2025 MNA CONVENTION
LEGAL UPDATE
January 31, 2025

NOTEWORTHY LEGAL ISSUES AND DEVELOPMENTS FROM THE PAST YEAR OF INTEREST TO MINNESOTA JOURNALISTS

A. OPEN RECORDS (aka DATA PRACTICES)

In 2024, there were several cases involving the Minnesota Government Data Practices Act (MGDPA) decided by the Minnesota appellate courts and the Minnesota federal district court, reflecting the pervasive character of data privacy issues. However, only one of those cases has some potential consequence for the news media and public access; it's summarized below.

1. Alpha News' Request for Body Camera Data of Sen. Mitchell Arrest Rejected

Alpha News v. City of Detroit Lakes
(Minn. App. July 30, 2024) 2024 WL 3634235

Factual Background: Alpha News filed an action in Becker County District Court pursuant to the Data Practice Act seeking access to body-worn-camera and dash-camera recordings relating to the April 2024 arrest of a state senator Nicole Mitchell. Although body-camera data that is part of an active criminal investigation is usually confidential, any person can "bring an action in the district court located in the county where the data are being maintained to authorize disclosure of investigative data." Minn. Stat. § 13.82, subd. 7. Disclosure is warranted under the statute if "the benefit to the person bringing the action or to the public outweighs any harm to the public, to the agency or to any person identified in the data." *Id.*

However, here the district court determined that because the requested data were active criminal investigative data, "the rights of an accused in an active criminal proceeding outweigh the public's interest" in accessing the data before the criminal trial. Alpha News then appealed, and asked the Court of Appeals to expedite the processing of the appeal.

Decision. The Court of Appeals denied the request to expedite, stating: "Although appellant has acted with diligence throughout this litigation, appellant has not demonstrated good cause for expediting the processing of this appeal. We are not persuaded that the appeal should be given the same priority as cases involving child-custody, civil-commitment, and juvenile court matters."

2. Data Practices Advisory Opinions

Of the four total advisory opinions issued by the Commissioner of Administration in 2024, three of them dealt with issues involving public access to data. Those opinions are summarized below.

a. ***City Failed to Maintain Required Data Access Policies.*** Member of the public sought an Opinion on whether city responded appropriately to a request for its data access policies. The Commissioner concluded that the city did not respond appropriately, because it appeared that the city did not have data access policies at the time of the request. Minn. Stat., §13.025, subd. 2 requires a government entity's responsible authority to prepare "a written data access policy" that informs members of the public about their rights under the Data Practices Act, as well as how to request access to public data that the entity maintains.

The responsible authority must also update the policies "no later than August 1 of each year, and at any other time as necessary to reflect changes in personnel, procedures, or other circumstances that impact the public's ability to access data." Additionally, §13.025, subd. 4 states that these policies must be made "easily available to the public by distributing free copies to the public or by posting the policies in a conspicuous place within the government entity that is easily accessible to the public or by posting it on the government entity's website." ***Advisory Opinion No. 24-002; City of Fertile.***

b. ***Emails among School Board Members in "Official Capacity" are Presumptively Public.*** School district requested Opinion as to whether emails and similar written correspondence regarding school district business that were sent between school board members were classified as private data under Minn. Stat., §13.601, subd. 2. The Commissioner responded that the private classification under that section applied to communications between elected officials and members of the public rather than between elected officials. Additionally, §13.601, subd. 2 does not apply to elected officials' correspondence when they are communicating in an official capacity. Therefore, school board members' emails are presumptively public unless specific data are classified as not public under another section of the Data Practices Act, other state statute, or federal law. ***Advisory Opinion No. 24-003; I.S.D. #11 (Anoka-Hennepin).***

[*Section 13.601, subd. 2 of the Data Practices Act states as follows: "Correspondence. Correspondence between individuals and elected officials is private data on individuals, but may be made public by either the sender or the recipient."*]

c. ***Request for Access to Public Data using Pseudonym was Proper.*** Member of the public asked whether a city responded appropriately to a request for public data that he made using a pseudonym. His request included "data documenting different City expenditures, resolutions, employment policies, hiring and termination processes, service contracts, and receipts and invoices over the course of several years." The City informed the requester

that it would not provide access to the data until he identified himself. The Commissioner opined that the city did not respond appropriately because Minn. Stat. §13.05, subd. 12 prohibits government entities from requiring data requesters to identify themselves as a condition of obtaining access to public data. ***Advisory Opinion No. 24-004; City of Kasota.***

3. Possible 2025 Legislation

B. THE MINNESOTA OPEN MEETING LAW

In 2023, there were no court decisions of any significance issued involving the Minnesota Open Meeting Law.

1. Open Meeting Law Advisory Opinions

None of the four total advisory opinions issued by the Commissioner of Administration in 2024 dealt with the Open Meeting Law.

2. When can Government Bodies Conduct Virtual Meetings?

OML, §13D.02: Meetings by Interactive Technology.

Subdivision 1. Conditions. (a) A meeting . . . may be conducted by interactive technology so long as:

(1) all members of the body participating in the meeting, wherever their physical location, can hear and see one another and can hear and see all discussion and testimony presented at any location at which at least one member is present;

(2) members of the public present at the regular meeting location of the body can hear and see all discussion and testimony and all votes of members of the body;

(3) at least one member of the body is physically present at the regular meeting location;

(4) all votes are conducted by roll call so each member's vote on each issue can be identified and recorded; and

(5) each location at which a member of the body is present is open and accessible to the public.

(b) A meeting satisfies the requirements of paragraph (a), although a member of the public body participates from a location that is not open or accessible to the public, if the member

has not participated more than three times in a calendar year from a location that is not open or accessible to the public, and:

(1) the member is serving in the military and is at a required drill, deployed, or on active duty; or

(2) the member has been advised by a health care professional against being in a public place for personal or family medical reasons.

Subd. 1a. Meeting exception. This section applies to meetings of entities described in section 13D.01, subdivision 1, except meetings of:

(1) a state agency, board, commission, or department, and a statewide public pension plan defined in section 356A.01, subdivision 24; and

(2) a committee, subcommittee, board, department, or commission of an entity listed in clause (1).

Subd. 2. Members are present for quorum; participation. Each member of a body participating in a meeting by interactive technology is considered present at the meeting for purposes of determining a quorum and participating in all proceedings.

Subd. 3. Monitoring from remote site. If interactive technology is used to conduct a meeting, to the extent practical, a public body shall allow a person to monitor the meeting electronically from a remote location.

Subd. 4. Notice of regular and all member locations. If interactive technology is used to conduct a regular, special, or emergency meeting, the public body shall provide notice of the regular meeting location and notice of any location where a member of the public body will be participating in the meeting by interactive technology, except for the locations of members participating pursuant to subdivision 1, paragraph (b). The timing and method of providing notice must be as described in section 13D.04.

Subd. 5. [Repealed]

Subd. 6. Record. The minutes for a meeting conducted under this section must reflect the names of any members appearing by interactive technology and state the reason or reasons for the appearance by interactive technology.

History:
1957 c 773 s 1; 1967 c 462 s 1; 1973 c 123 art 5 s 7; 1973 c 654 s 15; 1973 c 680 s 1,3; 1975 c 271 s 6; 1981 c 174 s 1; 1983 c 137 s 1; 1983 c 274 s 18; 1984 c 462 s 27; 1987 c 313 s

1; 1990 c 550 s 2,3; 1991 c 292 art 8 s 12; 1991 c 319 s 22; 1994 c 618 art 1 s 39; 1997 c 154 s 2; 1Sp2011 c 11 art 2 s 1; 2019 c 33 s 1-3; 2020 c 74 art 1 s 1; 2021 c 14 s 5; 2023 c 62 art 3 s 1

»See also §13D.021 -- Meetings During Pandemic or Chapter 12 Emergency

3. Possible 2025 Legislation

C. LIBEL (DEFAMATION)

1. Libel Plaintiff's Complaint Sufficient to Survive Motion to Dismiss

Reger v. Associated Press
U. S. District Court (Minn.) 2024 WL 1657724

Factual Background. This case arises from an article published by the Associated Press on June 16, 2022. Plaintiff Reger was an executive with an oil and gas company. In 2022, Reger was found civilly liable for securities fraud, but a civil claim for insider trading was rejected by the jury.

The *Star Tribune* then published an article accurately explaining the lawsuit and verdict. Shortly thereafter, the AP published a short article on the same topic. Unlike the *Star Tribune* article, however, and despite citing to that article, the AP story contained several errors. Plaintiff Reger alleges that these errors wrongfully stated and implied that he was convicted of criminal activity rather than held civilly liable, thus causing substantial harm to his personal and business reputation. Specifically, Reger cited the following factual errors in the AP article:

- "Former Minnesota oil executive convicted of securities fraud."
- Reger "has been convicted in a stock manipulation scheme."
- "A federal jury in New York on Tuesday found Michael Reger guilty of securities fraud, wrapping up a shareholder lawsuit filed five years ago[.]"
- "Reger was acquitted of insider trading."

In addition to the inaccurate terminology regarding the nature of the lawsuit and verdict, Reger alleges that the article implied that he was found criminally liable. According to Reger, references in the article to criminal convictions against his civil co-defendants and the article's inclusion of hyperlinks to other articles addressing their criminal convictions, along with the other inaccuracies in the article, created the false impression that Reger, too, was criminally liable and subject to imprisonment. In his lawsuit against the AP, Reger alleges defamation, defamation by implication, defamation per se, and intentional infliction of emotional distress.

Decision. The AP eventually asked the Court to dismiss the action for failure to state a valid legal claim. But in a decision filed on April 17, 2024, the Court allowed the defamation claims to

move forward, though it did dismiss the intentional infliction claim. The Court held that Reger's civil Complaint provided sufficient factual allegations to support each of the defamation counts, that it was therefore inappropriate to dismiss them at an early stage of the litigation, and that further development of the actual facts was necessary. It does remain plausible that once this factual development has been completed, the Court will conclude that the defenses raised by the AP, including the argument that Reger is a "public figure" and thus must prove "actual malice," will be sufficient to cause the case to be thrown out.

2. District Court Dismisses Libel Suit with Robust Application of Fair Report Privilege

Auleciems v. St. Paul Pioneer Press, et al.
Ramsey County District Court, File No. 62-CV-23-4372 (2024)

Factual Background. In 2021 plaintiff Auleciems was charged by the Washington County attorney's office with more than 70 felony counts for allegedly violating Minnesota's tax code and criminal code. Many of the tax code charges related to alleged sales tax and income tax violations related to plaintiff's "hosting business"—he frequently rented out his large house in Bayport. The charges also included "theft by swindle," by "deceitfully not returning renter's security deposits." Shortly after the criminal charges were filed, the Minnesota Department of Revenue issued a press release describing the criminal charges against Auleciems. The release was titled "Bayport man charged with 74 felony tax crimes," and it summarized the charges lodged against Auleciems.

The *Pioneer Press* then published an article about the charges on September 1, 2021, titled "West Lakeland man charged with theft by swindle and 74 felony tax crimes in VRBO scam." The article was based almost entirely on the criminal complaint itself, and on the press release issued by the Revenue summarizing the charges contained in the criminal complaint. These documents were indisputably publicly accessible government records.

Just before the two year statute of limitations on libel actions expired, plaintiff sued the *Pioneer Press* and its reporter for defamation. His Complaint stated that "The false published information by the defendants claimed that the plaintiff was a tax cheat who owed approximately $200,000 in Minnesota Income tax, filed false income tax returns, collected Minnesota sales tax and didn't pay the sales tax to the state and didn't file any sales tax returns." Auleciems placed heavy emphasis on the fact that the headline on the newspaper article referred to a "VRBO scam," even though this term didn't appear in either the criminal complaint or in the press release.

Nonetheless, there were several references to VRBO in the criminal complaint itself, where the county attorney stated that plaintiff used the VRBO website and similar platforms to advertise the availability of his property for rental.

Then, in December, 2023, Auleciems was tried before a Washington County jury on the criminal charges. He was found guilty and convicted of fourteen felonies, including eight counts of

felony failure to pay/collect taxes, four counts of felony filing false or fraudulent tax returns, and two counts of felony theft by swindle.

Decision. In April, the *Pioneer Press* filed a motion asking the Court to grant it summary judgment, and to dismiss Auleciems' claims. The Court readily granted the motion, relying primarily on the fair report privilege, which it correctly described as follows: "[T]he fair and accurate reporting privilege extends to protect the accurate and complete report or a fair abridgment of" government proceedings and records," citing *Moreno v. Crookston Times Printing Co*., 610 N.W.2d 321, 333 (Minn. 2000). The "privilege will not be defeated by a showing of common law malice, but is defeated by a showing that the report is not a fair and accurate report of [the] proceeding." "This privilege has recently been expanded to apply to comments made at official government news conferences and government press releases," citing *Larson v. Gannett Company, Inc.*, 940 N.W.2d 120, 133 (Minn. 2020).

"This fair report privilege rests on the principle that a fair and accurate report of government statements 'simply relay[s] information' that individuals could have received directly from the official source." "The question of substantial accuracy and fairness belongs to the jury where the undisputed facts allow for more than one conclusion to be drawn."

The Court then examined the article in question, and concluded that "the article fairly and accurately reports the content of publicly available records. Here, Mr. Auleciems was charged with theft by swindle, using the VRBO website to facilitate the business at the heart of the alleged crimes. The term 'VRBO scam' and the comments throughout the article . . . served only to facilitate the press in relaying the publicly-available information. The fair report privilege does not require verbatim republication of official records, but, consistent with its name, a fair and accurate report. Where the complained-of report is protected by the fair reporting privilege as a fair abridgment of the official records as here, Mr. Auleciems' claims against the *Pioneer Press* defendants are properly dismissed."

The Court also held that the lawsuit was defective on two additional grounds: (1) The statements in the newspaper article were substantially true, and therefore could not support a libel claim; and (2) Auleciems was a limited purpose public figure, meaning that "even if the complained-of statements or publication were false, Mr. Auleciems would still be required to show 'actual malice' or 'a knowing or reckless disregard for the truth or falsity of a statement.'" However, "he has not alleged this, and nothing in the record is indicative of actual malice or such disregard."

Auleciems did not appeal the District Court's decision.

3. Uniform Public Expression Protection Act Approved in 2024 Legislative Session

A few years ago, the Minnesota Supreme Court struck down the state statute that provided an expedited legal procedure by which frivolous libel lawsuits could be dismissed early, before

costs, attorney's fees, and time incurred in defending the action became too oppressive. The statute was aimed at so-called SLAPP suits, an acronym for "Strategic Lawsuits Against Public Participation." But the Supreme Court eventually concluded that the procedure described in the statute violated a libel plaintiff's constitutional right to a jury trial, and struck the statute down. The decision left Minnesota without any anti-SLAPP protections.

In response, a coalition of individuals and organizations persuaded the Legislature last session to adopt the Uniform Public Expression Protection Act (UPEPA), which became effective on May 25, 2024. The Act was developed by a respected national organization known as the Uniform Law Commission, which seeks to promulgate proposed statutes that can be enacted by states throughout the country. The UPEPA purports to avoid the constitutional defects that caused the high court to invalidate Minnesota's prior law.

The new statute includes the following provision:

§554.09 Special Motion for Expedited Relief.

Not later than 60 days after a party is served with a complaint, crossclaim, counterclaim, third-party claim, or other pleading that asserts a cause of action to which sections 554.07 to 554.19 apply, or at a later time on a showing of good cause, the party may file a special motion for expedited relief to dismiss the cause of action or part of the cause of action.

MNA worked actively with the other supporters of the legislation during the 2024 session to promote its adoption. In the few months since it became law, it hasn't yet been tested.

D. REPORTER'S PRIVILEGE

1. Is Reporter for Nonprofit, Advocacy News Organization Protected by Privilege?

Energy Transfer LP, et al. v. Greenpeace International; Unicorn Riot, et al., Respondents
Minnesota Court of Appeals, 7 N.W.3d 153 (Minn. App. 2024)

Factual Background. Energy Transfer and the other plaintiffs in this case are energy companies suing an advocacy organization, Greenpeace International, as well as environmental activists in North Dakota in connection with the 2016 Dakota Access Pipeline ("DAPL") protests. In the North Dakota state court, they issued a subpoena to a non-party nonprofit media organization in Minnesota, Unicorn Riot Collective LLC, and its co-founder Niko Georgiades. The subpoena sought the disclosure of materials from Unicorn Riot's coverage of the DAPL protests such as, "[d]ocuments and communications, including video and audio recordings, concerning actual or planned Direct Action relating to Energy Transfer, Dakota Access, and/or DAPL," and "[a]ll videos, audio recordings, images, reports, articles, letters, emails, press releases, statements,

internet postings or content, or other materials prepared by Unicorn Riot concerning Energy Transfer, Dakota Access, or DAPL."

When the subpoena was objected to, the companies brought proceedings in Minnesota to enforce it. A Minnesota district court determined that Unicorn Riot fell squarely within the protections of the (the Minnesota Free Flow of Information Act (MMFIA), the state Shield Law, and that the subpoena targeted privileged documents protected from disclosure under that statute. Nonetheless, and very strangely, the district court also ordered Unicorn Riot to create a detailed privilege log (which is a detailed description of materials in its possession that might be within the scope of the subpoena).

The energy companies appealed the ruling that the Shield Law applied, and Unicorn Riot cross-appealed the district court's requirement that despite its recognition of the privilege held by Unicorn Riot, it nonetheless had to create a burdensome "privilege log." Unicorn Riot argues on appeal that the purpose of the reporter's privilege under both the First Amendment and under the Minnesota Shield Law would be frustrated if non-party journalists were forced to participate in civil discovery like this.

Decision. In May, the Court of Appeals issued its decision, holding that Unicorn Riot "qualified as a news-media organization that could seek the MFFIA's protections; that the MFFIA's protections are not limited only to newsgathering information obtained by means of lawful, non-tortious conduct; that newsgathering information obtained by Unicorn Riot was subject to the privilege against disclosure provided by the MFFIA; that in a proceeding to enforce a third-party subpoena, a district court may not order a privilege log or require the production for in camera review of information that is privileged under the MFFIA and that does not fall within a statutory exception; but that further fact finding by the district court was required to determine whether any of the information sought was not privileged and whether the subpoenas were otherwise objectionable.

However, both sides then asked the Supreme Court to review this ruling, which the Court agreed to do. Oral arguments occurred recently, and a decision from the Court should be issued in the next few months. The Washington, D.C. based Reporters Committee for Freedom of the Press has submitted an amicus curiae brief on behalf of Unicorn Riot, which the Minnesota Newspaper Association and many state news organizations have signed on to.

E. FIRST AMENDMENT ISSUES

Lawsuit Challenging New Minnesota Law Imposing Criminal Penalties for Certain Uses of Deepfake Content Takes Amusing Turn.

Christopher Kohls et al. v. Keith Ellison et al.

U.S. District Court, Minnesota (Case number 0:24-cv-03754)

This case addresses a law enacted during the 2024 legislative session, Minn. Stat. §609.771, which imposes criminal penalties for sharing certain AI-generated political content (aka "deepfakes") that could adversely influence elections. The law is being challenged by social media personality Christopher Kohls and state Rep. Mary Franson, who argue it violates First Amendment free speech protections.

The case is still in its early stages, but it recently took an ironic and amusing twist, when the presiding federal judge excluded expert testimony from a Stanford University artificial intelligence researcher retained by the Attorney General's office in defending the statute, after discovering that he used AI to generate fake academic citations in an affidavit he submitted to the Court about the dangers of AI.

U.S. District Judge Laura Provinzino scolded Jeff Hancock, co-director of Stanford University's Cyber Policy Center, and rejected his affidavit. According to Judge Provinzino, "Professor Hancock, a credentialed expert on the dangers of AI and misinformation, has fallen victim to the siren call of relying too heavily on AI — in a case that revolves around the dangers of AI, no less."

Hancock acknowledged using GPT-4o to help draft his affidavit, which he offered in support of the state's defense of the statute's constitutionality. The AI program generated citations to nonexistent academic articles. Hancock apparently neglected to verify their authenticity before submitting the affidavit, which he signed under penalty of perjury. Judge Provinzino found it "particularly troubling" that Hancock typically validates citations with reference software for academic articles but didn't apply the same diligence to a legal declaration. "One would expect that greater attention would be paid to a document submitted under penalty of perjury than academic articles," she wrote.

Minnesota Attorney General Keith Ellison's office apologized for the fake citations, and requested permission to file a corrected version. But the judge refused, stating that Hancock's use of fake sources "shatters his credibility with this Court."

The episode isn't an isolated one in the court system. Judge Provinzino's Order referenced several recent cases where courts have sanctioned attorneys for including AI-generated fake citations in their submissions.

However, notwithstanding the exclusion of Hancock's expert affidavit, the Court denied the plaintiffs' request for a preliminary injunction against the statute.

F. ACCESS TO COURTS

1. Access to Court Proceedings by Cameras and other Audio-Visual Recording Devices Continues to Expand

It's now been a year since the Minnesota Supreme Court approved a major change in the rules governing the use of cameras and other audio-visual devices in state criminal cases. Under the revised rules, cameras and other audio-visual devices are allowed in state courtrooms during many criminal trials, for the first time in state history.

In particular, the Court eliminated the long-standing requirement that prohibited cameras in criminal trials unless all parties and the judge consented—something that virtually never happened. The new rules provide that cameras and other A-V devices are permitted simply at the discretion of the trial court judge presiding in each case. The objections of the parties and attorneys are no longer controlling.

It seems apparent that an increasing number of judges are accepting cameras not just during a sentencing hearing, but also during the trial phase of a criminal case. As experience with cameras accumulates, and the judicial system acquires further evidence that camera access provides substantial benefits for the general public as well as for the court system itself, it's plausible that many of the remaining restrictions on audio-visual access will be removed.

The Supreme Court did impose certain "guardrails" as it called them, limiting the use of cameras in some situations. These include jury selection, testimony of victims without their consent, coverage of minor witnesses and defendants, and pretrial proceedings.

You can find the current rules governing the use of audio-visual devices in judicial proceedings on the state court website at: *https://www.mncourts.gov/Media.aspx*

2. District Court Authorizes Access by Audio-Visual Devices in Sen. Mitchell Trial

State vs. Nicole Lynn Mitchell (Order issued January 6, 2025)

On January 6, Becker County District Court Judge Michael D. Fritz issued an Order authorizing several news organizations to conduct audio-visual recording during the upcoming trial of Nicole Mitchell, a state senator from Woodbury. Mitchell was arrested and charged with first degree burglary several months ago in Becker County when she attempted to break into a local residence.

In his Order, Judge Fritz cited the "heightened public interest in the case" given Mitchell's public office, and noted that "allowing the press and general public access to trial serves as a check on the judicial system 'with benefits to both the defendant and society as a whole." He further noted that "Minnesota has had a recent history of successful trials that allowed full A/V coverage," and that "these cases show that it is possible to successfully have A/V coverage in the courtroom without negatively impacting the dignity and decorum of the proceedings." In

addition, “this Court recognizes that the recording of criminal trials and court proceedings will likely benefit transparency, public education, and public trust and confidence in the proceedings and the judicial system.”

Judge Fritz’s ruling demonstrates that Minnesota district court judges are moving in the direction of recognizing the important benefits of allowing A/V access in criminal cases.

Although Sen. Mitchell’s trial was originally scheduled for late January, it has now been moved to “within 60 days of May 19, 2025, which is the last day of the legislative session.”

G. THE FUTURE OF SECTION 230, COMMUNICATIONS DECENCY ACT (47 U.S.C. §230)

Section 230(c)(1) grants immunity from liability for providers and users of an "interactive computer service" who publish information provided by third-party users:

> *“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”*

Congress continues to debate whether Section 230 should be modified, at least with respect to the big tech companies, in response to the widespread censorship that those companies have engaged in over the past few years. And the debate has taken a new turn, with the election of President Trump and the Republican majorities in Congress—there is now some talk about the emergence of bipartisan support for modifications to the law, or even its complete repeal. But it remains far from clear whether Congress is actually capable of doing anything more than just blowing smoke about the issue.

H. APPENDIX – ADVERTISING FOR CANNABIS AND CBD/THC PRODUCTS

Minnesota law now permits the legal use of cannabis (aka marijuana). Thus adults 21 and older may possess, consume, and cultivate small amounts of cannabis at home. The law further authorizes the sale of adult-use cannabis at retail dispensaries in the state. In addition, an Office of Cannabis Management (OCM) has been created to regulate the cannabis industry.

The retail cannabis sales were originally supposed to begin in January, 2025. But the new law included provisions requiring preferences in issuing retail license to “social equity” applicants. However, this procedure became the target of lawsuits that contended it was unfair and inequitable. That led the OCM to drop the lottery, but the fiasco has significantly delayed issuance of retail licenses. It now appears that the first legal retail sales won’t happen until mid-2025.

Current law also permits the sale in Minnesota of CBD products and hemp-derived edibles containing THC.

To what extent may these items be advertised?

Based on well established 1st Amendment principles, the normal rule governing advertising is that if a product or service is legal under state law, it's legal to advertise it, and that rule applies to cannabis and CBD/THC products. However, the recently enacted state statute does list several restrictions on advertising for "a cannabis business, a hemp business, cannabis flower, a cannabis product, a lower-potency hemp edible, or a hemp-derived consumer product," providing that such advertising cannot:

1) contain false or misleading statements;

(2) contain unverified claims about the health or therapeutic benefits or effects of consuming cannabis flower, a cannabis product, a lower-potency hemp edible, or a hemp-derived consumer product;
(3) promote the overconsumption of cannabis flower, a cannabis product, a lower-potency hemp edible, or a hemp-derived consumer product;

(4) depict a person under 21 years of age consuming cannabis flower, a cannabis product, a lower-potency hemp edible, or a hemp-derived consumer product; or

(5) include an image designed or likely to appeal to individuals under 21 years of age, including cartoons, toys, animals, or children, or any other likeness to images, characters, or phrases that is designed to be appealing to individuals under 21 years of age or encourage consumption by individuals under 21 years of age; and

(6) contain an image of alcohol or a person or persons consuming alcohol; and

(7) be disseminated without a warning as specified by the Office [of Cannabis Management] regarding impairment and health risks.

Note that the advertiser is responsible for complying with these requirements. The advertising medium has no obligation to verify that the advertising copy complies with the statute, and the medium has no liability if copy submitted by the advertiser fails to comply—except in cases where the advertising medium gives the advertiser advice about legal compliance, which is why such action should be usually be avoided.

Advertising CBD/THC Products by Liquor Stores

Minnesota liquor stores are now permitted to sell CBD/THC products. However, paragraph (6) in the statute copied above prohibits advertising for such products that "contains an image of alcohol or a person or persons consuming alcohol."

Liquor store ads of course often contain photos and other images of alcoholic beverages. Consequently, under the language of the statute, these ads cannot include CBD/THC products.

However, based on the First Amendment principle described above, it is almost certain that the probation on images of alcohol in advertising by liquor stores that also includes CBD/THC products is void and unenforceable. But so far, there's been no rush by liquor stores to test this principle in Minnesota.

The Statute's Requirement that Advertising Include a Disclaimer

The statute's mandate that advertising for CBD/THC products and cannabis must contain "a warning as specified by the Office [of Cannabis Management] regarding impairment and health risks" has produced some confusion. That because, despite requests, the Office has not yet issued any language for this warning, and it has given no indication of when it might do so. This has also deterred some advertising.

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