tainted by overly exuberant media coverage.

A final concern at the prehearing conference was a broad restraining order that Judge Robert J. Brunig had issued. The order precluded out-of-court statements regarding the substance of any proceedings having to do with Scott County child welfare. A quick phone call during a conference recess enabled me to speak with Judge Brunig. He assured me that he only meant to forbid anyone from testifying about those matters which they had learned

71. CODE OF JUDICIAL CONDUCT Canon 3A(7)(1985). The court allowed cameras as long as all parties agreed to their use. *See id.* Canon 3A(7)(ii).

of within a juvenile court hearing. He in no way meant to limit disclosures of information known independently by witnesses.

It should be mentioned that in most of the twenty-four child sexual abuse complaints charged in Scott County the child victims involved were also involved with juvenile court. Therefore, when the twenty-one cases were dismissed, many of those children and their families were still under the jurisdiction of the juvenile court and remained so for many months. In fact, some were still under such jurisdiction at the time we were designing our procedures for the hearing on removal of Ms. Morris. Consequently, we frequently dealt with the issue of what work product could be used from those juvenile court proceedings. Mr. Gage, for example, wanted a partial transcript of one of the hearings because Ms. Morris had testified in that particular case. Mr. Gage argued it was important to review her testimony under oath for possible impeachment purposes. An in camera review of that portion of the record was arranged with the juvenile court judge.

Following the May 17, 1985, prehearing conference, the decisions were summarized in a memorandum so that everyone would be on notice and be sure to object, if necessary, before the hearing actually started. At this point, we anticipated that the hearings would commence on June 7, 1985. In the memorandum, written to all counsel and copied to such other counsel as were peripherally involved, I added a caveat which stated, "Henceforth, it would be appreciated if none of the Commissioners are approached on a less than formal basis by any of the counsel either directly or peripherally involved. We wish to avoid even the appearance of impropriety, and thank you for your cooperation." I felt it was necessary to include this statement after one of the attorneys representing former defendants in the Scott County sex abuse cases stopped by my chambers one afternoon to discuss with me his frustration due to his belief that Mr. Gage was not utilizing information that he felt was important in the removal hearing. While I believe that this attorney did not recognize he was having ex parte communication, this was typical of the many different types of situations we seemed to be encountering while endeavoring to deal with what was an odd procedure for all of us. While not clearly a judicial process, it certainly was similar to one.

Although we had decided to follow civil trial rules, we did not wish to give the hearings the aura of a courtroom proceeding. Pursuant to that end, I stopped using my judicial letterhead and began referring to myself and Julius Gernes and Irene Scott as

"Commissioners." Up to this point, the lawyers, quite naturally, had been addressing me as "Judge" or "Your Honor."

As we moved closer to the hearing date of June 7, it became increasingly apparent that we would not make that deadline. Nevertheless, certain preparations had to be made well in advance. Arranging an appropriate hearing room, meeting with media representatives, and planning for security were the most important in a long list of details. We were aware that there had been threats made on Ms. Morris' life. We were concerned, also, that since anyone could attend the hearing, we might encounter problems with conflicting special interest groups such as Victims of Child Abuse Legislation (VOCAL) and Society's League Against Molestation (SLAM). We were able to secure a hearing room in the State Office Building next to the state capitol in Saint Paul. State capitol security agreed to provide security for the hearing. The initial meeting with the media representatives seemed to go very well. Following that meeting, I issued an order permitting audio and video coverage of the Commission hearings specifying what the media could and could not do.

There were continuing problems in the conducting of depositions. For example, I was asked by the special counsel at one point to rule specifically on whether Mr. Kurzman, the attorney for Petitioner Cindy Lee Buchan, could attend depositions and receive copies of the deposition transcripts. Ms. Morris' attorneys had complained that Ms. Buchan was simply using this removal hearing to do expedited discovery for her federal civil lawsuit against Ms. Morris. I had ruled earlier that these depositions were private and not open to the public. Therefore, since Mr. Kurzman was not a party to this action nor representing a party to this action, I ruled that he could not attend nor receive copies of the deposition.

The next problem occurred when Mr. Doyle served notice to Cindy Lee Buchan for deposition. She refused to attend, stating that she was having problems with her pregnancy and that the deposition would be too stressful. Mr. Doyle filed an ex parte motion in Ramsey County Court, where the subpoenas were acquired, and he requested an order that Ms. Buchan be found in contempt of court for failing to attend a scheduled deposition. He further requested that she be required to attend a deposition and bring various papers and documents with her. Mr. Doyle stated in an affidavit that he did not believe Ms. Morris could fully prepare her defense unless she had the opportunity to take the deposition of Ms. Buchan, the petitioner who filed for removal of Ms. Morris.

Within that Petition various acts on the part of Ms. Morris were alleged. Ms. Morris believed she had a right to depose Ms. Buchan in regard to those allegations.

Mr. Doyle further submitted affidavits of an investigator with the State of Minnesota and a detective with the Scott County Sheriff's Department. Both alleged that they had seen Ms. Buchan driving an automobile from her home, walking into her house, and caring for her two children who were in the car. Judge Joseph P. Summers of the Ramsey County District Court heard the matter and determined that it was an issue that should be decided by the Special Commissioner.

A telephone conference was arranged for June 3, 1985, with Cindy Lee Buchan's doctor to determine exactly what Ms. Buchan's problems were and whether she might be able to participate in a deposition. Dr. Luth, Ms. Buchan's obstetrical gynecology specialist, was of the opinion that since she was having premature contractions, she should avoid stress as much as possible. Dr. Luth said he believed that a high-pressure examination would cause Ms. Buchan stress.

Mr. Kurzman then requested that Ms. Buchan be allowed to respond to written interrogatories, but I denied his request. I decided that Ms. Buchan should be deposed with a doctor present. If she began to feel stressed, and it seemed to be causing her any problems, the doctor could then recommend that the deposition be stopped immediately.

Because of various problems with scheduling of depositions, the hearing was rescheduled to June 10. On June 5, however, it was revealed that Ms. Morris was scheduled for depositions in the federal civil lawsuit for June 10, 11, and 12. The federal district court was unwilling to change its deposition schedule, and therefore the hearing was continued to June 13, 1985.

Mr. Doyle was asked whether his client wished to be present at the hearing, since there had been comments by her attorneys that Ms. Morris might not attend the hearing because she did not want to give the hearing the dignity of her response to petitioner's allegations. Mr. Doyle responded that Ms. Morris wanted to attend the hearing. He added that she intended to continue performing her job as county attorney, so she probably could not be in attendance during the entire time.

Meanwhile, other concerns were voiced to us by attorneys representing the children. For example, Wright Walling, a Minneapolis attorney representing nine children in juvenile court

matters, was worried that children's names would be mentioned in the hearing and broadcast over television and radio.[72] As it turned out, the children's names were mentioned throughout the hearings and, in the initial stages, were sometimes accidentally broadcast. The lawyers were finally able to control that by prefacing the child's name with the warning, "Child's name coming." They were also able to coach their witnesses sufficiently in this same method. After about a week of hearings, children's names were no longer inadvertently broadcast.

Mr. Walling had also voiced serious concerns about children testifying at the hearing. The anxiety that Mr. Walling had about the mental health of his young clients was shared by all of us. Throughout the hearing, the special counsel, with strong urging from the Commissioners, did not call any of the children as witnesses.

An ancillary concern was that adults who had never been charged with child sexual abuse but whose names were mentioned in the hearings might be labeled child abusers or other kinds of criminals. Again, the attorneys stated they could not use pseudonyms or another system because of the great number of names, and they would simply have to use the adults' names. I had already issued an order to the media prohibiting the use of names of any persons not charged with a criminal offense relating to the subject matter of these hearings. While that prohibition was somewhat broad, the purpose was to protect people from being labeled child abusers. The prohibition was also intended to protect the Commission from being susceptible to libel or slander suits. By giving the media notice not to publish these names, we had at least made an effort to keep the names from being published. The media responded quite well to this prohibition and, as far as I know, did not publish the names of persons mentioned in the hearings who had not been charged with child sexual abuse.

The Minnesota Attorney General's Office researched the question whether any of the participants in the removal proceedings could be sued for defamation.[73] That office determined, based on the case law in Minnesota, that any statements made in the removal proceedings would be absolutely

72. Our major concern was with the simulcast by cable television stations and Minnesota Public Radio, which wanted to have live broadcasts of the hearings. Since the attorneys were all in agreement that it would be impossible to use pseudonyms or some other form which would not identify the children directly, we decided to go ahead with the use of their names in the hearing, but we made every effort to keep those names from being broadcast or published outside of the hearing.

73. *See* Letter from Jean Boler, Special Assistant Attorney General, to Honorable Lynn C. Olson (June 11, 1985).

privileged and could not be a basis for a defamation action.[74] They commented, however, that the precautions we had taken were nonetheless well advised and might well preclude the issue from even being raised.[75]

Throughout these months of meetings, motions and organizational problems, Kim Mesun, the Commission's attorney, had been preparing a memorandum for the Commission on the definition of malfeasance, which we had all thought in the beginning was the central issue. It was, of course, but other matters seemed to have taken center stage during these months while we were trying to get the hearing ready to commence.

Within the definition of malfeasance found in Black's Law Dictionary is the following statement: "Comprehensive term including any wrongful conduct that affects, interrupts or interferes with the performance of official duties."[76] Within Minnesota case law we looked primarily at the cases dealing with removal, but did find some other cases which had to deal with a malfeasance standard. What the research indicated was that malfeasance did not appear to be "susceptible of an exact definition."[77]

In *State ex rel. Kinsella v. Eberhart,* the court stated that conviction of a crime was not essential to show malfeasance.[78] In *State ex rel. Martin v. Burnquist,* we were told that "[t]he misconduct or malfeasance under our law must have direct relation to and be connected with the 'performance of official duties,' and amount either to maladministration, or to willful and intentional neglect and failure to discharge the duties of the office at all."[79] The court added that malfeasance "does not include acts and conduct, thought amounting to a violation of the criminal laws of the state, which have no connection with discharge of official duties."[80] Furthermore, the court in *In re Mason* determined that malfeasance occurs when the accused officer has so misconducted himself in respect to the performance of his official duties that the good of the public service requires his removal from office.[81]

Finally, within Minnesota, the only other direction given to us was a 1910 Minnesota Attorney General's opinion stating that "if

74. *See id.* at 3; *see also* Mathis v. Kennedy, 243 Minn. 219, 224, 67 N.W.2d 413, 417 (1954); Freier v. Independent School District No. 197, 356 N.W.2d 724, 729 (Minn. Ct. App. 1984).

75. *See* Letter, *supra* note 73, at 1.

76. BLACK'S LAW DICTIONARY 862 (5th ed. 1979). Malfeasance is currently defined pursuant to the Minnesota Statutes as "the willful commission of an unlawful or wrongful act in the performance of a public official's duties which is outside the scope of authority of the public official and which infringes on the rights of any person or entity." MINN. STAT. § 351.14(2) (1986).

77. *See* Jacobsen v. Nagle, 255 Minn. 300, 304, 96 N.W.2d 569, 573 (1959).

78. State *ex rel.* Kinsella v. Eberhart, 116 Minn. 313, 322, 133 N.W. 857, 861 (1911).

79. State *ex rel* Martin v. Burnquist, 141 Minn. 308, 322, 170 N.W. 201, 203 (1918).

80. *Id.*

81. *In re* Mason, 147 Minn. 387, 391, 181 N.W. 570, 572 (1920).

the standard is malfeasance, the evidence should show a willfull intent to violate the law" and that "[i]nnocent errors in the performance of the duties of office do not seem to be proper grounds for removal."[82] It was clear that with the research done within Minnesota we had a need to go outside of the state to find a clear definition of malfeasance.

After a nationwide computer search, Ms. Mesun found some 3000 cases having to do with malfeasance. She then spent a considerable amount of time narrowing these cases to malfeasance for removal of an elected official. Based upon all of this research, the following definition of malfeasance was adopted: "When an official consciously does an illegal act or a wrongful act which infringes upon the rights of another to his/her damage, and the act is outside the scope of the official's authority, that is malfeasance."

Now having determined the definition of malfeasance, the Commissioners were ready to analyze on three levels the testimony presented to the Commission. First, we had to analyze whether or not an allegation had been proved. If an allegation was proved, the question became whether the conduct amounted to malfeasance. Assuming that the conduct did amount to malfeasance, we had to determine whether Ms. Morris should be removed from office based on those acts of malfeasance.

We were still a long way from hearing enough testimony in a formal hearing to make a determination as to whether the allegations had been proved. On June 7, 1985, the Commission held its second prehearing conference. The hearing was scheduled to begin on June 13, less than a week away. It was at this prehearing conference that Special Counsel Gage presented his first set of additional allegations which were amended to the original petition.[84]

The most important additional allegation was that there was malfeasance with regard to the dismissal of the twenty-one sex abuse cases.[85] Mr. Gage stated that he would be unable to prove, based on what he had learned in depositions, the first allegation of the original Petition.[86] The allegation stated that Ms. Morris had caused the arrest of citizens, knowing there was insufficient

82. Minn. Op. Att'y Gen. No. 475-B (May 26, 1910).

83. Mesun, *Malfeasance and Nonfeasance of Public Officials*, 55 THE HENNEPIN LAWYER 10, 11, 27-28 (March-April 1986).

84. *See* Notice of Restated Petition and Additional Allegations (July 5, 1985) [hereinafter Notice of Restated Petition]. The Restated Petition includes the additional allegations presented by Mr. Gage at the second prehearing conference. *See id.*

85. *See id.* at 3.

86. *See* Petition to Remove, *supra* note 1, at 1.

probable cause existing at the time of the arrest to justify the issuance of criminal complaints.[87] Further, Mr. Gage felt he would be unable to prove the second allegation of the original Petition that Ms. Morris caused the forcible removal of children from their parental homes knowing there was no probable cause.[88] Mr. Gage also stated that he would be unable to prove that Ms. Morris was so deeply involved in the investigation that, either directly or indirectly, she caused children to develop false allegations concerning the sexual abuse of children.[89] Furthermore, Mr. Gage indicated he would be unable to prove the allegation in the Petition that Ms. Morris directed the Scott County Human Services Department to not perform their statutory and regulatory duties with regard to children and families involved in her investigation and prosecution.[90]

Mr. Gage then went on to present the first of three restated allegations. The allegation involved the tranferring of some of the allegations in the original Petition by Cindy Buchan and adding to that some additional allegations which Mr. Gage and his colleagues had uncovered during the discovery period in preparation for the hearing.[91] Some of those allegations were additional specific allegations with regard to the Scott County sex abuse cases stemming out of the twenty-four adults originally charged with sex abuse in that county.[92] There were also some additional charges which dealt only with Ms. Morris and her functioning in office.[93]

One allegation concerning Ms. Morris' functioning in office was that she had physically and verbally abused employees of her office.[94] Another was that Ms. Morris had misappropriated public funds belonging to Scott County and had caused others to misappropriate Scott County funds.[95] A further allegation was that Ms. Morris had improperly delegated her discretion as a prosecutor to local law enforcement officers, establishing a policy that any person charged with violating the Minnesota driving while intoxicated law would be prosecuted for that offense regardless of

87. *Id.*

88. *See id.* at 2.

89. *See id.* at 3. The fifth allegation in the Petition alleged that Ms. Morris caused the development of false allegations by children of sexual abuse by directly, or indirectly through her staff and others working under her direction, threatening and coercing the children. *Id.*

90. *See id.* The sixth allegation in the Petition alleged that Ms. Morris directed the Scott County Human Services Department to not perform their duties with regard to families involved in her investigation and prosecution. *Id.*

91. *See generally* Notice of Restated Petition, *supra* note 84.

92. *See generally id.*

93. *See generally id.*

94. *Id.* at 3.

95. *Id.*

the merits of the individual case.[96] This particular allegation was soon dropped by the special counsel.

Mr. Doyle argued at the second prehearing conference that special counsel ought not to be allowed to go outside of the original Petition of Cindy Buchan. He stated that if the information did not exist to support the allegations in Ms. Buchan's Petition, then other matters not alleged in the Petition should not be considered by the Commission. Furthermore, Mr. Doyle argued that it would be unfair to change the focus of the proceedings from whether Ms. Morris had probable cause to charge the complaints to whether Ms. Morris should have dismissed the charges. Mr. Gage responded by stating that he viewed his task as presenting all evidence he might find which would indicate malfeasance on the part of Ms. Morris while in elective office.

Minnesota case law allows the original document or petition to be amended.[97] In *In re Mason,* the court stated: "[W]e find no warrant in the statute for saying that only one charge or set of charges may be considered, and see no reason why additional charges may not be presented, either independently of the original charges or by way of amendment to them."[98] Therefore, the Commission concluded that the Petition could be amended to include additional allegations.

The suggestion was made that the Commission could require that Mr. Gage make an offer of proof for some of the allegations to determine whether the allegations would constitute malfeasance even if proved. We were concerned, however, that there had to be sufficient evidence in the record so that the Governor would have all of the facts before him, since it was the Governor who would make the ultimate decision whether to remove Ms. Morris.

It had become quite clear that neither side was able to do as much preparation as either wanted. There were some forty-one to fifty children involved. Law enforcement personnel included officers from the City of Jordan, from Scott County, and from the State Bureau of Criminal Apprehension. There were dozens of professionals such as social workers, assistant county attorneys, therapists, and medical personnel. Contacting these people for information was a phenomenal job.

In his investigation, Mr. Gage was becoming familiar with most of the issues and controversies in this case for the first time.

96. The allegation that Ms. Morris improperly delegated her discretion as prosecutor to local law enforcement officers was not included in the Restated Petition.

97. *See In re* Mason, 147 Minn. 383, 387, 181 N.W. 570, 572 (1920). For a discussion of *Mason,* see *supra* notes 34-43 and accompanying text.

98. *Id.*

Ms. Morris, on the other hand, had been personally involved since the original charging of these cases in late 1983. While the Commission was concerned that Ms. Morris would have adequate notice of the allegations against her, we had little sympathy for the argument by her attorney that she was hearing some of these allegations for the first time at the prehearing conference.

On June 13, 1985, the three Commissioners were sworn in at the State Office Building and the hearings upon the Petition to remove R. Kathleen Morris as Scott County Attorney began. The first item of business was a notice of motion and motion submitted to the Commissioners by Mr. Doyle, Ms. Morris' attorney. That motion was for a continuance of the hearing.

The continuance motion was specifically in response to a second document which was then proposed and served upon the Commission and Ms. Morris by Mr. Gage. That document incorporated the original Petition into a document entitled Notice of Restated Petition and Additional Allegations. [99] This document was essentially the same as the Restated Petition presented to all of us at the June 7, 1985, prehearing conference.

Mr. Doyle was granted permission to speak in support of his motion and he argued that the Notice of Restated Petition and Additional Allegations was being substituted for the Buchan Petition, and thus was a new petition. He contended that out of the eleven original allegations of the Buchan Petition, two-thirds of them were not going to be presented. He further stated that he first learned specifically of the new allegations when Mr. Gage presented them orally at the June 7 prehearing conference, which was conducted less than one week before this hearing began. Mr. Doyle argued vehemently that while everyone had worked at a high level of cooperation and intensity in taking depositions of potential witnesses, it was going to be impossible for him to properly represent his client. He maintained that in the discovery depositions he was learning new pieces of information that he had never heard before and had not had an opportunity to discuss with his client or with her other lawyer, Mr. Martin. Mr. Doyle also stated that there were literally tens of thousands of documents in this case that had to be examined and reviewed. He argued that since the Commission had decided that the Minnesota Rules of Civil Procedure should apply, the rules should be applied across the board. Pursuant to the Minnesota Rules of Civil Procedure, any amended complaints in a civil suit would allow the respondent

99. *See* Notice of Restated Petition, *supra* note 84, at 1.

time to respond.[100] Therefore, since there had been amendments in the Petition as recently as forty-eight hours earlier, Mr. Doyle believed that he and his client should have some time in which to respond. He insisted that the changes in allegations essentially created new charges and that an entire new document had developed out of the investigation by independent counsel. Mr. Doyle's final argument was that Ms. Morris was looking forward to an opportunity to respond to the additional allegations but he could not advise her or encourage her to do so without preparation.

The additional allegation that Mr. Doyle appeared to be most concerned about was a charge by Special Counsel Mr. Gage that Ms. Morris had dismissed all criminal complaints against twenty-one defendants on October 15, 1984. These dismissals occurred when, in Mr.Gage's judgment, the evidence in many of those cases was sufficient to obtain convictions. Mr. Gage stated that the reasons for these dismissals were spurious.

After Mr. Doyle finished with his argument for a continuance, Mr. Gage countered with his argument. He agreed that it had been an exhausting and difficult schedule during the past two and a half months, but he asserted that there had been a high level of cooperation and exchange of information, and he believed that both he and Mr. Doyle were as well informed as possible. He went on to state that, in actual fact, if anyone was better prepared, it would be Mr. Doyle and Mr. Martin. He based his comment on the fact that Mr. Martin had been representing many of the defendants in the federal civil rights cases, in which many depositions had already been taken and voluminous affidavits had been filed. Although Mr. Gage had seen some of those depositions and affidavits, he certainly had not seen all of them as had Mr. Martin. Mr. Gage also argued that he had read less than one tenth of the material that existed in this case, since there were files generated by not only the Scott County Attorney's Office but also the Scott County Sheriff's Office, the Jordan Police Department, the Bureau of Criminal Apprehension for the State of Minnesota, and the Federal Bureau of Investigation. These documents had all been available to Ms. Morris, some as early as 1983. Mr. Gage argued that Ms. Morris had all of the information about the additional allegation regarding the dismissal of the child sexual abuse cases, and that he was simply looking at the information and reasoning that Ms. Morris did not exercise proper prosecutorial discretion in dismissing the cases. Mr. Gage asserted that none of the information should have been new to Ms. Morris.

100. *See* MINN. R. CIV. P. 15 (1986).

The additional accusations now encompassed in the Notice of Restated Petition and Additional Allegations presented on June 13 were as follows: (1) Ms. Morris had physically and verbally abused employees of her office; (2) Ms. Morris had misappropriated public funds and caused others to misappropriate Scott County funds; (3) Ms. Morris had attempted to compel certain defendants charged with sexual abuse of children to suffer public arrest rather than surrendering voluntarily to avoid widespread news media coverage of their arrest; (4) Ms. Morris had violated the constitutional rights of certain criminal defendants represented by lawyers by arranging for those defendants to be contacted by a lay person instructed to obtain statements from them to be used in impending criminal prosecutions; (5) Ms. Morris had made a statement to the news media denouncing and criticizing the assumption of innocence; (6) Ms. Morris had caused Frederick Rgnonti, a Scott County Sheriff's Deputy, to sign a search warrant application without personal knowledge of its contents, and then directed the deputy to present that application to a judge on the basis of his personal knowledge; (7) Ms. Morris had directed Deputy Rgnonti to file a police report which falsely stated the date on which the final investigation began and then she issued a criminal complaint based upon the police report; (8) Ms. Morris had refused to prosecute a substantial number of welfare fraud cases investigated and represented by Deputy Rgnonti because of her hostile feelings toward him; (9) Ms. Morris had compelled the unfavorable transfer of Deputy Rgnonti based upon a "personality conflict;" and (10) when a public defender had sought a favorable disposition for one client, Ms. Morris threatened to penalize a second client.[101] Mr. Gage argued that these ten allegations involved comparatively simple factual settings and that they simply showed breaches of disciplinary rules or misconduct on the part of Ms. Morris.[102]

The Commission denied Mr. Doyle's motion for continuance but made further rulings. The first was that the formal paper prepared by Mr. Gage and presented to the Commission and Ms. Morris on that first day of hearing was to be the final petition and that those limited issues were the only ones to be presented. Second, the Commission stated that it would consider a motion for a recess for a reasonable period of time for preparation of Ms. Morris' response at the end of Mr. Gage's presentation.

Though the Commission recognized that there might be additional preparation needed by Ms. Morris' attorney, it

101. *See* Notice of Restated Petition, *supra* note 84, at 1.
102. *See id.*

remained unconvinced that any of the information presented by Mr. Gage came as a surprise or was new to Ms. Morris. In fact, the dismissal of the twenty-one cases was hardly an entirely new issue, since the Buchan Petition had alleged that Ms. Morris had misrepresented to court's counsel and to the public that she was dismissing charges because of an ongoing investigation of great magnitude, when she knew no law enforcement agency was conducting any such investigation. This is essentially what Mr. Gage was alleging. However, he was further stating that those cases should never have been dismissed based on the reasons given by Ms. Morris.

After the decision to deny the motion for continuance, Mr. Doyle then asked for a ten minute recess to consider the options with his client. After ten minutes Mr. Doyle, Mr. Martin, and Ms. Morris returned to the hearing room. Mr. Doyle announced that he and Mr. Martin had advised their client that to proceed in the hearing would be inappropriate because Ms. Morris would not receive a fair and fundamental due process hearing because of their inability to adequately prepare. Mr. Doyle then stated they would, therefore, not participate in the proceedings. At that point Mr. Doyle, Mr. Martin, and Ms. Morris stood up and walked out of the hearing room.

The hearing then commenced without the presence of Ms. Morris or her attorneys. Mr. Gage made an opening statement and went on to call the following five witnesses: Frederick W. Rgnonti, Scott County Sheriff's Deputy; Thomas J. O'Connor, Scott County Public Defender; Janet Vogel, Secretary to Ms. Morris; Deborah Gregor, Clerk-typist in the Scott County Attorney's Office; and Patricia Buss, a former Assistant Scott County Attorney.

As the hearing progressed we gradually became aware of some serious problems which we could anticipate encountering throughout the hearing without the presence of Ms. Morris and her attorneys. The first problem occurred with the first witness, Frederick Rgnonti, when Mr. Gage offered an exhibit through him. Commissioner Gernes questioned whether the exhibit was hearsay. Mr. Gage agreed that at this point it probably was hearsay. Our dilemma was who objects to the exhibit if the Commission did not object. Also, while we had agreed that Commission members would have the opportunity to question witnesses after completion of the attorneys' questions, we had not anticipated doing all cross examinations. The Commissioners

certainly were not prepared in any way to do adequate examination because we had purposely avoided reading or doing any investigation ourselves with regard to the facts in this matter. By the end of the day the Commissioners were all quite concerned whether we would be able to conduct a fair hearing and assure that all the evidence was competent as required by the statute[103] without the presence and participation of Ms. Morris and her attorneys. We also questioned the value to the Governor of a recommendation pursuant to this type of hearing. By the next morning we had determined that it was necessary for us to grant a continuance to Mr. Doyle after all. While his legal arguments did not convince us, his grandstand play had won the day for him.

On June 14, 1985, we commenced the second day of hearings with an announcement stating,

> It has become clear to the Commission, upon reflection, that without the participation of Ms. Morris and her attorneys the issues in this proceeding could not be fully and fairly aired. We have, therefore, determined, as a matter of fairness to Ms. Morris, to grant a continuance. In order to guarantee sufficient time to Ms. Morris to prepare, we are continuing the matter for a six-week period rather than the thirty-day period initially requested by her attorneys. The hearing will recommence at 8:30 a.m., August 1, 1985. We are in recess until that time.

It was significant that we determined to recess rather than continue from the moment of Mr. Doyle's motion. That significance was to become apparent when the hearings recommenced on August 1.

Very shortly after the hearing was recessed, discovery problems developed. Mr. Doyle sent out interrogatories to Mr. Gage on June 21, 1985. In these interrogatories Mr. Doyle requested clarification and specificity for each of the charges against Ms. Morris. This raised the issue of whether Mr. Gage could, during this discovery period prior to the recommencement of hearings, raise new allegations against Ms. Morris. The Commissioners discussed the matter with the attorneys and determined that new allegations could be raised but only within a very brief period of time. The following memo was issued:

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103. *See* MINN. STAT. § 351.04 (repealed 1986). For the text of § 351.04, see *supra* note 6.

> When the Commission continued the hearing of this matter it in effect reopened discovery for both parties. However, so that there will be no further delays of the hearing, Mr. Doyle shall receive from Mr. Gage's office no later than 5:00 p.m., Friday, July 5, 1985, written notice of any further allegations Mr. Gage intends to present at the hearing. This written notice shall also include the names of the witnesses Mr. Gage intends to call at the hearing in attempting to prove new allegations.[104]

An unusual problem arose immediately after Court Reporter Chris DuSchane had transcirbed the first day's testimony. Section 351.04 of the Minnesota Statutes required that "Each witness shall subscribe his name to his testimony when the same is reduced to writing."[105] This obviously is not the typical procedure used in a civil trial when someone gives testimony. We felt, however, that we had to follow the statute exactly.[106] Therefore, we had to develop a method to enable witnesses to review their testimony and to sign it as they would in depositions.

Since there was no order to compel witnesses to travel anywhere and sign a statement at the request of the attorney who called them, the question arose whether that testimony would have to be disregarded if the transcript was not reviewed and signed. We eventually worked out this difficulty. I announced to each witness at the recommenced hearing that he or she was still under subpoena until they had completed the signing of or the subscribing to his or her testimony. We allowed the witnesses to waive that signing, but many of them travelled to the court reporter's home where she was transcribing testimony day and night for the several weeks following the hearing. This was just another example of a requirement by a rather antiquated statute which made our job even more troublesome than it needed to be.

On July 5, 1985, Mr. Gage sent a Notice of Restated Petition and Additional Allegations to Mr. Doyle and the Commissioners.[107] This was to be the third and final petition by Mr. Gage. In his cover letter, however, he indicated that he was still investigating some additional matters, but did not have sufficient information to determine whether he would be seeking

104. This memorandum was sent to both Mr. Gage and Mr. Doyle on June 24, 1985.
105. MINN. STAT. § 351.04 (repealed 1986). For the text of § 351.04, see *supra* note 6.
106. *See id.*
107. *See* Notice of Restated Petition, *supra* note 84, at 3.

the Commission's approval to make them part of the Petition. He expected that this investigation would take approximately one more week, and stated three separate potential additional charges. Mr. Gage never requested to add these charges.

On July 19, the Supreme Court of Minnesota filed its opinion pertaining to the subpoena matter in which R. Kathleen Morris had requested that Ramsey County District Court be restrained from enforcing its order on May 15, 1985, which denied Ms. Morris' motion to quash subpoenas issued requiring attendance at prehearing deposition testimony.[108] Since the petitioners conceded that the Special Commissioner was empowered to authorize the issuance of subpoenas to compel testimony at any hearing pursuant to section 351.03 of the Minnesota Statutes, Chief Justice Amdahl, writing for the court, addressed the narrow issue of whether the Commission's subpoena power permitted the Commission to compel prehearing deposition testimony.[109] The Supreme Court of Minnesota concluded that authority to issue subpoenas was implied from the ultimate removal power delegated to the Governor by the legislature.[110] Justice Amdahl noted that procedural mechanisms are contemplated to accomplish a full investigation of matters relevant to the inquiry.[111] He further stated that "[t]o the extent the testimony of individuals whose knowledge is relevant cannot be voluntarily obtained, the subpoena power must be available" so that a full and complete investigation may be done.[112]

Justice Amdahl commented on the role of counsel appointed to assist the Commission. "[A]s defined by the Executive Order," Justice Amdahl wrote, the special counsel's duty implied "the neutral presentation of all evidence *for and against* the official, not merely the disclosure of evidence found to support the petition for removal."[113] The court concluded that the counsel's role was distinguishable from that of a prosecuting attorney.[114] The court's comments on the role of the special counsel were entirely

108. Bush v. Perpich, 370 N.W.2d 886, 888 (Minn. 1985). The Supreme Court of Minnesota orally denied Ms. Morris' motion on May 16, 1985, stating that a written opinion would be filed subsequently. *Id.* at 887.

109. *Id.* at 888; *see* MINN. STAT. § 351.03 (repealed 1986) (governor to make determination upon competent evidence). For the text of § 351.03, see *supra* note 6.

110. *Bush*, 370 N.W.2d at 888.

111. *Id.* The court invited the executive and legislative branches of Minnesota government to evaluate the need for more definitive and comprehensive procedures for the investigative and reporting process that is involved in a removal action. *Id.* at 888-89. Subsequent to the court's opinion in *Bush*, the legislature adopted a new procedure for the removal of elected county officials. *See* MINN. STAT. §§ 351.14-.23 (1986). For a discussion of §§ 351.14-.23, see *infra* notes 131-34 and accompanying text.

112. *Bush*, 370 N.W.2d at 888.

113. *Id.*

114. *Id.*

unexpected since neither the State nor Ms. Morris had asked the court for an opinion or a ruling on Mr. Gage's role in these removal hearings.

Three justices joined in a dissent on the issue whether testimony of the county attorney under investigation could be compelled.[115] The three justices disagreed with the majority that the executive order and section 351.03 of the Minnesota Statutes authorized the compelling of testimony of the county attorney.[116] Since the statute provided that the governor give "an opportunity to be heard in his defense" to the elected official charged, these justices were on to define the word "opportunity" as "chance" or "option" to testify in her own behalf, and thus found that Ms. Morris was not required to testify.[117]

On July 23, 1985, Mr. Doyle brought a motion before the Special Commissioner to remove Mr. Gage as special counsel in the removal hearings of Ms. Morris. Mr. Doyle argued that the Supreme Court of Minnesota had commented that Mr. Gage should be a neutral investigator and a neutral presenter of all evidence for and against Ms. Morris.[118] Since the Commission had directed him to take on the role of a prosecutor, Mr. Doyle asserted that Mr. Gage should now be replaced.

The Commission denied Mr. Doyle's motion to remove Mr. Gage from the proceedings. First, the Commission found it had selected the proper procedure in line with all the prior removal cases, and believed that it was the best procedure to afford all parties maximum due process. Second, the Commission viewed the comments in the supreme court's opinion as dicta, not a holding, and certainly not as a directive to the Commission to change its procedural process.[119] Finally, the statutes under which both the Governor and the Special Commissioner were operating did not specify how the hearing should be conducted.[120] The statutes simply provided that the Special Commissioner shall "[t]ake and report the testimony for and against [the elected official]," and that the Governor could remove an elected official only upon "competent evidence...of malfeasance or nonfeasance in the

115. *Id.* at 889 (Kelley, J., dissenting). Justices Wahl and Coyne joined in the dissent of Justice Kelley. *Id.*

116. *Id.*; *see* MINN. STAT. § 351.03 (repealed 1986). For the text of § 351.03, see *supra* note 6.

117. *Bush*, 370 N.W.2d at 889. (Kelley, J., dissenting); *see* MINN. STAT. § 351.03 (repealed 1986). For the text of § 351.03, see *supra* note 6.

118. *Bush*, 370 N.W.2d at 888.

119. *See id.*

120. *See* MINN. STAT. §§ 351.03-.04 (repealed 1986). For the text of §§ 351.03-.04, see *supra* note 6.

performance of his official duties.''[121] In its dicta the supreme court seemed to look only to the executive order and did not take into account the Minnesota statutes upon which the Commission relied.[122]

Following our decision to deny Mr. Doyle's motion, we set a prehearing conference for later in the afternoon so that we could discuss any anticipated problems, and assure ourselves that the hearing on the next day, August 1, would actually proceed. In anticipation of that prehearing conference, the Commissioners met and determined that we had to more carefully structure the presentation of the evidence by Mr. Gage. Hence, we sent a memorandum to Mr. Gage and to Mr. Doyle with a copy to Mr. Martin advising the attorneys that when the hearing resumed on August 1, we intended to begin with a review of the orginal Buchan Petition. The Commissioners agreed that it was necessary to review the original Buchan Petition since Mr. Gage was not going to present some evidence on some of the allegations made in that Petition. We expected that no matter what recommendation we gave to the Governor, he would want to know what had happened to the allegations in that original Petition, since that was the basis for the executive order. We informed Mr. Gage that we would require him to explain why he was not going to present evidence on some of the allegations in the original Petition, if that was the case. We also asked him to briefly outline the efforts he had made to find supporting evidence. Upon completion of the review of the Buchan Petition, we then would read into the record the additional allegations regarding the Scott County sex abuse cases which were not specifically included in the Buchan Petition.[123] At that point Mr. Gage would proceed with the evidence of malfeasance or nonfeasance arising from the Scott County sex abuse cases.

If Mr. Gage deemed it necessary to introduce evidence of malfeasance or nonfeasance not related to the Scott County sex abuse cases, then we would require that he make an offer of proof to the Commission. We, as a Commission, would then determine whether such evidence was pertinent and should be allowed in the hearing. We stated in our memorandum that the offer of proof need not include testimony, but that it should be quite complete. That would include, of course, a list of the witnesses and exactly what Mr. Gage would expect to prove through the

121. *Id.*

122. *See Bush*, 370 N.W.2d at 888; *see also* MINN. STAT. §§ 351.03-.04 (repealed 1986). For the text of §§ 351.03-.04, see *supra* note 6.

123. *See generally* Petition to Remove, *supra* note 1; Notice of Restated Petition, *supra* note 84.

testimony of these witnesses. The cover letter to this memorandum clearly stated that we believed the Governor was entitled to have every allegation in the Buchan Petition addressed as completely as possible, and therefore, we would require that Mr. Gage begin his presentation on August 1 with evidence relating to the Scott County sex abuse cases. We also required that Mr. Gage provide to Mr. Doyle a list of witnesses which Mr. Gage intended to call on August 1 and 2.

On July 31, 1985, the three Commissioners met with Mr. Doyle, Mr. Martin, and Mr. Gage at the State Office Building for the final prehearing conference. Bailey Blethen, a criminal attorney and law partner of Mr. Gage who would assist him at the hearing, was also present. At the prehearing conference the Commission was assured that Ms. Morris would be present, there would be no surprise motions, and that all parties were ready to fully participate.

The hearing was recommenced the next morning with a statement which the Commission hoped would clear up some misunderstandings about the purpose and the process of the hearing. All of those watching were reminded that these proceedings were started because Cindy Lee Buchan filed a removal petition with the Governor alleging that R. Kathleen Morris was guilty of malfeasance in the performance of her duties as Scott County Attorney. The statement further explained that once the Governor appointed the Commission, the Commision intentionally did not investigate the charges because that would have destroyed its ability to carry out its duty to impartially consider the evidence for and against Ms. Morris. The Commission went on to explain that it had made the decision that the fairest and best way to get at the truth while protecting everyone's rights, was to conduct the hearing utilizing the adversary or trial structure. Therefore, Mr. Gage, who had been appointed by the Attorney General's Office to organize and present evidence, had sought evidence in support of the Petition. He had a duty, however, to disclose any helpful or favorable evidence to Ms. Morris and her counsel. We further stated that Ms. Morris was entitled to be present at the hearings, to be represented by a lawyer of her choice, and to cross examine the witnesses. Mr. Doyle was introduced as the attorney appearing on behalf of Ms. Morris.

Finally, it was announced that, as the Special Commissioner, with the assistance of Irene Scott and Julius Gernes, I was charged with the responsibility of determining whether there was a basis to remove Ms. Morris as Scott County Attorney. Once that

determination was made, I would make a recommendation to the Governor to either remove Ms. Morris or dismiss the Petition and the other allegations as being not proved or insufficient for removal.

At that point in the hearing, I stated that the proceedings would resume and the Commission would review each of the allegations in the Buchan Petition with the presenter of the evidence, Mr. Gage. Each allegation in the original Petition was then read and Mr. Gage responded to each allegation, declaring whether he intended to present evidence or whether he had determined there was insufficient evidence to go forward with that particular allegation. He then stated the efforts he had made in order to find supporting evidence. All of the allegations in the Buchan Petition charging malfeasance were related to the Scott County sex abuse cases. While Mr. Gage stated he could not prove every charge in the petition, he indicated that he wished to offer further evidence of malfeasance or nonfeasance relating to these same Scott County sex abuse cases. The Commission decided it would hear the evidence.

Following Mr. Gage's presentation of evidence related to the sex abuse cases, we explained to persons watching the proceedings that Mr. Gage also had the responsibility and the obligation to call to the attention of the Commission any evidence at all of malfeasance which he uncovered in his investigation of Ms. Morris, including evidence not related to the sex abuse cases. Therefore, we would allow Mr. Gage, after all the evidence arising from the sex abuse cases had been completed, to introduce, first to the Commission alone, additional evidence of malfeasance. The Commission then would determine if such evidence was pertinent and if it should be presented in the open hearing and through witnesses.[124]

For the next two and a half weeks the Commission heard testimony from witnesses both for and against Ms. Morris, presented both by Mr. Gage and by Mr. Doyle. Mr. Martin, on behalf of Ms. Morris, and Mr. Blethen, assisting Mr. Gage, also participated. Witnesses from Scott County included assistant county attorneys, financial and social workers, the sheriff and several of his deputies, police officers from the cities of Jordan and Shakopee, several judges, attorneys who acted as guardians ad litem for the children, the stepmother of a victim, and R. Kathleen

124. We anticipated that Mr. Gage would present evidence to the Commission either in the form of affidavits or through his own statements. We did not expect that evidence would be presented through witnesses.

Morris, herself, called both by Mr. Gage and later by her attorney. Also appearing as witnesses were former defendants in the sex abuse cases and other citizens. Therapists, Minnesota Bureau of Criminal Apprehension agents, a criminal intelligence analyst, a television special reporter, and the Attorney General of Minnesota also testified.

Each witness was examined, and then cross examined. When both attorneys had completed their questioning of a witness, the Commissioners would ask any questions they might have. Following the completion of the Commissioners' questions, the attorneys were allowed to ask any further questions they might want to ask on issues raised by the Commissioners. There were over 200 exhibits entered into evidence, including the entire transcript from the *Bentz* trial. It was estimated that there were some eight to ten thousand pages of documents.

After the completion of testimony specifically dealing with the Scott County sex abuse cases, the Commission heard from Mr. Gage, *in camera,* regarding further allegations he proposed to place before it. There were seven such charges. Mr. Gage presented six of those charges, withdrawing the seventh allegation that Ms. Morris misappropriated public funds. Some of the testimony on the remaining six allegations had already been completed on June 13, 1985, when Ms. Morris and her attorneys chose to absent themselves from the hearing after being denied a continuance. The following day the Commission announced it would recess the hearings, thus, allowing all testimony that first day to stand. Therefore, Mr. Gage was requesting only to call certain witnesses to bolster his five charges with regard to Deputy Rgnonti and to the charges of verbal and physical abuse by Ms. Morris towards her staff and other Scott County employees. The Commission decided that this additional evidence appeared necessary and pertinent for a full airing of any possible malfeasance by Ms. Morris while acting as Scott County Attorney. After the completion of all the testimony Mr. Doyle and Mr. Gage each gave a closing argument. The hearings ended and the Commission retired to complete its task.

Away from the persistant energy of the hearing, the task appeared overwhelming in scope. It was essential to develop a system by which the Commission could review the evidence. We began by separating each allegation in the July 5 Revised Petition, and discussing them one by one to determine whether they had been proved by clear and convincing evidence. Some clearly had not been. Others appeared to be sufficiently proved. After discussion, we began writing findings for the questionable and the

clearly proved charges. That required reading through all of the documents and reviewing the testimony as it was being transcribed. Every finding was cited to a document or a transcript page number. We were determined to make this report as thorough and accurate as possible.

After completing forty pages of findings on twelve of the allegations, we concluded that seven of them were proved, four were not proved by clear and convincing evidence, and there was no basis for one of the allegations. The next analysis was to decide whether the seven allegations which were proved amounted to malfeasance. In making this determination we used a method of analysis developed from the definition of malfeasance which we had adopted after considerable research.[125]

We analyzed each act which we found proved with the following questions. First, we asked whether Ms. Morris willfully did a specific act, and, if she did, whether it was done consciously, voluntarily, and without coercion or duress. Second, if we answered the first question yes, then we asked whether the act was wrongful. In order to answer that question properly we needed to further define "wrongful." Black's Law Dictionary defines "wrongful" as injurious, heedless, unjust, reckless, unfair acts which would infringe upon the rights of another to his or her damage.[126] We determined that, in other words, someone must be damaged even if that someone was society in general. Third, if the answer to the second question was yes, we asked whether Ms. Morris had the right to do the act. Was it within the scope of her official duty or official authority to act in this way? For example, was it within her prosecutorial discretion? Finally, if the answer to the third questions was no, we asked whether the doing of the act interfered with the performance of her job. The purpose of this question was to avoid trivial allegations or acts which had no connection with the discharge of her official duties. With an affirmative response to this final question, malfeasance was established.

Using the above analysis on the seven allegations that were proved we concluded the following:

> 1. Ms. Morris failed to disclose to the trial judge that child witnesses were being housed together during a trial in which they were witnesses. We determined that R.

125. *See* Mesun, *supra* note 83, at 10.
126. BLACK'S LAW DICTIONARY 1446 (5th ed. 1979).

Kathleen Morris had no duty to disclose this information to the judge, although a prudent prosecutor would have done so. Therefore, we found no malfeasance.

2. Ms. Morris stated to the trial judge on the eighth day of the *Bentz* trial that the defendants never asked for the notes of the investigating officers when, in fact, defense counsel had specifically requested such notes. However, given the fact that the judge recalled that defense counsel had requested such notes and those notes were subsequently delivered during the trial to defense counsel, no damage was done. Therefore, because no damage was done, the Commission concluded that this was not malfeasance.

3. Ms. Morris struck physically at and verbally abused employees of her office and used intemperate and abusive language toward other Scott County employees. While her conduct, particularly toward those who worked for her, was reprehensible, it did not, the Commission concluded, constitute malfeasance since it did not interfere with the discharge of her official duties.

4. Ms. Morris made a false statement to the media when she said that children who were alleged victims of sex abuse in the Scott County cases were not subject to dozens of interviews. Even if one interprets this to mean only investigative interviews, the Commission did find that there were at least ten children who had more than a dozen interviews each with investigators. More than half of those children had almost or more than two dozen interviews. Those numbers did not include the additional interviews with therapists, psychologists, and with Ms. Morris and her staff. Though no records were retained by Ms. Morris, a guardian ad litem documented the number of court preparation interviews the County Attorney's Office had with two children as high as nineteen and fourteen interviews each. The Commission, however, did not find that the false statement made to the media amounted to malfeasance because it was not established who was damaged by these statements, except the public in a general sense.

5. Ms. Morris dismissed all criminal complaints against twenty-one defendants in the Scott County sex abuse cases on October 15, 1984, even though she believed that

> the cases had been properly investigated, that there was probable cause to charge, and that the cases had been properly prepared for trial and could be successfully prosecuted. Many individuals who were not allowed the opportunity to clear their names were greatly damaged by this decision, as was society's interests in seeing justice done. This act certainly interfered with the performance of Ms. Morris' official duties. However, a prosecutor has broad discretion in deciding whether to dismiss a case. The Commission determined that the evidence presented to it did not establish to a clear and convincing standard that Ms. Morris exceeded this prosecutorial discretion. The Commission concluded that the wholesale dismissal of the twenty-one cases was unjustified, but it could not find that this action constituted malfeasance. The county attorney or any prosecutor under our system of justice has such broad prosecutorial discretion that the power to dismiss cases without regard to whether a conviction could be secured is practically absolute.

Although our analysis led us to conclude there was no malfeasance in five of the proved allegations, we did go on to find that the final two charges proved were, in fact, malfeasant acts. The first charge proved that we determined was a malfeasant act was the intentional suppression by Ms. Morris of exculpatory evidence in the form of statements by children who were witnesses in the sex abuse cases that they had seen persons being mutiliated and murdered. These statements, which in most cases were extremely bizarre, were relevant to the credibility of those children as witnesses, and Ms. Morris admitted she was aware that others could consider such statements exculpatory. Furthermore, the Commission reasoned, even if Ms. Morris thought her choice to suppress this evidence was valid, she had a clear duty to apply to the court for a protective order rather than make a nondisclosure determination on her own. The damage done by this act was to the integrity of the criminal justice system. It was certainly outside the scope of her authority to act in this manner, and it was an interference with the proper discharge of her official duties.

The second malfeasant act Ms. Morris was determined to have committed was the violation of a court's order sequestering witnesses in the child sex abuse trial of Robert and Lois Bentz. The Commission decided that while it was reasonable to house the child

witnesses together during the *Bentz* trial, Ms. Morris had a duty, because of these special arrangments, to make both the children and the adults involved aware of the sequestration order. The Commission learned that at least one adult was not aware of the order, and numerous child witnesses discussed their testimony with each other, stating they did not know that was not allowed. She also had a responsibility to see to it that her own behavior was above reproach. She did not do this when she commended a child witness in front of all of the other children at a restaurant the evening after he testified and told everyone to give him a hand. Ms. Morris was clearly in violation of the sequestration order for the State's witnesses. The damage again was to the integrity of the criminal justice system as well as potentially to the State's case.

Having found malfeasance in two of the allegations which were proved, the Commission then had to determine whether we should make a recommendation to the Governor to remove Ms. Morris from her elected position as Scott County Attorney based on these two malfeasant acts. Section 351.03 of the Minnesota Statutes certainly provides the Governor with discretion in this decision stating that the Governor "may" remove.[127] Consequently, the Commission had to analyze carefully whether it should recommend to the Governor to exercise his discretion and remove Ms. Morris from office.

Research revealed a generally accepted principle that the removal of an official from an elective office is a drastic remedy.[128] This action is an intervention in the processes of democracy and it is an infringment on the fundamental principle that the right of choosing and repudiating public officials belongs exclusively to the electorate.[129] The Commission determined that the removal process is particularly difficult when an elected official is required to pass judgment to remove another from elective office. Because of the great weight of the consequences of removal, both to Ms. Morris and to the electorate who had chosen her, the Commission determined that the acts constituting malfeasance had to be so serious as to result in severe damage to an aggrieved party before the Governor would be justified in removing her. Thus, our next and final step in this now extremely lengthy process was to examine the amount of damage caused by Ms. Morris as a result of her malfeasant conduct.

We first assessed the degree of injury to the defendants and to

127. *See* MINN. STAT. § 351.03 (repealed 1986). For the text of § 351.03, see *supra* note 6.
128. *See* Evans v. Hutchinson, 158 W. Va. 359, ____, 214 S.E.2d 453, 464 (1975).
129. *See* State v. Jones, 17 Utah 2d 190, ____, 407 P.2d 571, 574 (1965).

the integrity of the criminal justice system caused by the withholding of potentially exculpatory evidence. Two events occurred which directed the Commission to the conclusion that the degree of injury was not severe enough to justify a recommendation to remove. The first event was the rulings made by the trial judge. Although the judge relied only on Ms. Morris' account, he eventually joined in allowing these statements of the children regarding murders and mutilation to be suppressed. Therefore, even when the statements were brought to the attention of the court, although with no help from Ms. Morris, the result was the same as that caused by Ms. Morris' malfeasant act. Thus, the degree of damage to the integrity of the criminal justice system was overshadowed by the subsequent actions of the trial judge.

The second event was the acquittal by jury of Robert and Lois Bentz. The lack of the exculpatory evidence did not prevent the defendants being adjudged not guilty by their peers. Hence, the damage to them was not significant.

The Commission next assessed the degree of injury wrought upon the criminal justice system and the State's case by Ms. Morris' violation of the sequestration order during the *Bentz* trial. It appeared to the Commission that Ms. Morris' failure to caution her witnesses resulted in the children discussing their testimony among themselves. A reading of the *Bentz* trial transcript revealed that such lack of sequestration bolstered the defense case and damaged the credibility of the children as witnesses. However, when the violation of the order was brought to the attention of the trial judge, he ruled that the children's testimony was not tainted and did not allow their testimony to be stricken. Therefore, it was impossible for the Commission to assess just how much damage Ms. Morris' malfeasant act caused to her case in which she was eventually unsuccessful. Thus, in both malfeasant actions by the Scott County Attorney R. Kathleen Morris, the Commission reluctantly had to find that there was not the high degree of resultant damage necessary to recommend her removal.

In the action where we did find that high degree of damage, the wholesale dismissal of twenty-one sex abuse cases in one day, we were foreclosed from finding malfeasance. For the Commission, that was the most troublesome of all the allegations. As we stated in our report to the Governor: "Those defendants who were guilty went free, and those who were innocent were left without the opportunity to clear their names. Those children who were victims

became victims once again."[130]

Upon receipt of our Commission Report, the Governor accepted our recommendation and did not remove the county attorney from her office. On October 10, 1985, at a press conference to announce his decision, the Governor stated that he would not remove R. Kathleen Morris but would let the voters of Scott County decide her fate.

Subsequently, on November 4, 1986, the Scott County electorate removed R. Kathleen Morris overwhelmingly from office by a vote of 2-1 in favor of her opponent.

Subsequent to the removal proceedings, the Minnesota Legislature adopted a new procedure for the removal of elected county officials.[131] I participated in that process by helping to write the new statute and by testifying to the Legislature. The Legislature incorporated the definitions for malfeasance, misfeasance, and nonfeasance constructed by Kim Mesun and applied by the Special Commission during the R. Kathleen Morris removal proceedings.[132] In addition, the Legislature adopted many of the standards and procedures employed by the Special Commission.[133] However, the Governor no longer has a role in the removal process, and the final decision to remove an elected county official is by a majority vote of the registered voters pursuant to a special election.[134]

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130. *See* Findings of Fact, Conclusions of Law and Recommendation of the Special Commission established by Executive Order 85-10 concerning Kathleen Morris, Scott County Attorney at 53 (1985).

131. *See* MINN. STAT. §§ 351.14-.23 (1986) (establishing procedures for the removal of elected officials).

132. *See id.* § 351.14. Malfeasance is defined as the willful commission of an unlawful or wrongful act in the performance of a public official's duties which is outside the scope of the authority of the public official and which infringes on the rights of any person or entity. *Id.* Nonfeasance is defined as the willful failure to perform a specific act which is a required part of the duties of the public official. *Id.* Misfeasance is defined as the negligent performance of the duties of a public official or the negligent failure to perform a specific act which is a required part of the duties of the public official. *Id.*; *see also* Mesun, *supra* note 83, at 10.

133. *See generally* MINN. STAT. §§ 351.14-.23 (1986).

134. *Id.* The newly enacted removal procedures pursuant to the Minnesota Statutes provide that any registered voter may submit a petition to the county auditor requesting the removal of an elected county official. *Id.* § 351.16. The petition must include the supporting signatures of at least 25% of the number of persons who voted in the preceding election for the office held by the county official named in the petition. *Id.* If the petition contains the requisite number of signatures, the petition is forwarded to the chief justice of the appellate courts, who is to determine whether the petition properly alleges facts which, if proven, constitute malfeasance or nonfeasance in the performance of official duties. *Id.* §§ 351.16-.17. If the petition properly contains factual allegations of malfeasance or nonfeasance, the chief justice shall assign a special master to take evidence at a public hearing. *Id.* § 351.17. The special master shall determine whether the petitioners have shown by clear and convincing evidence that the factual allegations of misfeasance or nonfeasance are true, and if so, whether the facts found to be true constitute malfeasance or nonfeasance. *Id.* § 351.19. If the special master determines that the elected county official committed malfeasance or nonfeasance in the performance of official duties, the special master shall order a removal election. *Id.* § 351.20. An elected county official may be removed pursuant to the special election by majority vote. *Id.* § 351.22.