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LEGAL UPDATE

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NOTEWORTHY LEGAL ISSUES AND DEVELOPMENTS FROM THE PAST YEAR AFFECTING MINNESOTA JOURNALISTS

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1. <u>HEADLINERS</u>
Most Notable Legal Developments of the Past Year

A. Access to Records – *Wetterlings vs. Stearns County and Stearns County Sheriff.* District Court rejects Wetterlings' lawsuit aimed at preventing disclosure of portions of law enforcement investigative file, based on claim of constitutional privacy right.

B. Access to Records— *Webster vs. Hennepin County and Hennepin County Sheriff's Office*. Supreme Court agrees that Hennepin County failed to comply with MGDPA in response to massive request for sheriff's office records, but ducks key issue as to whether request was overly burdensome and therefore invalid.

C. Access to Records—*DFL Party of Minnesota v. St. Louis County*. St. Louis County District Court holds that emails between county commissioner (and candidate for Congress) and political campaign organization are public.

D. Access to Records—*Echo Newspaper v. St. Louis Park Public Schools.* Student newspaper's effort to obtain school hallway security video rejected by Court of Appeals.

E. Access to Records—Advisory Opinion. Investigative report prompted by complaint against sheriff who retired while complaint was pending was public data.

F. Access to Records—Advisory Opinion. Personnel records that documented the discipline of a city police officer were public data, regardless of the fact that they were also part of an active criminal investigative file.

G. Open Meetings—*Funk, et al. vs. O'Connor, et al.* Supreme Court rejects removal from office claim, even though Victoria city officials violated OML 38 times.

H. Open Meetings—Advisory Opinion. City council acted contrary to Open Meeting Law by holding meeting outside of city limits.

I. Libel Litigation—*Larson vs. Gannett Company, et al. (KARE 11 and St. Cloud Times).* Court of Appeals overturns Hennepin County judge's distorted interpretation of fair report privilege in libel action brought by exonerated suspect in Cold Spring police killing, but dilutes value of ruling by suggesting the juries will often need to decide if privilege applies.

J. Libel Litigation—*Trivedi, LLC, et al. vs. Dennis Lang*. After nearly six years of litigation, libel lawsuit against St. Paul blogger and freelance journalist prompted by criticism of guru is settled.

K. Libel Litigation-- *Maethner vs. Someplace Safe, Inc.* Libel lawsuit against domestic violence support organization reinstated by appellate court.

L. Libel Litigation – *Nelson Auto Center, Inc. vs. Multimedia Holdings Corporation.* Federal court dismisses Fergus Falls auto dealership's defamation suit against KARE 11.

M. Reporter's Privilege—*State v. Zarate* (KAAL-TV)*.* Court rejects public defender's attempt to subpoena journalist in criminal case.

N. Access to Courts – Cameras in Court. Supreme Court adopts permanent rules for audio-video coverage of criminal proceedings.

2. OPEN RECORDS (aka DATA PRACTICES)

-District Court Rejects Wetterlings' Constitutional Privacy Claim; Supreme Court Sides with Tony Webster in Email Access Case—Sort of

Two data practices cases with broad potential impact were decided this past year. In April, the District Court dismissed the lawsuit brought by Jerry and Patty Wetterling to block public disclosure of portions of the criminal investigative file accumulated in connection with the kidnapping of their son Jacob, based on a constitutional privacy argument. And also in April, the Supreme Court ruled in Tony Webster's lawsuit against Hennepin County prompted by Webster's request for thousands of emails maintained by the Hennepin County sheriff's office.

In addition, a number of advisory opinions were issued in 2018 by the Commissioner of Administration addressing important public access issues. They are summarized below. The Legislature did not make any noteworthy revisions to the MGDPA in its 2018 session.

A. Wetterling Litigation—Constitutional Right To Informational Privacy Rejected.

Wetterlings vs. Stearns County and Stearns County Sheriff
Stearns County District Court (Court File No. 73-CV-17-4904) – April 2018

Following the conviction and sentencing of the man who kidnapped and killed Jacob Wetterling, most of the criminal investigative file accumulated by the Stearns County sheriff's office became publicly accessible, pursuant to Minn. Stat. §13.82, subd. 7, part of the Data Practices Act. That statute provides that when a law enforcement investigation turns "inactive", the classification of investigative data collected during the investigation becomes public, with some limited exceptions. The investigative file in the Wetterling case is very large, containing many thousands of documents and other records. Following a laborious review of the file by the Stearns County attorney to determine what materials remained classified, the county attorney announced that public access to the file would be permitted in June, 2017.

A few days before the release date, however, Jerry and Patty Wetterling filed suit against Stearns County and the Stearns County sheriff's office, asking that certain portions of the public file should be withheld. They argued that those portions consisted of extremely sensitive

information, which were therefore protected against disclosure by privacy rights guaranteed under the state and federal constitutions—even though such rights in this context have never been recognized in Minnesota. Early in the case, the Stearns County attorney informed the Court that her office was taking no position on the Wetterlings' claims, and would not be opposing the relief they requested.

The potential impact of the Wetterlings' suit was very significant. If the Court were to agree that there was a constitutional privacy right that could be used to override the public data classifications of state law, then those classifications would become much less reliable, and the presumption of public access found in the Data Practices Act would be seriously compromised. In response to the Stearns County attorney's decision not to oppose the Wetterlings' claims, a coalition of journalism and public interest organizations (the Minnesota Newspaper Association, the Minnesota Broadcasters Association, Hubbard Broadcasting Company, the St. Paul Pioneer Press, Minnesota Public Radio, the Silha Center at the University of Minnesota, the Society for Professional Journalists, and MNCOGI) intervened in the litigation.

The case was further complicated when the United States Department of Justice (DOJ) also intervened, seeking the return of thousands of documents in the investigative file that apparently originated with the FBI. The DOJ claimed that those documents were the property of the federal government, were only "loaned" to Stearns County, and that they had to be returned without permitting any public access.

The case was assigned to Judge Ann Carrott in Alexandria after the Stearns County judges recused themselves, and in April she issued an Order dismissing the Wetterlings' claims, categorically rejecting their argument that there is a constitutional right of informational privacy which can be used on an ad hoc basis to override the public data classifications found in state law.

In her ruling, Judge Carrot agreed with the arguments advanced by the Intervenors, holding that the Supreme Court "has issued no rulings to support the conclusion that an individual can claim the right of informational privacy to prevent the government from disclosing information as public by state statute." Somewhat surprisingly, the Order was not appealed.

The decision is one of the most important ever issued interpreting the Data Practices Act, because a contrary holding would have had an extremely disruptive impact on public access rights under the Data Practices Act and other state laws.

B. Supreme Court Issues Mixed Decision in Case Involving Massive Request for Sheriff's Office Emails and other Data.

Webster vs. Hennepin County and Hennepin County Sheriff's Office
Minnesota Supreme Court, 910 N.W.2d 420 (Minn. 2018)

In an effort to learn how the Hennepin County Sheriff's Office might be using and deploying cutting edge technology to track people with "biometrics" (through their faces, fingerprints and

irises), Tony Webster submitted a public records request to the County in August 2015 seeking contracts, e-mail messages, or any other data relating to this issue. The request asked for all emails containing several keywords that Webster specified related to the use of the biometric technology. The County made some effort to respond, but objected that the Data Practices Act doesn't require government entities to conduct massive e-mail keyword searches, and that Webster's request was "unreasonable and too burdensome with which to comply." The County said it had 209 million e-mails in its accounts and gets 6 million more every month, 70% of which are spam, and claimed that searching every e-mail account for the 20 keywords cited by Webster would keep its servers running 24 hours a day for more than 15 months.

Webster eventually filed a complaint with the state Office of Administrative Hearings under the statute establishing an expedited procedure for data practices disputes, and in April, 2016 an Administrative Law Judge (ALJ) ruled in Webster's favor. The County appealed, and in April, 2017, the Court of Appeals issued a complex and detailed decision reversing part of the ALJ's Order. The Supreme Court then granted review, and in April, 2018 filed an opinion that partly favored Webster by reversing the Court of Appeals and holding that Hennepin County's procedures were not sufficient to produce compliance with his information requests under the Data Practices Act, which resulted in "missteps and failures" to promptly turn over the information, the Court said.

However, the justices upheld the lower court on a second count. Webster had argued that Hennepin County's delays in producing data were caused by an email system that wasn't—contrary to the Data Practices Act--maintained in "an arrangement and condition" that made data "easily accessible for convenient use." But the high court rejected this claim, concluding that the county's technology was compliant. On a third issue–arguably the most important one—the Court ruled that it lacked jurisdiction to decide if Webster's request was overly burdensome or if the county had a right to turn him down on this basis. That disappointed many people who were hoping for some judicial clarification on the issue.

In an article in *Minnesota Lawyer* about the decision, Webster said it sends an important message to all Minnesota government agencies. "When you get a data request you have to comply with it," Webster said. "You can't ignore it." But MNA attorney Mark Anfinson suggested that's not much of a result after three years of "bitter, knock-down drag-out litigation," because the law already requires agencies to comply with data requests. "This is sort of an abstract holding that doesn't change anything," Anfinson said. The attorney who represented Hennepin County added this perspective: "The significant time involvement in a large email request is really on the reviewing part—and there is no real way to speed that up," Rogan said. "Somebody has to review each of those emails to determine what the data in there is and whether or not it needs to be redacted."

C. Correspondence (including Emails) between Elected Officials and Persons acting on Behalf of an Organization are not Private Data under Minn. Stat. §13.601, subd. 2.

DFL Party of Minnesota v. St. Louis County
St. Louis County District Court (October 2018)

Last spring, the *Star Tribune* made a data request to St. Louis County for all correspondence between St. Louis County Commissioner Pete Stauber and the National Republican Congressional Committee (NRCC). Stauber was a candidate for Congress. The County responded that it had recovered 15 responsive emails, but said the emails were being withheld pursuant to Minn. Stat. §13.601, subd. 2, which provides that "[c]orrespondence between individuals and elected officials is private data on individuals, but may be made public by either the sender or the recipient." (Email is a form of correspondence for purposes of the statute.)

The *Star Tribune* and the *Duluth News Tribune* subsequently requested an advisory opinion from the Department of Administration's Data Practices Office, which in October held that the emails were public data. However, the County still declined to release the emails, contending the DPO opinion was merely advisory, and that the literal language of the statute required that the emails be withheld.

Minnesota's DFL party then sued the County for access to the emails. In late October, the St. Louis County District Court ruled in favor of the DFL, agreeing with the analysis outlined in the advisory opinion. The Court said that the private data classification in §13.601, subd. 2 applies only to individuals who are corresponding as private citizens, and does not apply to people acting as representatives of organizations. Because the NRCC is an organization, any correspondence between Commissioner Stauber and persons communicating with him on behalf of the NRCC is presumptively public because those persons are simply acting as agents of the organization, and not in their personal capacity. The decision was not appealed, and shortly after it was issued, St. Louis County released the emails.

D. Student Newspaper's Effort to Obtain School Hallway Video Again Rejected on Appeal.

Echo Newspaper v. St. Louis Park Public Schools
Minnesota Court of Appeals, 2018 WL 3826264 (August 2018)

The St. Louis Park high school student newspaper—known as *The Echo*—sued the school district after it refused the newspaper's data request for school security camera video taken in a school hallway showing a student allegedly ripping a hijab off of a another student. After the district received the request, it downloaded a copy of the video so that it would not be "relooped." The district does not archive video from the security cameras, *The Echo* argued the video was important to news coverage, and that it should be considered public data. The newspaper had covered the hallway incident extensively, earning national awards. The school district responded that the video should be classified as private "educational data" under the Data

Practices Act. In October, 2017, a Hennepin County district court judge agreed, and dismissed the lawsuit. The newspaper then appealed.

In August, the Court of Appeals affirmed the District Court. In its opinion, the Court noted that the MGDPA defines "[e]ducational data" as "data on individuals maintained by a public educational agency or institution or by a person acting for the agency or institution which relates to a student." And the appellate court readily rejected *The Echo's* arguments "that the district court erred by concluding that the district 'maintained' the hallway video [or] that the video contains information 'which relates to a student.'" Citing the recent Supreme Court decision in *KSTP-TV v. Metro. Council*, 884 N.W.2d 342 (Minn. 2016), the Court said that "because the hallway video was stored and accessible for at least one day after the incident, we conclude that the security video was 'maintained' within the meaning of the MGDPA." And citing Minn. R. 1205.0200 (which is used to interpret the MGDPA), the Court said that "'the duration of the existence of data, including whether certain data is temporary rather than permanent, is not relevant to compliance with [the MGDPA].'"

As for the Echo's claim that the statutory term "relates to a student" is ambiguous and that the district court erred in interpreting that phrase, the Court responded that "the word 'relates' as it is used in the MGDPA appears to cover a wide range of data. However, this breadth does not necessarily imply ambiguity."

> We conclude that "relates to a student" is not ambiguous and that it covers data that has a relationship or connection with a student. We also conclude that a security video depicting identifiable students allegedly involved in an altercation "relates to a student" within the meaning of the statute. Therefore, the district court did not err by concluding that the video footage was "educational data" within the meaning of the MGDPA and inaccessible to Echo.

The decision demonstrates the challenges of obtaining public access to government audio and video data in contexts such as schools, where much of the data will be classified as not public.

DATA PRACTICES ADVISORY OPINIONS

In 2018, the state Commissioner of Administration, through the Department's Data Practices Office (DPO), issued at total of 19 advisory opinions. Fifteen of the opinions addressed open records and data practices issues, while the remainder related to the Open Meeting Law. The data practices opinions having some significance to journalists are summarized below. The Data Practices Office was called the Information Policy Analysis Division (IPAD) until 2017.

A. ***Advisory Opinion No. 18-001; Minnesota Office of Management and Budget***
Arbitrator's decision reversing disciplinary action against state-level public official was public data under Minn. Stat. §13.43, subd. 2(e).

State agency received data request for an arbitrator's decision related to the disciplinary

discharge of an individual who was classified as a "public official" under Minn. Stat. §13.43, subd. 2(e). The public official had challenged the discipline through arbitration with the Bureau of Mediation Services (BMS). The arbitrator found that the discharge was not supported by just cause, and reversed all aspects of the disciplinary action. Normally, an arbitration decision that sustains a grievance and completely reverses a disciplinary action against a public employee is private personnel data. In this case, however, because a state-level public official was involved, under §13.43, subd. 2(e), all data related to the complaint against the official (except private personnel data on other employees or other not public data) became public once the investigation was complete, or the official resigned or was terminated while the investigation was pending. No final disposition was required.

B. *Advisory Opinion No. 18-002; Blue Earth Police Department*
Data in incident reports involving a misdemeanor juvenile assault case relating to the suspect and witnesses are classified as private.

A reporter from KSTP-TV requested incident reports from the Blue Earth police department related to a misdemeanor juvenile assault case, naming the accused and providing a description of events. The reports also contain information that identifies two juvenile witnesses. In response to an advisory opinion request from the city attorney, the DPO held that (1) the classification of data in an incident report involving a misdemeanor juvenile assault case are private pursuant to Minnesota Statutes §260B.171 (which classifies peace officer records on most juveniles as private); and (2) data identifying the juvenile witnesses are private pursuant to Minn. Stat. §13.82, subd. 17, because the Blue Earth police department determined that the subject matter of the investigation justifies protecting the witnesses.

C. *Advisory Opinion No. 18-006; University of Minnesota*
University failed to respond in a timely manner to request for small amount of public personnel data.

Citizen submitted data request to the University for public personnel data about three University employees on February 17, 2018. When the University didn't respond, citizen sought an advisory opinion, stating that as of April 18, 2018, the University had not provided him with the data. In its opinion, DPO noted that under Minn. Stat. §13.03, when a government entity receives a data request from a requester who is not the subject of the data, the entity is required to respond in an appropriate and prompt manner and within a reasonable time. In responding, an entity must provide the data, advise that the data are classified such that the requester cannot have access, or inform the requester that the data do not exist. Also, pursuant to §13.03, subd. 1, "[t]he responsible authority in every government entity shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use." In previous advisory opinions, "the Commissioner has stated that a prompt, reasonable response is relative to the volume of data requested." Here, the University claimed that the requested information was provided in May. But DPO concluded that since the citizen had only asked for public data on three employees, the University's response was not timely.

D. *Advisory Opinion No. 18-008; Chisago County*
Investigative report prompted by complaint against sheriff who retired while complaint was pending was public data.

Chisago County received a complaint against its elected sheriff and initiated an external investigation into the complaint. In April, the investigator issued her report to Chisago County. Shortly thereafter, the sheriff submitted his written notice of retirement, effective in May. In late April, Chisago County received a data request from KSTP-TV seeking the "investigation into complaint, disciplinary action, finding of investigation" regarding the sheriff.

In response to an advisory opinion request from the county attorney about the classification of data in the investigative report, DPO held that because the sheriff "resigned" when the complaint or charge was still pending, all data related to the complaint or charge became public (except for private data on other employees or data that would jeopardize an active investigation). The sheriff was a "public official," and an employee. In DPO's view, his retirement was equivalent to a resignation. DPO noted that generally, only the existence and status of a complaint or charge against an employee are public data, unless there is a final disposition of a disciplinary action. But for employees who are "public officials," all data relating to a complaint or charge are public if certain conditions are met pursuant to Minn. Stat. §13.43, subd. 2(e) and (f), without needing a final disposition.

E. *Advisory Opinion No. 18-009; Minnesota Dept. of Health*
Statute blocked reporter's access to data maintained by MDH that identify the location of any radon testing or mitigation site.

A reporter for KARE 11 asked for an advisory opinion regarding certain data the Minnesota Department of Health maintains, after MDH denied his request for access to the data. The request covered school building radon data collected by MDH. In seeking the opinion, the reporter argued that the statute cited by MDH--§13.3805, subd. 5--is focused on the location of residential property owners and not public/government buildings. He further argued that "the same data that MDH is withholding" is considered public data by individual school districts, but requires hundreds of individual data requests and countless wasted hours by school districts responding to those requests when MDH has the data in one location." However, the Opinion issued by DPO agreed with the Department of Health, concluding that the statute's classification is not limited to residential property. "Data maintained by the Department that identify the location of any radon testing or mitigation site, regardless of the type of property, including school buildings, are nonpublic."

F. *Advisory Opinion No. 18-010; Duluth Public Schools*
School district failed to respond appropriately to requests from citizen for access to public data.

Citizen submitted four data requests to Ind. School District 709 (Duluth) in early March. The District time stamped the requests as "received" on March 7. On March 20, the District

emailed citizen that it had received the requests and that the requests were "currently in the process of being evaluated and we are gathering data." However, citizen did not receive any further communication or any data from the District for several weeks, despite requests for a status update. He then sought an advisory opinion. In the Opinion, DPO concluded that the School District did not respond appropriately to the requests for public data because it did not notify the data requester that certain responsive data did not exist, provide any data to the requester on at least one of the requests, or provide information to explain the delay in responding to the requests.

G. *Advisory Opinion No. 18-013; St. Louis County*
Emails between county commissioner and political organization are public data.

The *Star Tribune* asked for an advisory opinion (joined by the *Duluth News Tribune)* after St. Louis County denied a request "for all correspondence between St. Louis County Commissioner Pete Stauber and the National Republican Congressional Committee (NRCC)." The County said that it had recovered 15 responsive emails, but that they were being withheld pursuant to Minn. Stat. §13.601, subd. 2, which states that "[c]orrespondence between individuals and elected officials is private data on individuals, but may be made public by either the sender or the recipient."

The DPO determined that the emails were public data. "The plain language of section 13.601, subdivision 2, is clear; had the Legislature intended to classify correspondence between elected officials and organizations as private under section 13.601, it would have used the term 'person' instead of 'individual.' The Legislature's decision to use the term 'individual' evidences an intent that correspondence between elected officials and organizations is not meant to be classified as private," notwithstanding the fact that a person acting on behalf of an organization is participating in the correspondence. (The analysis in this Opinion was subsequently endorsed by the St. Louis County District Court in a decision addressing the same dispute; see summary earlier in this outline.)

H. *Advisory Opinion No. 18-015; Minn. PELSB*
Legislator's effort to obtain details about suspension of teacher's license due to maltreatment of minors rebuffed.

Legislator sought an advisory opinion after the state Professional Educator Licensing and Standards Board's (PELSB) claimed that some of the data she requested was not public. Legislator had asked PELSB for certain "stipulation and consent agreements" entered into by the Board, which were provided. However, upon review, legislator noticed that in one of the agreements a teacher's license was suspended and stayed due to maltreatment of minors, but the agreement did not specify what the maltreatment was. She then requested additional details from PELSB, which responded that such information was considered inactive investigative data which is classified as private under Minn. Stat. §13.41 subd. 2. Legislator

then sought advisory opinion, arguing that PELSB did take disciplinary action, and therefore under the statute, the requested information was public.

In its Opinion, DPO disagreed. It noted that pursuant to §13.41, subd. 4, when a licensing agency investigates one of its licensees, and the investigation becomes inactive, the classification of the data depends upon certain factors. In general, under §13.41, subd. 2(a), all "inactive investigative data relating to violations of statutes or rules" are "classified as private." Subdivision 5 articulates certain exceptions for inactive investigative data if the agency took disciplinary action, mainly in those instances where there is a public hearing concerning the disciplinary action. But if the licensee and the licensing agency agree to resolve a complaint without a hearing, only the agreement and the specific reasons for the agreement are public data. Since this case was resolved without a public hearing, the additional data requested by the legislator are not public.

I. ***Advisory Opinion No. 18-016; Minn. Racing Commission***
Financial statements provided by racetracks to MRC are not trade secret data, and are therefore public.

Minnesota's two licensed racetracks are required to provide the Minnesota Racing Commission (MRC) with a number of disclosures as part of their license applications, including annual audited financial statements, as well as quarterly unaudited financial statements. MRC sought an advisory opinion on the issue of whether these financial statements meet the definition of "trade secret data" under Minn. Stat. §13.37, subd. 1(b) and would therefore be classified as nonpublic data in the case of a racetrack that is a privately held entity. After reviewing the proper meaning of the term "trade secret data" as discussed in several prior opinions, the DPO concluded that "certain financial data submitted by a licensee to the Minnesota Racing Commission do not meet the definition of trade secret data in Minnesota Statutes, section 13.37, and are therefore presumptively public."

J. ***Advisory Opinion No. 18-017; City of Eden Prairie***
Personnel records that documented the discipline of a city police officer were public data, regardless of the fact that they were also part of an active criminal investigative file.

City received a complaint against one of its police officers, involving potential employment misconduct. The City conducted an administrative investigation and prepared a report. As a result of the investigation, the City took disciplinary action against the officer, which reached final disposition. The City then determined that the investigative report, the letter describing the discipline, and other records were public as data documenting the basis of a disciplinary action. However, the officer's personnel file is now being reviewed by a county attorney's office to evaluate whether to criminally charge the officer, and it therefore can be considered active criminal investigative data, which is confidential. One of the attorneys involved in the review told City that disclosure of the disciplinary records would jeopardize the active investigation and potentially result in a decision not to bring charges against the officer on that

basis alone, irrespective of the merits. The City asked the DPO for an advisory opinion as to whether the fact that the personnel records could be considered active criminal investigative data overrides their classification as public personnel data. After an extended analysis of the issue, the DPO concluded that *all* data related to the final disposition of the disciplinary action against the officer are public personnel data, even though the same data are now part of an active criminal investigation.

3. OPEN MEETINGS

Supreme Court Affirms Decision in Victoria Case; Four New Advisory Opinions from DPO

In the past year, there was one significant decision from the Minnesota appellate courts interpreting the Open Meeting Law (Minn. Stat. Chapter 13D)—the Supreme Court's decision in the Victoria litigation, in which a Carver County district court judge found that city officials violated the OML 38 times. There were also four advisory opinions issued by the state Data Practices Office (DPO) relating to the OML, which are summarized below. The Legislature did not make any noteworthy revisions to the statute in its 2018 session.

Supreme Court Denies Removal from Office Claim, even though Victoria City Officials Violated OML 38 Times

Funk vs. O'Connor

Minnesota Supreme Court, 916 N.W.2d 319 (Minn. 2018)

In 2014, three groups of Victoria residents commenced separate, identical legal actions against the city's mayor and council members alleging violations of the Open Meeting Law that occurred while the city was deliberating about a new city hall, public library, and public works facility. Subsequently, two additional groups of residents filed OML actions against the defendants. Despite plaintiffs' objection, the district court then consolidated all of the pending lawsuits into one (the basis for plaintiffs' objection was that consolidation would "effectively eviscerate one of their requested remedies—the removal of the Defendants from office").

In March, 2016 a Carver County District Court judge found that the defendants had committed a total of 38 intentional violations of the state Open Meeting Law, and imposed fines totaling $7,800. Judge Janet Cain not only ruled that many meetings were improperly closed, but held that there were numerous additional violations of the OML by the council as an entity for failing to record meetings, provide notice of meetings, and properly close meetings. However, the Court rejected plaintiffs' demand that the officials be removed from office because the violations were established in a single court action, and the OML requires violations found in "three or more actions" in order for the removal penalty to apply.

Even though they mostly won in the trial court, the plaintiffs appealed, mainly arguing that by consolidating the separate actions, the District Court deprived them of obtaining the OML's forfeiture of office penalty. The Court of Appeals disagreed, however. The Supreme Court then

granted review, and in July affirmed the decision of the Court of Appeals.

According to the Court, "Appellants urge us to conclude that the forfeiture-of-office provision is triggered when three or more actions, involving the same public official and the same governing body, are filed and ultimately result in a court finding three or more intentional Open Meeting Law violations. Under Appellants' interpretation, the fact that the *Funk*, *Goulart*, and *Gubbe* complaints were filed separately and alleged separate violations would be sufficient to trigger the forfeiture-of-office provision." In other words, "Appellants ask us to condition the application of the [forfeiture-of-office provision] on the number of actions commenced."

The Court responded to this argument by carefully examining the language of the OML's forfeiture provision, focusing on the language stating that "upon finding as to the occurrence of a separate third violation, unrelated to the previous violations, [the court shall] issue its order declaring the position vacant and notify the appointing authority or clerk of the governing body." The Court then observed that "in context, however, 'previous' also necessarily implies that the 'separate' and 'unrelated' third violation was *found* after the first and second violations were found, because findings of violations under the statute are made at the conclusion of an action." "Unless two previous violations had already been established by findings made when previous actions were adjudicated, a court would not have sufficient information to find that the third, removable violation was separate and unrelated. Under the plain language of [the statute] therefore, some time must pass between the action that results in a finding of a separate, unrelated third violation and the resolution of the actions concerning two previous violations."

The Court therefore concluded "that the forfeiture-of-office provision is not triggered unless three separate, sequential adjudications result in findings of three separate, unrelated Open Meeting Law violations. Allowing three concurrently adjudicated actions to trigger the forfeiture-of-office provision would deny effect to the word 'previous' in subdivision 3(b)." "Because applying the plain meaning of 'previous' from subdivision 3(b) resolves the alleged ambiguity in subdivision 3(a) in favor of requiring three separate adjudications, we conclude that the district court could not have removed the officials from office."

This decision really doesn't break any new legal ground, because the interpretation of the forfeiture-of-office provision adopted by the Court has been widely accepted as the proper meaning of the statute for many years, under an earlier Court of Appeals opinion. Nonetheless, the Court's decision should resolve any remaining ambiguity about the provision, which has periodically tempted people seeking to attack their political opponents, as in the Victoria case.

OPEN MEETING LAW ADVISORY OPINIONS

A. *Advisory Opinion No. 18-003; City of St. Anthony Village*
City council acted contrary to Open Meeting Law by holding meeting outside of city limits, and by failing to make agenda materials available to public.

In January, the St. Anthony Village city council held a meeting that it described, in part, as a "Goal Setting Session." The meeting was held at a hotel in Brooklyn Park. A resident subsequently asked for an advisory opinion, raising three issues: (1) Was the meeting legally held in Brooklyn Park? (2) Did the council comply with the OML requirement to make at least one copy of members' materials available at meeting? (3) Did the council comply with the OML when members met for dinner in a hotel dining room on the evening of the meeting?

In its Opinion, the DPO held: (1) Based on the Minnesota Supreme Court's decision in *Quast v. Knutson*, 150 N.W.2d 199, 200 (Minn.1967), all public bodies must hold their meetings within the territorial confines of their jurisdictions. (2) A public body cannot fulfill its obligation to make members' materials available in the meeting room for inspection by the public if the public does not know they are available for inspection. While there is not an affirmative duty to distribute copies to each member of the public in attendance at the meeting, liberally construing the OML to protect the public's right to full access to the decision-making process of public bodies requires a public body to provide easy access to the materials. Where here, the materials were at a staff work station with other personal materials and not demonstrably available, members of the public could have been intimidated and possibly prevented from exercising their right to review a copy of the materials by being compelled to ask for them. (3) In this case, the council members at dinner apparently took specific measures to ensure that they would be in compliance with the OML by sitting at different tables in a public dining room, and not discussing official business. Thus a quorum of members did not discuss, decide, or receive information as a group related to official business, and therefore the dinner was a social gathering and not a "meeting" subject to the OML.

B. *Advisory Opinion No. 18-011; Greenwood Township Board*
Town board did not comply with Open Meeting Law when it failed to make agenda document available to public.

At a regular meeting of the Greenwood Township Board in May, a revision of the Greenwood Fire Department's Standard Operating Guidelines [SOG] was listed on the agenda. When the Board addressed this topic, the fire chief asked if the board would like to have a copy of the revision, and he proceeded to pass a copy out to each supervisor. The clerk did not receive a copy and no public copy was available for viewing. A resident asked for an advisory opinion on the issue of whether the members of the town board complied with the OML requirement to make at least one copy of members' materials available to the public at this meeting.
In its Opinion, the DPO readily concluded that the members of the town board did not comply with that requirement.

C. *<u>Advisory Opinion No. 18-018; Bois de Sioux Watershed District Board</u>*
Watershed district board did not comply with Open Meeting Law when member participated in two meetings by telephone.

In October, 2017 and January, 2018, a member of the Bois de Sioux Watershed District Board of Managers participated by telephone at regular meetings in order to reach a quorum. A resident then requested an advisory opinion as to whether the board complied with the Open Meeting Law in allowing the member to participate by telephone. In addressing this issue, the advisory opinion noted that there are two provisions in the OML that permit public bodies to conduct meetings by telephone. Minn. Stat. §13D.015 authorizes *state*-level agencies, boards, commissions, departments and public pension plans to conduct meetings by telephone if certain conditions are met. And Minn. Stat. §13D.021 allows all public bodies to conduct meetings by telephone if “the presiding officer, chief legal counsel, or chief administrative officer for the affected governing body determines that an in-person meeting or a meeting conducted under section 13D.02 is not practical or prudent because of a health pandemic or an emergency declared under chapter 12.” In this case, neither exception applied, and therefore the board member’s participation by telephone did not comply with the OML. (In his response to the advisory opinion request, the attorney for the board acknowledged that “the Board made a mistake, which the Board now recognizes and will not allow it to happen in the future.”)

D. *<u>Advisory Opinion No. 18-019; Rice Creek Watershed District Board</u>*
Member of watershed district board could participate in meetings via interactive television from Florida.

Administrator of the Rice Creek Watershed District asked for advisory opinion to address whether a member of the board of managers could participate in board meetings while out of state pursuant to the "interactive television" provision of the Open Meeting Law. “One member of the board of managers would like to participate in meetings while spending the winter months in Florida.” However, the administrator said that “our legal counsel is concerned that the Minnesota Supreme Court decision in *Quast v. Knutson*, 150 N.W.2d 199 (Minn. 1967), where the Court ruled that the phrase ‘open to the public’ as used in a section of the OML means ‘within the territorial confines" of the public body,’” prevents participation by interactive television. But the DPO concluded that the OML permitted the board member to use interactive television. DPO plausibly argued that “the *Quast* decision applies to an entire public body holding a meeting outside its territorial confines. The Court has yet to address the issue of location of meetings in other contexts. Thus, the plain language of section 13D.02 governs and board members of the District, and other public bodies, may use interactive television to attend and participate in meetings that meet the conditions of that section.” However, “the Commissioner reminds the District that the Board member attending via interactive television from Florida must do so from a location that is ‘open and accessible’ to the public and must provide notice according to section 13D.02, subd. 4.” [This Opinion reaffirmed Advisory Opinion 13-009, which held that a city council member participating remotely in a meeting using Skype was a valid form of interactive television.]

4. <u>LIBEL AND PRIVACY</u>

Libel Lawsuits Remain Active Hazard in Minnesota; Supreme Court to Decide Gannett Fair Report Privilege Case

During the past year, a number of major libel cases against Minnesota news organizations and journalists continued to be processed by the court system. They demonstrate the hazard that libel actions pose, in terms of damage claims, defense costs, and distraction. Privacy claims against the state's news media were again a pretty rare commodity over the past year--there were none of any significance.

A. <u>Key Fair Report Privilege Case now at Supreme Court</u>

Larson vs. Gannett Company, Inc. (KARE 11 and St. Cloud Times)
Minn. Court of Appeals, 915 N.W.2d 485 (Minn. App. 2018)
Argued before Minnesota Supreme Court, Jan. 7, 2019

In November, 2012, Cold Spring police officer Tom Decker was shot and killed outside a bar in the city. There were no witnesses to the shooting, but initially, law enforcement authorities focused their suspicions on Ryan Larson, who lived in an apartment above the bar. On the same day as the killing, Larson was arrested and booked into the Stearns County jail. A few hours later, the BCA issued a news release stating that Larson had been charged with second degree murder, and top law enforcement officials held a news conference during which they said that Larson had been taken into custody and that authorities were not looking for any other suspects. The Stearns County jail log also indicated that the charge against Larson was second degree murder.

However, Larson was eventually exonerated after another individual from the area committed suicide, and an investigation of the circumstances caused law enforcement to conclude that he had apparently killed Officer Decker, not Larson. Larson then sued KARE 11 and the *St. Cloud Times*, contending that both news organizations had inaccurately portrayed him as the killer, and that their reporting went beyond the facts available to them at the time. The news organizations responded that their reporting was protected by the "fair report" privilege, one of the most important protections that journalists have against libel claims, which allows journalists to relay the contents of public government records and proceedings even if it turns out they contained falsehoods. The news reports disseminated by both KARE 11 and the *Times* in the days after the shooting did not state that Larson was the killer, only that this is what the authorities were claiming.

In May, 2016, Hennepin County District Court Judge Susan Burke denied a motion by the news organizations to dismiss the case on the basis of the fair report privilege. Burke adopted a narrow and peculiar definition of the privilege, ruling that the news conference and news release were not the kinds of matters that the privilege applied to, even though they involved top law enforcement officials. As a result, Judge Burke determined that several of the statements at issue needed to be submitted to a jury.

A trial lasting several days followed, but in early November, 2016, the jury ruled completely in favor of KARE 11 and the *Times*, concluding that all of the statements they made about Larson were substantially true accounts of what the law enforcement authorities had in fact said. The drama didn't end there, however. Larson's attorney asked Judge Burke for a new trial, contending that her jury instructions were defective, and that the jury should have been allowed to consider three additional statements that were allegedly defamatory (statements which Judge Burke had earlier dismissed). Astonishingly, Judge Burke granted the motion in June, 2017, holding that eight of the statements in question were both defamatory and false as a matter of law—that she should never have given these issues to the jury—and ordered another trial on damages.

The news organizations then filed an appeal, and in May, the Minnesota Court of Appeals issued something of a split decision. On the positive side, it repudiated Judge Burke's aberrant and restrictive interpretation of the fair report privilege, concluding that the news conference and press release were clearly within its scope, and that reports based on them were protected by the privilege. But the second part of the Court's ruling was distinctly disappointing. The Court suggested that Judge Burke was correct in sending several of the allegedly defamatory statements to the jury for its evaluation of whether they were protected by the privilege—in other words, whether they had provided a substantially accurate account of the law enforcement news conference, jail log, and news release. Only because the Hennepin County jury concluded that the statements were accurate did the appellate panel dismiss the case. This part of the Court's decision would effectively nullify much of the benefit produced by a strong fair report privilege, and would mean that many disputes over whether the privilege protects a particular news report would need to be submitted to a jury for resolution. Cases that involve jury trials almost invariably produce huge defense costs and long delays. That fundamentally conflicts with a core purpose of the fair report privilege, which is to avoid lengthy and expensive libel actions based on the recognition that they will deter reporting about what government agencies are doing, including criminal matters.

Neither side was happy with the Court of Appeals decision, and both requested Supreme Court review, which was granted. The case was argued before the Court on January 7. And while it's rarely possible to predict what a court might do based simply on the oral arguments, many of the questions asked by the justices seemed problematic with respect to the possible scope of the privilege. A decision in the case is likely several months away.

This lawsuit should have been dismissed long ago. It reflects a troubling, protracted failure by the courts to appreciate just how chilling unfettered libel claims can be on reporting that is of vital interest and importance to the general public.

B. Libel Suit against Domestic Violence Support
Organization Reinstated by Appellate Court.
Maethner vs. Someplace Safe, Inc.
Minn. Court of Appeals, 907 N.W.2d 665 (Minn. App. 2018)
Review granted by Minnesota Supreme Court

At a fundraising banquet held in 2014 by Someplace Safe, a Fergus Falls-based advocacy organization for victims of domestic abuse, the group gave a "Survivor Award" to Jacquelyn Jorud as a "survivor of domestic abuse." Jorud had been married to Kurt Maethner, but they had divorced in 2010. In a fundraising newsletter issued by Someplace Safe, an article written by Jorud appeared that among other things said: "I was asked to write a short article celebrating the fact of not just surviving domestic violence, but thriving through recovery;" "Getting out of an unhealthy, threatening and dangerous relationship is hard. It is scary;" "I don't know if there will ever be a time when I can be certain I am no longer being stalked and watched;" and "I didn't want to live in a constant state of fear." After the banquet, Someplace Safe issued a news release with her photo, which area newspapers used in articles. The organization never investigated any of her claims.

Jorud and Someplace Safe didn't name Maethner, nor did they provide specific information suggesting that she was talking about him. But he nonetheless sued her and Someplace Safe for defamation, arguing that it was well known in the area that they had been married, and that a reasonable person would believe she was talking about him. He said the claims of abuse were false. The defendants responded that Maethner was not sufficiently identified to support a libel claim, and that regardless, Jorud's statements were immunized by a qualified privilege, that the group had no duty to investigate Jorud's claims, and that Maethner had failed to show he had suffered actual damages.

The Otter Tail County district court rejected the defendants' argument that Maethner could not be identified. But it agreed with their other defenses, and dismissed Maethner's action. Maethner appealed, and in February, the Court of Appeals came to a different conclusion, reinstating the lawsuit, and sending it back to district court for trial.

The Court first rejected the qualified privilege claim. While defamatory statements might be protected in certain contexts when presented in good faith — a psychologist alleging likely child abuse, for example — this was not such a case. "A banquet and newsletter were not the proper occasion to disseminate statements alleging criminal conduct, nor did the fundraising purpose for both of these activities reflect a proper motive for doing so."

Furthermore, Someplace Safe did not claim to have a "reasonable belief" that Jorud was abused. Instead, Someplace Safe expressly stated that it accepted Jorud's statements at face value. But according to the Court, Someplace Safe had a duty to investigate Jorud's claims. The Court rejected Someplace Safe's contention that it cannot be held liable for negligence because it did not directly make the allegedly defamatory statements, and merely "printed an article [Jorud] wrote." The Court responded that only if the "wire service defense" applied

would this be true, and that it had no bearing on Maethner's case.

Finally, the Court held that Maethner had identified sufficient evidence to let the jury decide if he had suffered actual damages, especially because some of Jorud's statements could be considered defamation per se and were therefore actionable without proof of damages. "In Minnesota, defamation per se includes statements that, 'falsely accuse a person of a crime, of having a loathsome disease, or of unchastity,' or that 'refer to improper or incompetent conduct involving a person's business, trade, or profession.'" The appellate panel also said that the district court's reliance on the Supreme Court's 1996 decision in *Richie v. Paramount Pictures Corp.* was misplaced, because it had considered First Amendment restrictions on defamation claims against the media. In *Richie*, the defamatory statements "made by the media ... involved a matter of public concern," and the plaintiffs were, therefore, required to prove actual damages. "Here, the statements were made by Jorud and a non-profit organization that was soliciting donations. The media, and related concerns to protect constitutional rights under the First Amendment, were not involved."

In April, the Minnesota Supreme Court agreed to review the decision of the Court of Appeals. Thus the important issues addressed in the case may be resolved differently.

C. Federal Court Dismisses Fergus Falls Auto Dealership's Defamation Suit Against KARE 11

Nelson Auto Center, Inc. vs. Multimedia Holdings Corporation
U.S. District Court (Minn.), 2018 WL 4353690, September 2018

In December, 2017 a Fergus Falls auto dealership (Nelson Auto Center, Inc.) sued KARE 11 along with its parent companies for defamation, alleging that the station published false and misleading statements in its reporting about a former dealership employee and claims that law enforcement agencies had been overcharged by the dealership. According to the dealership's Complaint, KARE 11 published a story on its website stating that Nelson Auto Center, which does business with the state of Minnesota, was facing criminal charges in connection with alleged double-billing practices. In addition, the plaintiff claimed that KARE 11 published a "rehash" of the story on its website, which allegedly contained misleading statements implying that the dealership was aware of warnings but ignored them.

KARE 11 asked the Court to dismiss the lawsuit. The station argued that under Minnesota law, all corporations are public figures for purposes of defamation claims, and therefore Nelson Auto was required to demonstrate actual malice on the part of KARE 11.
Nelson Auto disputed that argument, contending that Minnesota law "distinguishes between highly regulated industries ... and less regulated industries, leaving space for small, family owned businesses to keep the protection afforded by private figure status, while allowing larger corporations, more accountable to the public through regulations, to be limited purpose public figures." The Court disagreed, however, holding that where any corporation brings a claim for libel against a media entity, the corporation must show actual malice. The Court cited

the Minnesota Supreme Court as holding "that 'corporate plaintiffs in defamation actions must prove actual malice by media defendants when the defendants establish that the defamatory material concerns matters of legitimate public interest in the geographic area in which the defamatory material is published.'"

The Court also repudiated Nelson Auto's argument that KARE 11's reporting did not concern "matters of legitimate public interest." "KARE 11's reporting focused on an overbilling scheme involving the expenditure of public funds through a public procurement process," and therefore the "reporting centered on a matter of legitimate public interest."

The Court then examined the factual claims made in Nelson Auto's legal Complaint, on which its defamation action was grounded, and whether those claims provided any support for the existence of actual malice on the part of KARE 11 (actual malice is when statements are made (1) "with knowledge that the statements were false," or (2) "with reckless disregard of whether they were true or false.") Based on this examination, the Court concluded "that Nelson Auto has failed to adequately allege facts that would support a finding of actual malice, and Nelson Auto's defamation claim therefore fails." However, the plaintiff has filed an appeal to the Eighth Circuit, and consequently, the case probably won't be resolved until sometime in 2020.

D. Long Running Libel Litigation against St. Paul <u>Blogger finally Concludes—After Nearly Six Years</u> ***Trivedi LLC, et al. vs. Dennis Lang***

The libel actions commenced by Mahendra Trivedi against Dennis Lang finally came to an end in 2018, after nearly six years of litigation. The litigation arose out of blog posts made by Lang, a St. Paul resident, who after retiring from a career in business, returned to writing (he was an English major in college), focusing mostly on longer non-fiction articles, which were published in a number of journals. In 2011, Lang was exploring topics for a new article, and through his research encountered Mahendra Trivedi. Trivedi is a self-styled "charismatic spiritual teacher," and among other things, claims to have the ability to alter physical objects simply by transmitting energy with focused thought (he calls it "The Trivedi Effect"). Lang's interest was piqued by these claims, and he began looking more closely at Trivedi and his enterprises. He posted requests for information about Trivedi on internet sites. Many individuals responded, offering accounts of their experiences with Trivedi, portraying an operation that allegedly often relied on deception, deceit, and manipulation, and suggesting that Trivedi himself was engaging in distinctly questionable activity. Lang began posting summaries of what he was learning along with some commentary regarding it on a blog called PurQi, which was described as a forum for discussion about alternative medicine practitioners, and which was emerging as an online forum for people interested in Trivedi and his operations. Over the next several months, Lang contributed more than 200 posts to PurQi as he continued to work on his article about Trivedi.

In October, 2012, Trivedi and several of his affiliated enterprises sued Lang for defamation and other claims in Arizona state court in Phoenix, where Trivedi was located at the time. Lang

responded by challenging the Arizona court's jurisdiction over him, and therefore did not make an appearance. The court proceeded anyway, and in early 2013, Lang learned that judgments totaling $59 million had been entered against him by default in Phoenix. Those judgments were subsequently docketed in Minnesota. Lang then filed a motion in Ramsey County district court to vacate the judgments, arguing that they were void because the Arizona courts lacked personal jurisdiction. The Minnesota Court agreed and threw out the Arizona judgments. Trivedi appealed, but the decision was affirmed by the Minnesota Court of Appeals in 2014.

However, Trivedi wasn't done. He (and his affiliated enterprises) sued Lang for defamation again, this time in Ramsey County district court, where there was jurisdiction. Their lawsuit identified more than 60 separate blog posts they claimed were defamatory. In February, 2016, Lang moved for dismissal on the grounds that Trivedi was a "public figure" for libel law purposes, and that he was therefore required to demonstrate "actual malice" on Lang's part (which means the he knew that what he was publishing was false, or had a high degree of awareness of its probable falsity). In June, 2016, Ramsey County district court judge Robert Awsumb agreed with Lang, and threw the case out. His decision included an unusually forceful application of the principles originally adopted by the U.S. Supreme Court in *New York Times v. Sullivan*, which were designed to protect free expression against the chill caused by the threat of libel suits—principles that have not been reliably applied by many courts in recent years.

Trivedi then appealed Awsumb's ruling. In May, 2017 the Minnesota Court of Appeals affirmed the dismissal, except for one of Trivedi's claims. Though it agreed with the trial court that Trivedi and his affiliated enterprises were public figures, and that most of the statements made by Lang about them were protected by the actual malice doctrine, the Court held that Lang's allegations of sexual improprieties by Trivedi involving some of his young employees and followers were not related to the public controversy that made Trivedi a public figure, and that with respect to those statements, Trivedi was not a public figure and did not need to prove actual malice. This argument had never been made by the plaintiffs' attorney, and it was of dubious legal validity. Nonetheless, Lang was forced to return to Ramsey County district court, where a jury would determine the truth or falsity of the statements about Trivedi, and if false whether Lang was negligent in making them.

The trial was scheduled for May, 2018 and then moved to August, nearly six years after Lang was first sued. But as the trial date approached, the attorneys for the parties began re-examining the possibility of a settlement, and in April favorable terms were worked out which produced a dismissal of Trivedi's remaining claims.

5. <u>REPORTER'S PRIVILEGE (SHIELD LAW); NEWSGATHERING</u>

Effort to Subpoena TV Reporter Squelched by District Court

Subpoenas issued to journalists continue to be relatively infrequent in Minnesota, though they do happen. During 2018, there were few legal developments of consequence involving the reporter's privilege, or shield law (referred to in Minnesota statute as the Free Flow of

Information Act). But one positive event was the rejection by a District Court judge in southern Minnesota of an attempt to subpoena a television reporter.

Court Rejects Public Defender's Attempt to Subpoena Journalist in Criminal Case

State vs. Zarate (KAAL-TV)

Freeborn County District Court (File No. 24-CR-18-1442)

Logan Reigstad is a reporter for KAAL-TV in Rochester. Last October, in the course of his work, Reigstad spoke with the parents of a young girl who had allegedly been molested by a neighbor. The neighbor had been charged criminally, but the parents were apparently upset that the charges weren't more severe, prompting their contact with Reigstad, who met with them to discuss the case. Shortly thereafter, the county attorney added kidnapping charges to the criminal complaint.

When the public defender assigned to the case learned of Reigstad's meeting with the parents, he asked the District Court to allow him to subpoena Reigstad, and that he be compelled "to disclose information he obtained regarding the complaint made by the child complainant's family," including "any notes, audio or other documentation of the complaint and/or discussion(s)." The public defender evidently believed that the girl's parents had persuaded her to change her story about what had happened with the neighbor so that it would support a more serious charge, and he thought that the parents may have shared information about this with Reigstad. Although KAAL subsequently broadcast a story about the criminal proceedings, the contents of the discussion that Reigstad had with the child's parents were not broadcast, posted, or otherwise publicly shared.

In response to the public defender's subpoena request, KAAL invoked the state shield law, arguing that the P.D. could not satisfy the conditions imposed by that law, which must be met before a subpoena can be issued in a criminal case. In early December, Freeborn County District Court judge Steven Schwab agreed, and denied the public defender's application. The Court's Order didn't provide an explanation for the decision, but in the hearing that was held on the subpoena request, Judge Schwab asked the public defender why his request didn't amount to "a fishing expedition." It wouldn't be surprising if he concluded that in essence, that's what the subpoena request amounted to, and that it therefore failed to satisfy the conditions of the shield law.

6. ACCESS TO COURTS

Criminal Pilot on Cameras in Courts Ends—Supreme Court Adopts Permanent Rules Governing Criminal Cases

A. New Permanent Rules for Audio-Video Coverage of Criminal Proceedings.

In July, after assessing the results of its two year pilot project, the Minnesota Supreme Court filed an Order adopting permanent rules governing the use of audio and video devices in criminal court proceedings. The Court considered recommendations made by an advisory committee, along with submissions from a number of groups (including MNA). It concluded that "the overall impact of permitted coverage on the proceedings ranged from neutral to positive," and that there was "minimal disruption of the proceedings." The permanent rules, which are similar to those used during the pilot project. took effect on September 1, and they represent a modest but important step forward for the state's news media (and public).

The Court's decision was no slam dunk. The opponents of cameras and other recording devices in criminal cases remain both active and influential in Minnesota, and some of the Court's members are believed to have reservations about even limited electronic access. It's therefore good news that the Court's decision was unanimous.

As was the case during the pilot project, the permanent rules provide that electronic recording will be allowed only in "post-guilt" proceedings, i.e., after a guilty plea has been accepted or a guilty verdict has been reached. And the permanent rules continue to allow audio and video recording purely at the discretion of the trial judge—the attorneys and parties don't have a veto.

The Court did tweak the pilot rules in some particulars, mostly in ways that favor electronic access. The revisions include the following:

- The deadline for providing notice of intent to cover a hearing electronically has been reduced from 10 days to 7 days.
- Where parties object to an electronic coverage request, they must provide notice at least three days in advance of the hearing, including to the person or organizations that requested coverage. Again, an objection from a party does not control what the judge decides to do.
- The category of domestic violence cases in which electronic coverage is generally prohibited has been narrowed, so that it includes only cases in which the victim is a family or household member. This issue caused some confusion during the pilot project.
- The Court clarified the circumstances in which an electronic coverage request can be denied. Specifically, lack of consent to coverage by a defendant is not good cause to deny such a request. Furthermore, coverage is permitted even if a guilty plea is not formally accepted until the sentencing hearing (this caused problems during the pilot because it was impossible

to comply with the advance notice requirement where a plea wasn't accepted until the sentencing hearing).

- The rules applying to coverage of both civil and criminal proceedings have been made more consistent, including clarification as to when and how notices of intent to cover should be submitted and provided to parties.

The complete terms and conditions now governing cameras in both civil and criminal court proceedings are found in Rule 4 of the Minnesota General Rules of Practice--available on the Supreme Court's website.

B. <u>Court Unseals Keith Ellison's Divorce File</u>.
Alpha News and Star Tribune, Petitioners
Hennepin County District Court

During the run-up to the 2018 elections, two women accused Rep. Keith Ellison of domestic violence. At the time, Ellison was the DFL candidate for Minnesota attorney general. An organization called Alpha News learned that Ellison's divorce file in Hennepin County had been sealed, and brought a motion asking the Court to unseal it, arguing that it might contain information of value to voters relating to the domestic violence charges. The *Star Tribune* then also submitted a request to unseal the court file. In October, a Hennepin County district court judge granted the motions, and ordered that the file be unsealed. However, a review of the newly public records apparently revealed little that shed light on the allegations against Ellison.

7. <u>POSSIBLE LEGISLATION IN 2019</u>
Several Important Issues Percolating

Legislation of special interest to Minnesota journalists that may be addressed in the 2019 session includes the items summarized below. The session this year kicked off in early January, and runs through mid-May.

A. Classification of Data Collected by New Law Enforcement Technology. Again this year, there are a number of complex data practices issues likely to arise involving law enforcement technology. This includes data recorded by body cameras, drones, and devices that collect "bio-metric" information.

B. Retention of Email. Legislators will continue to wrestle with the difficult issue of how long electronic government records must be retained, especially email. Government agencies are seeking shorter retention periods because they have a burgeoning concern about the volume of such records, and the costs associated with reviewing and redacting them when access is requested.

C. Restricting "Unreasonable" Data Requests. Local governments may seek legislation aimed at restricting what they see as extremely burdensome and unreasonable requests for records,

which can impose significant expenses on local government bodies, another issue prompted largely by the volume of records that are electronically stored.

D. Restricting Access to Phone Numbers, Email Addresses, and Dates of Birth. Legislation may again be considered that would prevent public access to phone numbers, email addresses, and dates of birth collected by law enforcement agencies.

E. Alteration of Digital Photos, Recordings. Legislation is being discussed that would make it illegal to alter digital photos and recordings without consent, in certain contexts.

F. Extending Data Practices Act to Legislature. There may again be an effort to extend the coverage of the Data Practices Act to the Legislature, a proposal motivated by the controversy over sexual harassment claims and settlements, and the inability under current law to obtain information about this issue in the context of the Legislature.