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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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2. OPEN RECORDS (aka DATA PRACTICES)

Key Rulings on Access to Surveillance Recordings, Access where Conflicting Classifications Exist, and Obligation to Search Email Records.

In August, the Minnesota Supreme Court issued an important decision involving public access to most audio-video surveillance recordings made by Metro Transit on its mass transit vehicles, which has ramifications that are considerably broader. The Court also issued a decision holding

that where data about a former government employee could be classified as public under one statute and confidential under another, the public classification prevailed.
Strangely, only two advisory opinions were issued in 2016 by the Commissioner of Administration relating to data privacy and public access issues, just one of which is important. It's summarized below.

A. Supreme Court Adopts Complex Rule for Determining when Audio-Video Surveillance Recordings are Public Data.

KSTP-TV vs. Metro Transit and Metropolitan Council
Minnesota Supreme Court, ___ N.W.2d ___ (Minn. 2016)

After receiving credible information about questionable behavior by Metro Transit bus drivers, a reporter for KSTP-TV asked the agency for data relating to the incidents. Metro Transit responded that since neither driver had been disciplined, no public data existed (other than that an investigation had been performed).

The reporter was aware that Metro Transit has multiple surveillance cameras on most of its vehicles, and so he then asked for portions of the video recorded at the time of the incidents in question. But Metro Transit denied that request as well, arguing that regardless of whether the surveillance video captured on the Metro Transit vehicles might normally be considered public data, since the segments sought by the reporter had been used in the personnel investigations of the two drivers it became part of their personnel files, and since no discipline was imposed, the video would be permanently classified as private data.

KSTP-TV then filed a complaint with the state Office of Administrative Hearings (OAH), using the expedited data practices procedure established by the Legislature in 2010. Its central argument was that the transit video would normally be considered public data, and an agency should not be able to convert public data to private data—especially on a permanent basis—simply because it was used in a personnel investigation. In October, 2014, an administrative law judge agreed, and ruled in favor of KSTP-TV. Metro Transit appealed that decision to the Minnesota Court of Appeals, which in August issued a stellar opinion affirming the OAH ruling and forcefully applying the presumption of public access at the core of the Data Practices Act.

However, the Supreme Court agreed to review the decision, and in August it issued a complicated, convoluted decision that while technically reversing the Court of Appeals, actually upheld much of that Court's interpretation of the Data Practices Act favoring public access.
In particular, the Court fully embraced the central principle on which the Court of Appeals based its decision—that if there are multiple reasons for a government entity to collect specific data, the data cannot be considered personnel data (which is mostly private), even if one of the reasons for collecting it includes personnel management. This holding has considerable value, and represents an important new precedent.

The Metropolitan Council's core argument was that the audio-video recorded by its surveillance cameras becomes private personnel data from the moment that Metro Transit initiates an

investigation of an employee's behavior shown on the recording. The Supreme Court responded to that argument with an analysis consisting of two main parts.

1. First, it looked at why the recordings were made. The Court concluded that since Metro Transit had multiple reasons for making the recordings, some of which supported classifying the recordings as public data, the private classification for personnel data did not apply. The Court held that particular data cannot be treated as personnel data in the first place unless it is maintained exclusively for personnel purposes, an important principle.

2. However, the Court said that it was also required to consider the timing of requests for public access to the surveillance recordings, because unless the recordings are copied to another medium, at some point they no longer exist (being overwritten by new surveillance camera data). Therefore, where segments of the audio-video record are copied to a DVD as part of a personnel investigation, placed in the employee's personnel file, and end up being the only copy of those segments, they were kept exclusively for personnel purposes once the data no longer existed on the camera drives, and the classification of the data morphed from public to private—even though it was exactly the same data.

Based on this two-part analysis, the Court held that if a request for public access is submitted when a record that was made for multiple purposes still exists, access must be allowed, even if some portion of the record relates to agency employees and might otherwise be considered private personnel data. But if the request is made later, at a time when the record is being maintained only for personnel management purposes, access is not permitted because the data has become private.

The good news is that in most cases, public access will be allowed, though it's unfortunate that the Court decided to make the interpretation of the law so complicated. Its convoluted analysis will certainly create confusion, generating a semantic fog tending to inhibit compliance with some legitimate requests for access.

B. Supreme Court Rules that Public Data Classification Prevails, Even if Same Information Could be Confidential Under Another Statute.

Harlow v. State Dept. of Human Services
Minnesota Supreme Court, 883 N.W.2d 561 (Minn. 2016)

Michael Harlow was fired from his position as a psychiatrist at the St. Peter security hospital following a patient incident, and subsequently brought an action alleging violations of the Minnesota Government Data Practices Act (MGDPA), as well as defamation. Specifically, he claimed that statements made about him after the incident by the administrator of the security hospital and by the Deputy Commissioner of Human Services (DHS) to a reporter for Minnesota Public Radio (MPR) and to other DHS employees disclosed private and confidential data about him, data contained in an employment investigation report and in a DHS licensing report. Harlow argued that the data contained in the employment investigation report was private personnel data about him, and that even if the data in the employment investigation report

became public under Minn. Stat. §13.43, subd. 2(a)(5) when the disciplinary action against Harlow became final, the data remained confidential in the DHS licensing report governed by a separate statute relating to welfare data—in other words, that the confidential welfare data classification trumped the public personnel data classification.

As stated by the Supreme Court, "Harlow's argument requires that we determine whether the MGDPA is violated when a person or governmental entity discloses data that is classified as public for one purpose and confidential for another purpose." The Court's decision in August rejected Harlow's arguments, and it is a valuable, vigorous application of the presumption of public access found in the Data Practices Act.

The Court firmly resolved the conflict between the two statutes in favor of public access. It said that the employment investigation report was public because it was "a final decision under Minn. Stat. §13.43, subd. 2(a)(5)" because it "document[s] the specific reasons for the termination and document the basis for the decision to terminate Harlow," and that this classification was not nullified by the fact that the the DHS licensing report, which contained much of the same information about Harlow, was confidential welfare data.

The Court acknowledged that the "relevant provisions of sections 13.43 and 13.46 do not directly resolve the question of whether personnel data that is simultaneously classified as public for one purpose and classified as confidential for another purpose is disclosable to the public." But "the MGDPA provides a framework for resolving the classification of data when the Act is silent on the topic. Specifically, the MGDPA 'establishes a presumption that all governmental data are public ... unless there is a federal law, a state statute, or temporary classification that provides that the data are not public.'" Minn. Stat. §13.01, subd. 3. On this basis, the Court concluded "that personnel data consisting of an employment investigation report that is reclassified as public upon the "final disposition of an [ ] [employee] disciplinary action" in accordance with Minn.Stat. § 13.43, subd. 2(a)(5) remains public even though the data is duplicative of data in a maltreatment investigation that is classified as confidential under Minn.Stat. § 13.46, subd. 3." "We acknowledge that it may seem anomalous to have data classified as public for one purpose, and confidential for another purpose. But we see nothing in the text of the MGDPA that prohibits this outcome."

C. <u>Access to Township Records not Required by First Amendment or Common Law</u>.

Eggenberger v. West Albany Township

U. S. Court of Appeals, 820 F.3d 938 (8th Cir. 2016)

In this case, the plaintiff claimed that a Wabasha County township violated his state and federal constitutional rights along with his common law rights by refusing him access to and copies of certain township documents. The plaintiff conceded that the Data Practices Act did not apply to the township, and instead argued that there is a First Amendment right to access documents which is broader than the statute and compels the township to provide certain information to him.

The Minnesota federal district court dismissed Eggenberger's claims in 2015, and last July, a federal appellate affirmed that decision. According to the Court, Eggenberger failed to produce evidence of "a vested common-law right" of access, and "Minnesota has never recognized such a right." The Court similarly rejected Eggenberger's First Amendment access argument. "The Supreme Court has 'never intimated a First Amendment guarantee of a right of access to all sources of information within government control.'" The First Amendment "guarantees a right to publish information, but not necessarily a right to *gain* information." Thus Eggenberger had no First Amendment right to access information which was not publicly available as a general matter.

D. OAH Rules Hennepin County Violated DPA in Response to Massive Request for Sheriff's Office Emails.

Webster vs. Hennepin County and Hennepin County Sheriff's Office
Minnesota Court of Appeals (Case No. A16-0736)

In an effort to learn if the Hennepin County Sheriff's Office was employing cutting edge technology to track people using "biometrics" (through their faces, fingerprints and irises), Tony Webster submitted a public records request with the county in August 2015 seeking contracts, e-mail messages or any other data about mobile "biometric" technology. The county made some extent to respond, but objected to the request for emails, arguing that the Data Practices Act does not require government entities to do massive e-mail term searches in the way that Webster had requested, and that Webster's request for a keyword search of county e-mails was "unreasonable and too burdensome with which to comply." The County said it has 209 million e-mails in its accounts and gets 6 million more every month, 70% of which are spam. County officials estimated 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 Office of Administrative Hearings. In an April 22 Order, an Administrative Law Judge (ALJ) referred to four months of unexplained delays, improperly redacted records, inadequate answers, and other behavior by county officials in response to Webster's request. He held that the county's actions violated the Data Practices Act and fined the county $300, ordered it to pay up to $5,000 in Webster's attorney's fee, and imposed additional sanctions. He also ordered the county to figure out a way to make its millions of e-mail messages promptly accessible to the public. Hennepin County appealed the decision, and obtained a stay from the ALJ, meaning that access would be delayed until the appeal was resolved. Webster's request to the Court of Appeals that the stay be canceled was refused, and that procedural issue is now pending before the Supreme Court. In short, a decision on the merits in this case is several months away.

DATA PRACTICES ADVISORY OPINIONS

In 2016, the state Commissioner of Administration, through the Department's Information Policy Analysis Division (IPAD), issued only two advisory opinions addressing open records and data practices issues. The one with significance to journalists is summarized below.
There were only a total of six opinions during the past year (the other four related to the Open Meeting Law, and are discussed below). These are unusually low numbers, since in most years it's been common to see 30 opinions or more. There is no obvious explanation for the decline.

Private Complaint Data about Former School District Employee who was Also School Board Member Became Public when Included in Notice of Removal from Board. A school district employee was the subject of apparently serious complaints that were substantiated after an investigation, but the employee resigned before discipline was imposed, meaning that all data relating to the complaints remained private. However the employee was also a member of the school board, and based on the complaints the board sought to remove him under the Minnesota statute stating that a school board member may be removed from office by the board, but only after a notice of removal containing the reasons for the proposed removal have been provided. In this district, members of the board were not considered to be employees, making most data collected about board members outside the scope of the Data Practices Act and therefore public. But the board member and former employee argued that because the information submitted to the board in the notice of removal was basically the same as the private personnel data that had prompted his resignation as an employee, it still had to be considered private data. The Commissioner of Administration disagreed, concluding that the data contained in the notice of removal were public data. ***Advisory Opinion No. 16-001; Ind. School District #911 (Cambridge/Isanti)***.

3. OPEN MEETINGS
Four New Advisory Opinions, And Court Puts Hammer on Victoria Officials

In the past year, there were no significant decisions from the Minnesota appellate courts involving the interpretation of the Minnesota Open Meeting Law (Minn. Stat. Chapter 13D), nor did the Legislature make any noteworthy revisions to the statute. There were, however, four advisory opinions issued by the Commissioner of Administration (pursuant to Minn. Stat. §13.072) relating to the OML, which are summarized below.

Court Rules that Victoria City Council Members violated OML 38 Times
Funk, et al. vs. O'Connor, et al.
Carver County District Court (March 2016)

In March, a Carver County District Court judge found that four Victoria city council members committed a total of 38 intentional violations of the state Open Meeting Law, and imposed fines totaling $7,800. The case was brought by a citizens group, alleging numerous violations of

the Open Meeting Law by city officials in 2013 in the process leading up to building a new city hall and public works building.

Judge Janet Cain not only found that many meetings were improperly closed, by 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. She placed most of the responsibility for those violations on city staff.

"The Defendants profess their ignorance of the OML to a degree this Court finds shameful with regard to their duty to the public," Judge Cain wrote. "Defendants claim the OML is somehow unclear and overly technical. There is no justification for this argument. All meetings of the public body are to remain open, with certain specifically defined exceptions."

The case dragged on for nearly two years and cost the city more than $250,000 in attorney's fees. In her decision, Judge Cain said she weighed the council members' service to the community against "a comprehensive showing by Plaintiffs of a lack of accountability to the public by Defendants in their lack of adherence to the OML."

Judge Cain also suggested the need for a "legislative overhaul" of the Open Meeting Law to make it more feasible for citizens to participate. "Private individuals--ordinary citizens--are generally ill-equipped to adequately address and litigate alleged violations of the OML, primarily for financial reasons," Cain said. "Private individual financing of a case such as this is simply not a reasonable expectation."

OPEN MEETING LAW ADVISORY OPINIONS

A. Evaluation Summary was Adequate, Despite Decision to "Seek Change in Leadership." The Moorhead city council closed a meeting to conduct an evaluation of the city manager's performance. At its next open meeting, the mayor provided an oral summary of the council's conclusions, which lasted about 30 seconds. Among other things, the mayor mentioned that "the Council has been very satisfied with the quality and quantity of the work performed by the city manager," and said that the council also "discussed the administrative leadership of the City." But then, despite the apparently positive review, the mayor stated that a majority of the council and the city manager had agreed to proceed with a separation agreement "in order to seek a change in leadership." A citizen asked for an Opinion, claiming the summary was insufficient under the circumstances. But the Commissioner disagreed, concluding that "the Council discussed two salient points, came to a consensus on each of those points, and presented its two conclusions in its summary at the next open meeting." The Commissioner also took into account the fact that the closed evaluation meeting was apparently cut short after a majority of the council and the city manager decided to enter into the separation agreement during the closed meeting. The Commissioner did note in the Opinion that "given that the evaluation seems incongruous with the outcome of the evaluation," the council "could have provided more information to foster a broader explanation of its activities and decisions." ***Advisory Opinion No. 16-002; Moorhead City Council***.

B. Meeting to Discuss Threat of Litigation from City Clerk's Attorney was Properly Closed. The Motley city council noticed a special meeting that was to be closed to the public. The stated purpose in the notice was "discussion of the proposal of a separation agreement with the city clerk." The *Staples World* objected to this procedure, arguing that the discussion of a proposed separation agreement did not fall within any of the exceptions to the Open Meeting Law. In response to the newspaper's objection, the council responded with an email from their labor attorney, stating that the closed session was pursuant to the attorney client privilege. The newspaper then requested an advisory opinion. At that point, the council's attorney disclosed that the city clerk had retained an attorney and that the attorney had threatened the city with litigation prior to the closed meeting which (as the Opinion notes) was information "not available to the Staples World when it requested this advisory opinion." The council argued that "this matter had taken the first steps toward litigation," and that the council needed to have a discussion "outside the earshot of the potential litigant." The Commissioner then weighed the purpose of the attorney-client privilege against the purpose of public access, and concluded that the council was justified in closing the meeting, because "these circumstances [dictated] the need for absolute confidentiality." [NOTE: This opinion appears dubious in light of the Supreme Court's decision several years ago in Prior Lake American vs. Mader, where the Court held that in most cases, a public body cannot close a meeting based on the attorney-client privilege to discuss matters yet to be decided, even if a threat of litigation existed. Indeed, in that case, the city council had had been expressly threatened with litigation, in writing, by an attorney representing a local business, and the council wanted to discuss how to deal with the threat in a closed meeting. But the Court said because the decision about a special use permit had not yet been made, the meeting was improperly closed.] ***Advisory Opinion No. 16-003; Motley City Council***.

C. OML Violated when Two Town Board Members Attended County Planning Commission Meeting. Two members of a township board (a quorum) attended a county planning commission meeting, and while there, listened to and discussed matters also pending before the town board. The Opinion held that this violated the OML, citing the Supreme Court's decision in *Moberg vs. Ind. School. Dist. No. 281*(1983) (which held that "gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of the governing body" are subject to the OML). The Opinion noted that the Supreme Court has also said that the Open Meeting Law is to be interpreted broadly in favor of public access. Thus because "a quorum of [the town board] attended and participated in the planning commission meeting, relayed board business, [and] deliberated and received information as a group relating to the official business of the board," the attendance of the two town board members "was a special meeting and the board should have posted written notice of the time, date, place, and purpose." ***Advisory Opinion No. 16-005; Westfield Town Board (Dodge County)***.

D. "Training Sessions" Attended by Quorum of School Board would not Violate OML. The St. Paul school board requested an advisory opinion asking whether it would violate the Open

Meeting Law if "a quorum of the Board met privately with a facilitator in sessions designed to 'improve trust, our relationships, communications, and collaborative problem solving among Board members," if they are not ''gathering to discuss, decide, or receive information as a group relating to the official business of the governing body.'' According to the board's request, the school district has experienced numerous challenges recently and wants to "strengthen community engagement and commitment among the board members and other stakeholders." In response, the Commissioner concluded that such sessions would not violate the OML. He cited a 1975 Attorney General's opinion, which held that another training program would not offend the OML because it appeared to "consist largely of discussions devoted solely to developing skills in communication, planning, delegation of responsibilities, and decision-making, and to strengthening and clarifying an understanding of the responsibilities of" the members of the public body. Consequently, Opinion determined that the school board training sessions fell outside the scope of the OML as defined in the Supreme Court's *Moberg* decision, since they did not seem to involve a situation in which board "members discuss, decide, or receive information as a group on issues relating to official business." The Advisory Opinion did caution that the "Board should avoid any issues related to its official business during the sessions, as incidental discussions of public business would constitute a meeting subject to the OML." ***Advisory Opinion No. 16-006; Ind. School District No. 625 (St. Paul)***.

4. LIBEL AND PRIVACY

Several Major Libel Lawsuits Remain Active in Minnesota

During the past year, a number of major libel cases against Minnesota news organizations continued to be processed by the court system. They demonstrate the hazard that libel actions pose for news organizations, in terms of in terms of damage claims, defense costs, and distraction.

The immunity provided by the federal law found at 47 U.S.C. §230 continues to provide strong protection against defamatory comments that are posted on news organization's web sites *by third parties*. 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. Jury Rejects Libel Claim of Exonerated Suspect in Cold Spring Police Killing.

Ryan Larson vs. Gannett Company, et al. (KARE 11 and St. Cloud Times)
Hennepin County District Court (November 2016)

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. Larson was arrested and booked into the Stearns County jail, though he was never formally charged.

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. Several months later, Larson sued WCCO-TV and KSTP-TV for defamation, contending that both stations had inaccurately portrayed Larson as the killer, and that their reporting went beyond the facts available to them at the time. The stations eventually decided to settle with Larson.

Larson then sued KARE 11 and the *St. Cloud Times*, based on the same legal theory. 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 factual errors. The news reports disseminated by both KARE 11 and the *Times* in the days after the shooting stated that law enforcement authorities believed Larson was the killer. The reports were based on the fact that a BCA news release said that Larson had been charged with second degree murder, and a statement made at a law enforcement news conference that Larson had been taken into custody and that authorities were not looking for any other suspects. The Stearns County jail log also stated that the charge against Larson was second degree murder.

In May, 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. Judge Burke held that several of the statements at issue needed to be submitted to a jury. Then in early November, after a trial lasting about 10 days, the jury ruled completely in favor of KARE 11 and the *Times*, concluding that all of the statements about Ryan Larson were indeed substantially true—something Judge Burke should have been able to do. Larson's attorney has now asked Judge Burke for a new trial, and the arguments on that motion will be heard in February.

B. St. Paul Blogger Wins First Round of Second Big Libel Lawsuit for Criticizing Guru.

Trivedi LLC, et al. vs. Dennis Lang
Ramsey County District Court (June 2016)

Dennis Lang is a long-time resident of St. Paul who, after retiring from his career in the business world, decided he wanted to return to writing (he was an English major in college). Lang began writing mostly 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, purported to have the ability to alter physical objects simply by transmitting energy with focused thought (he calls it "The Trivedi Effect"). Trivedi claimed that this unusual ability had been validated by thousands of scientific studies, and that with it he can cure cancer, facilitate the growth of agricultural crops, and restore the health of livestock. Lang's interest was piqued by these claims, and he began focusing on Trivedi and his enterprises. He posted requests for information about Trivedi on internet sites, and also learned of a blog called PurQi.com, 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. Many individuals contacted Lang or posted comments on the PurQi blog, offering accounts of their experiences with Trivedi, portraying an operation that often allegedly relied on deception,

deceit, and manipulation, and suggested 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 the PurQi blog. Over the next several months, Lang contributed more than 200 posts to PurQi as he continued to work on his article. For the most part, they were not flattering of Trivedi and his operations.

In October, 2012, Lang was sued by Trivedi and his affiliated enterprises for defamation and other claims in a state court in Phoenix, AZ, where Trivedi was located at the time. Lang contended that the Arizona court did not have jurisdiction over him, and therefore did not respond. Then, in early 2013, he learned that judgments totaling $59 million had been entered against him by default in Phoenix. The judgments against Lang were subsequently docketed in Minnesota. Not long thereafter, Lang filed a motion in Ramsey County district court to vacate the foreign judgments, on the basis that the Arizona courts had no personal jurisdiction over him. The Court agreed and threw out the Arizona judgments. Plaintiffs' challenge to the decision was rejected by the Minnesota Court of Appeals in June, 2014.

However, Trivedi and his enterprises weren't done. They proceeded to again sue Lang for defamation, this time in Ramsey County district court, thus negating the jurisdiction defense. Their lawsuit identifies more than 60 separate posts that the plaintiffs claim were defamatory. In February, 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 he had a high degree of awareness of the probable falsity of what he was publishing). Lang's argument was by no means airtight, especially the claim that Trivedi should be classified as a public figure. But on June 1, Ramsey County district court judge Robert Awsumb agreed with Lang, and threw the case out. His decision includes an unusually vigorous 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 the courts in recent years. Trivedi subsequently appealed the ruling, and the Minnesota Court of Appeals will hear oral arguments in the case on Februrary 8.

C. Federal Appeals Court Rejects Part of Jesse Ventura's Libel Suit against "American Sniper," Sends Rest of Case Back for Second Trial.

Ventura vs. Kyle

U. S. Court of Appeals, 825 F.3d 876 (8th Circuit 2016)

In July, 2014, a federal jury concluded that former Minnesota governor and professional wrestler Jesse Ventura had been defamed and suffered other damages as the result of the publication of the best-selling book *American Sniper.* The book was written by famous U.S. Navy SEAL sniper Chris Kyle (who was later killed at a Texas shooting range). After Kyle's death, Ventura continued the lawsuit against his estate. Kyle wrote in the book that in 2006, he punched someone he called "Scruff Face" at a California bar after the latter made disparaging remarks about the SEALs and U.S. policy in the Middle East. He later identified Scruff Face as Ventura.

Despite the very high standards that must be satisfied in a libel suit by a public figure such as Ventura (i.e., clear and convincing proof of actual malice), a federal judge sent the case to a jury, which voted 8-2 to award Ventura $500,000 for damage to his reputation and career caused by defamation. They also awarded him $1.3 million for unjust enrichment -- money they found Kyle made by exploiting Ventura's name and reputation. The decision was appealed to the 8th federal circuit Court of Appeals. MNA joined many other media organizations from around the country in submitting a friend of the court brief in support of the appeal.

In June, the appellate court overturned the verdict, holding that no claim for unjust enrichment was permitted in defamation cases. The Court also determined that references made to the defendant's insurance coverage during the trial were improper, thus voiding Ventura's defamation award. While the portion of the decision dealing with unjust enrichment is definitely positive, it's not especially dramatic, because most observers felt that the trial court was clearly wrong in permitting such a claim anyway. However, the decision on defamation is disappointing. The appellate court could have thrown the whole case out on the basis that there was insufficient evidence to establish actual malice, since the witness accounts of the incident in the California bar were inconsistent and incomplete. By instead sending the case back for another trial on the defamation issue imposes on the defendant, at minimum, substantial additional defense costs, and it could produce another big verdict as well. For these reasons, the decision is no great victory for the First Amendment. Incidentally, Ventura asked the U. S. Supreme Court to review the 8th Circuit decision, but that request was recently rejected.

D. Star Tribune Faces Jury Trial Over Story on Care Facility.

Range Development Co. of Chisholm v. Star Tribune
St. Louis County District Court (2016)

Shortly before the public release of a Minnesota Department of Health report critical of a care facility, *Star Tribune* reporter Paul McEnroe obtained a copy of the report from a confidential source and wrote an article based on its contents. McEnroe's article contained nine alleged misstatements concerning claims made about the care of a resident at the facility, including alleged maltreatment, the substantiation of neglect, and a referral to the St. Louis County Attorney's Office. The MDH report was publicly released on its website shortly after publication of McEnroe's story.

The owner of the facility filed a defamation lawsuit against the *Star Tribune* and McEnroe, McEnroe's unidentified source, and others. The plaintiff then sought to discover the identity of McEnroe's source. After taking McEnroe's deposition and those of several other people, the plaintiff was unable to determine who it was. McEnroe did provide an affidavit stating that the confidential source had supplied him with a copy of the report a few days before it was posted online, and that he wrote the article based on the report, and not on any other information provided by the confidential source. He acknowledged that he also based the article on his own medical research online and his general knowledge of the working relationship between licensing agencies and law enforcement relating to possible abuse of vulnerable adults.

The plaintiff then asked the district court to compel disclosure of the source's identity, arguing that McEnroe's claim that all his information for the article came from the report was inconsistent with the fact that some of the article's statements (e.g., that the resident was "barely alive," and that the case was referred for criminal charges) differed from the report. The plaintiff contended that McEnroe "got some other information from somebody else." The district court agreed with the plaintiff, and issued an Order requiring McEnroe to disclose the identity of his source, stating as follows: "Given that several statements appearing in the newspaper article in question arguably deviate significantly from the actual information available in the [MDH] report that the article is said to be based on, it is only logical to conclude the identity of defendant McEnroe'ssource will provide evidence as to whether or not he, or any other named defendant, spoke with actual malice in making the allegedly defamatory statements."

McEnroe appealed that Order, as permitted by the Minnesota Shield Law. Meanwhile, the district court issued a separate Order denying a request from the *Star Tribune* and McEnroe to dismiss the libel action, concluding that three of the allegedly defamatory statements—that "black mold festered on a table," that the resident was found "barely alive," and that "[t]he case has been referred to the St. Louis County attorney's office for possible criminal charges"—met the legal thresholds for submission to a jury on the elements of material falsity and actual malice. But in September, the Court of Appeals did conclude that the district court was wrong in requiring McEnroe to divulge his source—that decision is discussed below in the section of this outline on the Shield Law. Unfortunately, however, the defendants are facing a libel trial in St. Louis County, probably sometime this spring.

E. Court of Appeals Strikes Down Minnesota's Anti-SLAPP Statute

Mobile Diagnostic Imaging, Inc. v. Hooten
Minnesota Court of Appeals, __ N.W.2d __ (2016) WL 7338754

Mobile Diagnostic Imaging, Inc. (MDI) sued the defendants on a variety of grounds, including unfair competition, civil theft, and breach of contract. The defendants responded by, among other things, claiming immunity from suit under Minn. Stat. §554.03, the Minnesota anti-SLAPP suit statute, and requested dismissal on that basis (SLAPP is an acronym for "strategic lawsuit against public participation"). The district court granted the defendants' request, and threw the lawsuit out.

On MDI's appeal, the Court of Appeals noted that the Legislature enacted the anti-SLAPP statute "to protect citizens and organizations from civil lawsuits for exercising their rights of public participation in government." A party to a lawsuit may raise an affirmative defense under the statute by asserting that a claim "materially relates to an act of the moving party that involves public participation" and asking for immunity for acts that constitute public participation. Under the statute, the party opposing the anti-SLAPP motion must produce clear and convincing evidence that the lawsuit is not intended to affect public participation. However, in its December ruling, the Court concluded that the procedural requirements of Minnesota's anti-SLAPP statute "violate the non-moving party's constitutional right to a jury

trial by requiring a court to make a pretrial factual determination that the non-moving party has produced clear and convincing evidence to support his claim." The Court therefore held that the statute was unconstitutional. The ruling means that for all intents and purposes, Minnesota's anti-SLAPP law is void.

5. REPORTER'S PRIVILEGE -- SHIELD LAW
An Important Ruling from the Court of Appeals

Disclosure of Source Must Lead to Persuasive Evidence on Elements of Defamation Claim

Range Development Co. of Chisholm v. Star Tribune
Minnesota Court of Appeals, 885 N.W.2d 500 (2016)

The factual background of this case is summarized above in the Libel section. As described there, *Star Tribune* reporter Paul McEnroe wrote an article about a residential care facility that was in part based on a Minnesota Department of Health report that he had been given by a confidential source. In the course of the defamation lawsuit brought against McEnroe and the *Star Tribune* by the owner of the facility, a St. Louis County district court judge ordered McEnroe to disclose his source. The court relied on an exception found in the Shield Law which applies to confidential sources who provide information that may bear on the issue of whether the journalist was culpable of "actual malice" in publishing defamatory falsehoods.

McEnroe and the *Star Tribune* appealed the judge's ruling, and in September, the Court of Appeals reversed the district court. The appeals court concluded that in the context of the defamation exception, Minn. Stat. §595.025 (part of the Shield Law) "requires an affirmative showing, with concrete evidence, that disclosure of the source will lead to persuasive evidence on the elements of a defamation claim. District courts, when conducting this analysis, must necessarily review the merits of the defamation claim, but will not, as McEnroe proposes, impose a prima-facie-case requirement. Here, because Range failed to demonstrate that disclosing the identity of McEnroe's source will lead to persuasive evidence on the issues of falsity and malice, we reverse the district court's order requiring disclosure of the confidential source." The ruling is a valuable addition to the law protecting the ability of journalists to shield their sources.

6. ACCESS TO COURTS
Cameras in Courts Criminal Pilot Continues

A. Cameras in Courts--Background

The campaign to get cameras and other electronic recording devices into Minnesota courtrooms continues to make slow but real progress. In August, 2015 the Supreme Court finally agreed that cameras could be used to some extent in criminal cases, ordering a pilot project that began on November 10. This builds on the Court's earlier approval of liberalized access for cameras and other electronic devices in many kinds of *civil* proceedings, which was initiated as a pilot project in 2011 and subsequently authorized on a permanent basis. Electronic coverage in civil actions now requires only the judge's permission, with no need to obtain approval from the attorneys. Certain kinds of cases are excluded, such as family court actions.

B. Pilot Project for Criminal Proceedings Continues.

During the pilot project (which lasts for approximately two years), electronic coverage is permitted in the "post-conviction" phase of criminal proceedings—which occurs after a guilty verdict has been returned by a jury or a guilty plea accepted. The new rule is even stronger than in civil cases, again not requiring consent by the attorneys, but also creating a presumption that cameras are allowed unless the presiding judge identifies specific good cause to prohibit the coverage.

A person wishing to conduct such coverage must provide written notice of the intended coverage at least 10 days in advance. The notice should be furnished to county court administrator, the trial judge, all counsel of record, and any parties appearing without counsel. A copy of the notice should also go to the local media coordinator and the State Court Information Office (which has forms online if you want to use them). Media coordinators are representatives from the news media who have volunteered to facilitate interaction between the media and judges, and can coordinate things like pooling and local courthouse logistics. Camera coverage is not permitted in the several types of criminal proceedings, which are listed in the Court's rules. Keep in mind that the presiding judge has broad discretion to control the decorum of the proceedings and to ensure that the fair administration of justice is preserved, and it's therefore especially important to coordinate any planned coverage with the judge and his/her staff.

7. POSSIBLE LEGISLATION IN 2017
Several Important Issues Already Percolating

Legislation of special interest to Minnesota journalists that may be addressed in the 2017 session includes the items summarized below. The session this year is the alternate year "long session," so there's plenty of time for all sorts of things to happen.

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 are preparing 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 claim that the volume of such records is imposing excessive burdens on them.

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 the local government bodies.

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

E. Prince Bill Could Return. Legislation unsuccessfully pursued last year that would establish broad "rights of publicity" in Minnesota—with significant implications for expression protected by the First Amendment—could be introduced again this year.