2022 MNA CONVENTION
LEGAL UPDATE

January 28, 2022

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

A. OPEN RECORDS (aka DATA PRACTICES)

In 2021, there were almost 20 cases involving the Minnesota Government Data Practices Act (MGDPA) decided by the Minnesota appellate courts and the Minnesota federal district court, reflecting the relentlessly expanding reach of data privacy issues. Those cases of some potential consequence for the news media are summarized below.

1. Court Opinion Provides Master Class on how Data Practices Claims should be Analyzed

Energy Policy Advocates v. Ellison, 963 N.W.2d 485 (Minn. App. 2021)
Minnesota Supreme Court review granted, August 10, 2021

A non-profit corporation that focuses on energy policy advocacy requested certain records from the Office of the state Attorney General (OAG) pursuant to the Minnesota Government Data Practices Act (MGDPA). Specifically, the nonprofit requested all correspondence during a six-month period to or from a particular person within OAG that contained any of eleven search terms, which referred to certain persons, organizations, websites, or software applications. Many of the documents involved correspondence with other state attorneys general with whom the OAG was coordinating environmental actions.

The OAG identified 192 documents that were within the scope of the request but denied access to all of them, citing various data classifications found in the MGDPA covering records maintained by the OAG. The non-profit then sued to compel disclosure, but the district court ruled in favor of the OAG. On appeal however, the Court of Appeals reversed the District Court in some important respects.

In a meticulous and detailed opinion, the Court examined whether the OAG had properly applied the data classification statute that governs records held by the Attorney General's office (Minn. Stat. §13.65), so as to negate the presumption of public access that covers all government data in Minnesota. On several points, the Court concluded that the OAG had improperly interpreted the statute.

The Court said that the OAG was incorrect in claiming that where records did not include data on individuals, they could still be withheld as private data, which by definition only applies to data in which an identifiable individual is the subject of the data. The Court also disagreed with the OAG about the proper classification of certain records relating to investigations conducted by the OAG, and about the scope and application of the attorney-client privilege, lawyer's work-product doctrine, and other principles that limit the disclosure of attorney records.

Overall, the decision represents an impressive effort to correctly apply the complex classifications of the MGDPA. Unfortunately, however, the Supreme Court decided to grant review in the case, which means that the Court of Appeals opinion will be superseded by the high court decision, likely later this year. But it is possible that the Supreme Court's ruling will be generally positive as well. During the recent oral arguments in the case, Justice Gordon Moore said that the AG's argument for withholding communications involving climate litigation "makes no sense to me—zero."

2. Data Obtained by Illegal Hacker was not "Dissemination" under MGDPA

***Smallwood v. Dept. of Human Services,* 966 N.W.2d 257 (Minn. App. 2021)**

Curtis Smallwood was civilly committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person in 2011. In 2018, the Minnesota Department of Human Services (DHS) informed him that a hacker had accessed a DHS email account assigned to a DHS employee. The email account contained no Social Security or financial information but did contain "first and last names, dates of birth, contact information, other demographic data, treatment data, legal history data, and/or information about [Smallwood] or [his] family's interactions with [MSOP treatment partners]."

Smallwood subsequently filed a civil lawsuit seeking damages for DHS's alleged violations of the Minnesota Government Data Practices Act (MGDPA), and other statutes. Smallwood's MGDPA claim alleged that DHS had "disclos[ed]" his private information to an unauthorized person by virtue of the hack. His complaint contended that Smallwood's private data "were disseminated and distributed" to unauthorized persons without his consent, violating the MGDPA, specifically the provisions that generally prohibit government entities from "disseminat[ing]" private or confidential data to others without the consent of the subject of the data.

The Court of Appeals disagreed, however: "Smallwood's allegations do not support the claim that DHS disseminated his private or confidential data," because although the "statute does not define 'disseminate,' . . . under its common definition the verb implies action. Nothing in the context of the statutory restriction on state handling of private and confidential data implies that the Legislature intended to treat information stolen *from* a governmental entity as information disseminated *by* the entity. The complaint does not allege, nor does it invite any reasonable inference, that any member of DHS actively participated in the hacker's intrusion into the DHS employee's email account. DHS no more 'disseminated' Smallwood's information exposed during the illegal hacking intrusion than a burglary victim can be said to have

distributed property stolen from her during a break-in. Smallwood's assertion that DHS 'disseminated and distributed' his data is not supported by the factual allegation that an unknown hacker accessed the employee's DHS email account." Based on this analysis, the Court dismissed Smallwood's MGDPA claim.

3. No Private Right of Civil Action under Official Records Act

***Halva v. Minnesota State Colleges and Universities,* 953 N.W.2d 496 (Minn. 2021)**

In 2015, the Minnesota State Colleges and Universities (MnSCU) posted a request for proposals for certain professional services. Tyler Halva submitted a proposal, but it was eventually disqualified because he allegedly failed to provide certain required information.
Halva then made several data requests related to the bidding procedure. Not satisfied by MnSCU's responses to his requests, Halva filed a complaint with the state Office of Administrative Hearings under the expedited data practices procedure to compel MnSCU's compliance with both the Data Practices Act and the Minnesota Official Records Act.

The OAH generally ruled in Halva's favor. He then sought enforcement of the decision through the court system, but both the District Court and the Court of Appeals rejected his claims. The Supreme Court then granted review. In its decision, the high court reversed the Court of Appeals with respect to Halva's Data Practices Act complaint on technical grounds, allowing him to proceed with his claim in district court. However, the Court denied Halva's Official Records Act claim.

The Official Records Act (Minn. Stat. §15.17) requires the state and its agencies to "make and preserve all records necessary to a full and accurate knowledge of their official activities." Any records maintained pursuant to the Official Records Act are public information and can be publicly obtained via enforcement mechanisms in the Data Practices Act. However, the ORA is silent as to enforceability and provides no private cause of action. In its decision, the Court held that "an individual aggrieved by the failure of a government body to comply with the Official Records Act has a cause of action under" the Data Practices Act. "In other words, the Legislature has already provided a judicial remedy for violations of the Official Records Act within the Data Practices Act." "Under these circumstances, there is no reason to imply a separate, additional, cause of action under the Official Records Act."

Data Practices Advisory Opinions

In 2021, the Department of Administration's Data Practices Office (formerly known as IPAD) issued five advisory opinions addressing data practices issues. The opinions were signed by the Commissioner of Administration.

1. Access to Recording of Public School Board Meeting. Citizen requested a copy of the recording of a school board open meeting. The school district denied access to the recording, indicating the recording contained discussions of allegations against school district personnel. In the Opinion, the Commissioner said it could not be determined whether the school district

properly responded to the public data request because there was a factual dispute as to the purpose for the school district's maintenance of the recording, and whether the school district maintained more than one copy of the recording for separate purposes. *Adv. Op. 21-002, Jan. 13, 2021; West St. Paul-Mendota Heights-Eagan Area Schools.*

2. Classification of Data about Teachers who Attend Continuing Education Programs. School district requested Opinion about the classification of data that the district maintains about teachers who attend professional development programs offered by the District. The Commissioner concluded that the data which identified the teachers who attended the programs constituted "work-related continuing education" within the meaning of section 13.43, subdivision 2(a)(7) of the Data Practices Act, and were therefore public. *Adv. Op. 21-005, June 21, 2021; Pequot Lakes Public Schools.*

3. Access to Security Information, Request for Explanation of Classification. Citizen sought Opinion about whether Sheriff's Office responded appropriately to a data request, and a request for a "short description explaining the necessity" for a security information classification pursuant to section 13.37 of the MGDPA. The Commissioner concluded that the Sheriff's Office did not respond appropriately to the data request, as the response was ambiguous and did not properly indicate whether responsive data existed. The Commissioner also concluded that the Sheriff's Office did not respond appropriately to a request for a "short description explaining the necessity for the classification" after withholding responsive data as "security information" pursuant to section 13.37. *Adv. Op. 21-006, October 21, 2021; Aitkin County Sheriff's Office.*

4. Whether Personal Recording Uploaded to City Computer System is Government Data. City requested Opinion about whether data in a recording made by an employee on a personal device and uploaded to the city's computer system was government data, and therefore subject to the Data Practices Act. If so, the city asked how such data were classified. In reviewing its own policies, the city determined that the storage of the data on government computer systems did not fall within the employee's limited ability to use city technology for personal reasons. As a result, the Commissioner agreed with the city's assessment that the data were government data. The Commissioner also opined that any data in the recording in which an employee is an identifiable subject are personnel data classified by section 13.43 of the Data Practices Act, and any other data that are not on individuals are presumptively public unless classified by another law. *Adv. Op. 21-007, November 29, 2021; City of Golden Valley.*

5. Did School District Violate MGDPA by Giving Newspaper Info about Student? A parent asked the Commissioner whether school district complied with the Data Practices Act and the federal Family Education Rights and Privacy Act (FERPA) when it disclosed the parent's student's directory information to a local newspaper. The Commissioner concluded that the District did not comply with the law because the parent had opted out of directory information disclosures. *Adv. Op. 21-008, December 8, 2021; Foley Public Schools.*

B. OPEN MEETINGS

In 2021, there were no court decisions of any significance involving the Minnesota Open Meeting Law.

Open Meeting Law Advisory Opinions

In 2021, the Department of Administration's Data Practices Office (formerly known as IPAD) issued three advisory opinions addressing Open Meeting Law issues. The opinions were signed by the Commissioner of Administration.

1. Multiple OML Issues Prompted by Town Board. Citizen requested an opinion about whether township board had complied with the Open Meeting Law, regarding four separate issues: the requirement to maintain a journal of votes, special meeting notice requirements, public copy of members' materials, and discussions at special meetings. The Opinion held that the Board did not comply with the OML because it did not keep a separate journal of its votes, and it changed the location of a meeting without providing the three day notice required by the OML. However, the Commissioner could not determine whether the Board had complied with the requirement to provide one public copy of the members' materials at a meeting, nor whether the Board held a discussion outside of the noticed purpose of a special meeting, because as to both issues there was a factual dispute as to what had actually occurred. *Adv. Op. 21-001, Jan. 3, 2021; West Lakeland Township.*

2. Whether School Board could Meet in Person while Requiring Public to Attend Remotely. Citizen asked for opinion as to whether the conduct of a school board violated the Open Meeting Law when a quorum of the board attended a meeting in person, while members of the public were limited to remote attendance. The Commissioner determined that the School Board did not comply with the Open Meeting Law, specifically noting that there is currently no mechanism in the Open Meeting Law allowing an in-person meeting while restricting public attendance to remote monitoring. *Adv. Op. 21-003, April 19, 2021; St. Louis County Schools.*

3. Availability of Recordings of Meetings Closed for Labor Negotiation Strategy Discussions. Citizen asked for recordings of township board of supervisors meetings closed for labor negotiation strategy pursuant to section 13D.03 of the OML. The board argued that members voted to post the recordings to the Township website and to make them available upon request, but it was unclear from the facts whether the board actually made the recordings available. The Commissioner concluded that the board members did not comply with the OML if they did not make the recordings "available" to the public after the township had signed all of the contracts for the current budget period. *Adv. Op. 21-004, May 7, 2021; Windemere Township Board of Supervisors.*

C. LIBEL (DEFAMATION)

There were no court decisions issued during the past year addressing libel issues that are of particular significance to Minnesota news organizations.

1. Key Fair Report Privilege Case Settled After Years of Litigation

Larson vs. Gannett Company, Inc. (KARE 11 and St. Cloud Times)

In February, 2020, the Minnesota Supreme Court issued its decision in the case known as *Larson v. Gannett Company, Inc., et al.,* 940 N.W.2d 120 (Minn. 2020). It's one of the most important libel rulings in state history, because the case dealt directly with the scope and application of the crucial fair report privilege. The Court's decision was something of a mixed bag—one part very good, the other disappointing and perplexing.

The definition of the fair report privilege adopted by the Court was positive, and will provide significant benefits to all Minnesota journalists. But the second part of the Court's opinion focused on how the fair report privilege should be applied to the facts of the *Larson* case; the Court concluded that five of the statements which Larson alleged were defamatory may or not be protected by the fair report privilege, and that this issue needed to be decided by a jury, which meant a second trial was necessary. However, in the wake of the Court's decision and given that the litigation had been going on for several years, the parties decided to settle, which finally ended the case. The terms of the settlement have not been disclosed.

2. Could the "Actual Malice" Standard be in Play?

Two Supreme Court Justices say Issue should be Reexamined

The "actual malice" standard has long been one of the cornerstones of modern 1st Amendment law, designed by the Supreme Court to limit libel lawsuits and the chilling effect they can have on speech about influential people in government and society. Established by the Court in its famous 1964 *New York Times v. Sullivan* decision, it requires public officials and public figures to prove by clear and convincing evidence that a defamatory falsehood was conveyed "with knowledge of its falsity or with a high degree of awareness of probable falsity." In other libel cases, the standard of care that's applied is simple negligence (in other words, was publication of the falsehood due to a lack of reasonable care?). This is not only much easier to prove, but it's also usually one that the jury decides, which makes it considerably less predictable while being much more expensive to litigate.

Particularly among journalists, it's an article of faith that the actual malice standard is vital to being able to adequately hold powerful people in government and society accountable. And with the advent of social media platforms and widespread community participation in the distribution of information, the potential application of the actual malice standard has increased significantly.

While the standard has long been the target of sharp criticism among some jurists and academics (including Justice Clarence Thomas), until recently it seemed secure. But this past July, in a libel case known as *Berisha v. Lawson*, Justice Gorsuch joined Justice Thomas in dissenting from the Court's refusal to accept an appeal from a plaintiff who the lower courts had defined as a public figure, issuing a biting critique of the actual malice standard, and arguing it was time for the Court to revisit the issue.

What's concerning about this development is that previously Justice Thomas has been alone on the Supreme Court in his opposition to the actual malice standard. Now Justice Gorsuch has offered what could be a considerably stronger argument. Thomas has mainly focused his critique on the claim that the actual malice standard was invented out of whole cloth by the Court and has no legitimate basis in the Constitution—but that's not an argument that usually persuades the Court to overturn precedent (except in politically charged cases such as *Roe v. Wade*, and *Brown v. Board of Education*).

However, Gorsuch contends that much has changed since 1964 when *New York Times vs. Sullivan* was decided. He suggests that the actual malice doctrine might have made more sense when there were fewer and more reliable sources of news, dominated by outlets "employing legions of investigative reporters, editors and fact checkers." But he says, many of the traditional and reliable sources of news have been overtaken by "the rise of 24-hour cable news and online media platforms that 'monetize anything that garners clicks.'"

"What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets," he wrote, "has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable."

This begins to sound like an argument that could eventually attract other conservative justices—namely, that there's been a significant change in the environment in which expression occurs, which in turn warrants different libel rules.

D. FIRST AMENDMENT ISSUES; SECTION 230 DEBATE

Pending and Recent First Amendment Supreme Court Decisions

1. Mahanoy Area School District v. B.L. (June 2021)
Vulgar Snapchat Message Sent by High School Student was Protected Speech

Facts: High school student named Brandi Levy sent vulgar message on Snapchat after she failed to make the varsity cheerleading team. ["F--- cheerleading, F--- school, F--- everything."] In response, her coach suspended her from cheerleading for one year. Levy sued, claiming the punishment violated her free speech rights.

A federal appeals court ruled in the student's favor, holding that the landmark 1969 high court speech decision in *Tinker v. Des Moines Independent Community School District* did not allow school officials to police off-campus speech. In *Tinker,* the Court had said that public schools could discipline students for in-school speech that substantially disrupted the school. But in the Levy case, the appellate court made the mistake of adopting a relatively simple, clear rule.

The school district appealed, arguing that the question of whether *Tinker* applies to off-campus speech has become especially important in the Internet era because "social media has made it far easier for students' off-campus messages to instantly reach a wide audience of classmates and dominate the on-campus environment." The district also argued that Levy's Snapchat message "expressed disdain and anger toward the school and cheer team and condemned her coaches' decision-making about the varsity roster. She plainly targeted her speech at campus."

The Supreme Court affirmed the appellate court decision 8-1, but on narrower and considerably more complicated grounds: "We do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus." "The school's regulatory interests remain significant in some off-campus circumstances." These include "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers."

The Court then announced a three part test to be used in determining when off-campus speech may be regulated by the school: But, "We leave for future cases to decide where, when, and how" [these] three features of off-campus speech "mean the speaker's off-campus location will make the critical difference."

In Levy's case, the Court held that the special interests offered by the school were not sufficient to overcome the student's interest in free expression, especially since "[Levy] was expressing irritation with, and criticism of, the school and cheerleading communities." "While schools have an interest in teaching good manners and punishing vulgar language directed at the school community, that interest was weakened by the fact that Levy spoke outside of school and on her own time," the Court said.

2. Americans for Prosperity Foundation v. Bonta (July 2021)
California Donor Disclosure Requirements Contrary to First Amendment

Facts: Nonprofit organizations challenged a California rule that required nonprofits to file copies of their IRS 990 forms with the state attorney general. Form 990 includes Schedule B, which contains the names and addresses of all individuals who donated more than $5,000 to the nonprofit in a given tax year. Although the law did not allow public access to Schedule B information, disclosures from the Attorney General's office had periodically occurred.

In 2014, Americans for Prosperity and the Thomas More Law Center sued in federal court, arguing that the rule in practice infringed on freedom of association and freedom of speech—that even the potential for disclosure of donors' names could seriously chill their willingness to make contributions to some groups. A federal appeals court ruled against the plaintiffs, and the Supreme Court granted review.

The high court reversed the appellate decision, ruling 6-3 in favor of the plaintiffs. The Court acknowledged that California had an important interest in preventing wrongdoing by charitable organizations. But, the Court said there was "a dramatic mismatch" between that interest and California's donor disclosure requirements. "The upshot is that California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though the information will become relevant in only a small number of cases involving filed complaints." The Court concluded that California's actual interest in investigating fraud was relatively small, and that this interest did not "reflect the seriousness of the actual burden that the demand for Schedule B imposes on donors' . . . rights."

The question now is whether the Court is going to try and draw some lines on disclosures allowed in the political context, or is instead going to say: disclosure laws of all kinds risk chilling speech. Some commentators believe that the Supreme Court's ruling could affect campaign finance laws more broadly.

3. Houston Comm. College System v. Wilson (Argued Nov. 2, 2021)
Can Public Bodies Punish their Members for Criticism of the Public Body?

Issue: The case concerns the extent to which the First Amendment limits an elected governing body's authority to punish members for speech criticizing the actions of the governing body, its other members, or the agency that it controls.

The case is important, because in recent years, it's become quite common for local public bodies (especially school districts) in Minnesota and throughout the country to adopt strict limitations on the ability of members to engage in such public criticism. And that has a direct impact on the flow of potentially valuable information to members of the public and to local news organizations.

Facts: The Houston Community College System (HCCS) operates community colleges throughout the greater Houston area. It's run by a Board of nine elected trustees. David Wilson was elected to the Board in 2013, and beginning in 2017, he started criticizing his fellow trustees, alleging among other things that they had violated the Board's bylaws, that another trustee didn't live within his trustee district, and that the board's decision to fund a campus in Qatar was a bad idea. Wilson conveyed these criticisms publicly in a variety of ways, including during interviews with a local radio station.

The Board then censured Wilson, accusing him of violating the board's bylaws, and not acting in the best interests of the college system and the board. It barred Wilson from holding officer

positions with the board and from receiving travel cost reimbursements; it also held that Wilson would be subject to further disciplinary action unless he stopped the behavior for which he had been censured.

Wilson responded by suing HCCS, alleging that the Board's censure violated his First Amendment right to free speech. The federal district court in Texas initially ruled against him, but a federal appellate court reversed that decision, holding that the 1st Amendment prevented the board from punishing members for their speech, where it involved an issue of "public concern". The HCCS then appealed to the U.S. Supreme Court, which granted review.

Impact of the Supreme Court's Decision: The way in which the Court decides this case will likely have a significant impact on the extent to which local public officials can express their personal views about the practices and policies of the governing body to which they belong, and the government agency that they supervise--especially important since elected officials across the country are confronting a host of divisive issues, combined with the ease and effect of using social media platforms to air complaints against them. The Court's ruling in the case will likely be issued sometime between March and June.

4. <u>City of Austin v. Reagan Nat. Advert. of TX (Argued Nov. 10, 2021)</u>
Does a Ban on Off-Premises Digital Signs Offend the First Amendment?

Facts: Another case prompted by the advance of technology, in this instance, electronic digital signs. Reagan National Advertising of Austin and Lamar Advantage Outdoor Company own and operate signs and billboards that display commercial and non-commercial messages. They filed applications with the City of Austin to digitize existing billboards, but the City denied the applications because its sign code does not allow the digitization of off-premises signs.

Reagan and Lamar sued, advancing a clever and subtle free speech argument. They claim that the code's distinction between on-premise signs and off-premise signs violates the First Amendment, and that Austin's sign code is content-based because its on-premises versus off-premises distinction applies based on the communicative content of the signs. Off-premises signs' functions are to advertise businesses and direct people to their premises at a different location, and whether a sign qualifies as off-premises hinges on the communicative content of the sign.

The plaintiffs argue that Austin's distinction will lead to bans on certain messages from some speakers, like those who lack the ability to host on-premises signs. Additionally, they contend that Austin's sign code may threaten non-commercial speech: banning the digitization of new off-premises signs restricts the number of messages that can appear on each off-premises sign, and, since on-site speech is more likely to be commercial, the code leaves non-commercial entities with fewer outlets.

Question at the Court: Does the Austin city code's distinction between on-premise signs, which may be digitized, and off-premise signs, which may not be, constitute a facially unconstitutional

content-based regulation in violation of the First Amendment? (Content-based regulations are the least likely to survive 1st Amendment scrutiny.)

This case has significant implications. If the Supreme Court upholds the Court of Appeals' opinion favoring the plaintiffs, portions of sign laws and ordinances throughout the country may be unenforceable, limiting the ability of state and local governments to restrict billboard advertising and potentially impeding much of the Highway Beautification Act. The Court's decision will likely be issued between March and June.

5. Social Media Platforms and the 1st Amendment

The Debate over Social Media Censorship

Few issues have presented a bigger challenge to traditional notions of what free speech means than those triggered by the rise of the internet and Big Tech. Internet and social media platforms such as Twitter, Facebook, Google, and Snapchat have become the primary means by which much of the public conversation in this country about politics, social issues, morality, and almost everything else is conducted. As a result, the recent actions of the Big Tech companies to block certain speech and speakers on their platforms raise important free speech concerns—because what they are doing clearly amounts to censorship.

Yet the 1st Amendment only limits the ability of *government* to restrict expression, and furthermore, corporations are among those protected by the Amendment's free speech guarantee. This means that under current law, the Big Tech companies have a 1st Amendment right to disseminate only what they want to, no matter how arbitrary or impactful their decisions may be.

Nonetheless, it's fair to ask whether this is a good thing. The First Amendment is not simply a legal declaration. It embodies one of the most important values of our democracy, repeatedly acknowledged by the Supreme Court over many decades as representing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." It "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." "Those who won our independence believed" that the "path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law."

In the Founders' time, and for most of American history, only the government had the power to censor speech in a broad enough way to disrupt the "debate on public issues," to interfere with the "opportunity to discuss freely supposed grievances and proposed remedies." But arguably Big Tech companies now have more power than the government does in this context. And consequently, when they exercise that power, they are effectively able to remove certain information and points of view from public awareness, just as surely as if access to them was prohibited by the government.

If as the Founders believed it's bad for democracy when the government restricts the public exchange of ideas, proposals, and arguments, maybe it's equally bad when Big Tech does so. Can we be confident that if powerful private corporations are controlling large parts of the public conversation, the effects will be any different than if the government were acting as censor?

This question has prompted some observers to think about a new approach to Big Tech censorship. According to some critics, one option would be to impose on Big Tech platforms the same stringent rules that currently apply to government officials before they are allowed to restrict expression. This would obviously involve a significant departure from portions of traditional 1st Amendment theory. But the critics argue that such an approach is warranted, because the Big Tech platforms represent a significant departure from traditional methods of public communication.

6. 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. At this point, however, the debate seems to be generating more heat than light. It remains far from clear what specific changes to Section 230 would actually deter the tech giants from censoring certain people and points of view, and whether Congress is actually capable of doing anything more than just bloviating about the issue.

E. ACCESS TO COURTS

1. Chauvin, Potter Police Trials Livestreamed without Serious Issues
Will this Experience Prompt Expansion of Minnesota Cameras in Court Rules?

Last year, two high profile criminal trials—those of police officers Derek Chauvin and Kimberly Potter in Hennepin County—were livestreamed, allowing the public and news media to observe them from beginning to end in real time. The experience was overwhelmingly positive, and even those directly involved in the trials didn't observe any serious problems.

This would seem to support a broad expansion of Minnesota's rules governing cameras in court. Under current criminal court rules, all parties and the court must agree to permit cameras (and other audio-visual recording devices), except during the sentencing phase of a criminal case. Last summer, Minnesota Supreme Court Chief Justice Lorie Gildea directed a Court advisory committee

to examine whether more audio and video coverage of criminal proceedings should be permitted. The advisory panel must report back to the Court with recommendations by July 1.

The committee has been meeting over the past few months, and unsurprisingly, given the long history of opposition to cameras in courtrooms from many on the Minnesota bench and in the bar, the members of the committee appear to be divided. On the plus side, Ramsey County Judge Richard Kyle said at a recent meeting that hesitation from judges and attorneys about livestreaming the Chauvin trial turned to praise for how smoothly the proceedings unfolded. He noted that people involved in the trial concluded that it went very well, and provided useful insights into the case and the judicial process. But other members of the committee have expressed skepticism, rolling out the same arguments used in the past, arguing that the Chauvin and Potter cases were exceptional, and should not determine whether cameras are more routinely allowed in more routine cases. They've expressed concerns about the potential chilling effect on victims and witnesses.

Minnesota media organizations (including MNA) have expressed strong support for liberalizing the court rules, in light of the experience with the Chauvin and Potter trials.

2. Impact on Court Access caused by Covid Restrictions, Options

Access to district court records and proceedings continues to be disrupted across the state by the restrictions imposed in response to the Covid pandemic. The situation appears to be improving, but until the pandemic seems largely under control, it's likely that some restrictions will remain in place.

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