2012 MNA CONVENTION

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NOTEWORTHY LEGAL ISSUES AND DEVELOPMENTS AFFECTING MINNESOTA JOURNALISTS

CONTENTS

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1. LIBEL AND PRIVACY
Libel Makes a Comeback

The strong trend away from libel cases against Minnesota news organizations that we had seen over the past several years has rather abruptly reversed. In 2011, we witnessed what appears to be the largest libel verdict ever awarded in the state, a substantial libel verdict against a citizen blogger, and a number of new libel cases.

There's no obvious explanation for this relatively sudden change. Whether its just a brief blip or a more definitive swing of the pendulum will only be determined by the passage of time. It's petty obvious though that the million dollar libel verdict returned last fall against KSTP-TV won't discourage attorneys from bringing new libel actions. In any event, the developments of the past several months have certainly furnished a reminder that libel suits haven't gone away, and won't anytime soon.

Section 230 of the Communications Decency Act of 1996 (discussed in more detail later in this outline) continues to provide strong protection against defamatory comments that are posted on news organization's Web sites *by third parties*. At the same time, all of the recent lawsuits were prompted by articles prepared by the new organization itself.

In contrast to the uptick in libel lawsuits, privacy claims against the state's news media were again a *rara avis* over the past year. There were none of any significance.

In sum, libel and privacy claims, though infrequent, continue to pose a significant monetary risk to the state's news media in terms of legal liability.

A. Anderson vs. KSTP-TV
Dakota County District Court
November, 2011

$1 Million Dollar Verdict against KSTP-TV

The plaintiff is this case was a "holistic healer" from Hudson, Wisconsin. She claimed that KSTP-TV falsely reported that she had "deprescribed" anti-anxiety medication being taken by one of her patients, and that the patient then said in the broadcast story that she had tried to commit suicide as a result of being taken off the medicine by Anderson, the plaintiff.

In her lawsuit, Anderson argued that medical records given to the reporter suggested that the patient's own medical doctor was the one who had changed the medication. She also contended that there was no proof that the patient had ever attempted suicide, and that this was also supported by the medical records. On this basis, plaintiff Anderson not only alleged that the station had defamed her, but that it was also culpable of "actual malice." That's a

significant issue even in a case where the plaintiff isn't a public official or public figure, because if the jury finds actual malice, it can jump to awarding reputational damages without a demonstration of specific harm to reputation by the plaintiff.

After a week long trial in Dakota County, the jury in the case gave the plaintiff $100,000 for lost earnings, and $900,000 for damage to her reputation.

KSTP-TV has filed motions asking that the verdict being vacated or modified, but the district court has not ruled on these yet. It's virtually certain that if the motions are denied, KSTP-TV will pursue an appeal. The plaintiff's attorney was quoted in a news report as stating that because the jury found actual malice, it would make it almost impossible for the award to be overturned or reduced. But that assessment may turn out to be overly optimistic in this case.

B. Jerry L. Moore vs. John Hoff, aka "Johnny Northside"
Hennepin County District Court
March, 2011

Minneapolis Blogger Hit with $60,000 Tortious Interference Verdict

Plaintiff Moore was hired by the University of Minnesota, but was terminated not long thereafter. In his lawsuit, he claimed that Hoff had defamed him through his "Johnny Northside" blog, and that posts on the blog had led directly to his firing. The plaintiff also sued Hoff for "tortious interference" with his employment.

The key accusation about Moore that Hoff had made on his blog was that Moore had been involved in mortgage fraud, and this allegation was the linchpin of Moore's lawsuit. Hoff raised First Amendment defenses, but the case eventually went to trial. In a special verdict form, the jury was asked to determine if the statement posted by Hoff that "Jerry Moore was involved with a high-profile fraudulent mortgage" was false. The jury responded "No,' it was *not* false. Though that effectively scuttled the libel claim, the jury nonetheless awarded substantial damages against Hoff on the tortious interference count. Hoff then asked the judge to throw out the verdict, arguing on First Amendment grounds that the tortious interference claim was nothing more than a libel claim with a different label. But the judge rejected the request, holding that there was other "direct and circumstantial evidence" to support the jury's verdict.

Hoff has filed an appeal with the Minnesota Court of Appeals, which probably won't be decided until next fall. The case could have important ramifications, both because of the plaintiff's success at the trial court in evading the barriers imposed on libel actions by using the cause of action for tortious interference, and because this appears to be the first case to reach Minnesota's appellate courts involving damage claims against a private blogger–or any blogger for that matter.

C. John Strange and St. Luke's vs. Duluth News Tribune
St. Louis County District
Action commenced Fall, 2011

News Tribune Sued by Hospital and its CEO after Investigation Exposes Problems

Beginning last spring, the Duluth News Tribune published a number of articles that raised troubling questions about a prominent neurosurgeon who had practiced in Duluth for more than a decade. The newspaper's investigation found that more malpractice suits had been filed against the neurosurgeon than against any other practitioner in St. Louis County, identified numerous former patients who claimed that they had suffered serious harm, and documented that the neurosurgeon had been reprimanded by the state Board of Medical Practice in 2008 for unethical and unprofessional conduct.

During the time that he practiced in Duluth, the surgeon had been affiliated with St. Luke's hospital, a major medical provider in the North Country. Eventually, he became the hospital's highest paid physician, receiving more than $1 million in some years.

On July 31, 2011, the News Tribune ran one of the culminating articles in its investigative series about the neurosurgeon and his practice. The article's headline stated that "As St. Luke's reaped millions, surgeon racked up complaints." The article noted that despite the many malpractice suits and "warnings" from other doctors and staff at the hospital about him, "St. Luke's hospital continued to allow the neurosurgeon to practice." The article then speculated that "one possible reason" might be that the neurosurgeon "produced significant revenues for the hospital by performing more neurosurgeries than his peers in Duluth," and that during his time on staff there, "the hospital went from the red to the black." The article went into considerable detail about the hospital's financial record, the neurosurgeon's history at the hospital, and described concerns expressed to reporters by a number of doctors and other staff.

Even though the newspaper's claims were true regarding the hospital's financial turnaround and its correlation with the time period that the neurosurgeon practiced there, John Strange–the hospital's CEO–and St. Luke's itself sued the News Tribune for defamation not long after this article appeared. Their Complaint basically alleges that the article falsely suggested that the hospital and its administration were more concerned about profits than they were about their patients.

This is arguably one of the most important libel cases in recent Minnesota history, with very significant potential ramifications for contemporary defamation law and how it will be applied to protect investigations conducted by news organizations. Incidentally, the attorney for the hospital and its CEO is the same attorney who represented the plaintiff in the libel action against KSTP-TV discussed above.

D. REPORTER'S PRIVILEGE—SHIELD LAW
An Occasional Subpoena, But No Big Showdowns

During the past year, Minnesota news outlets continued to see an occasional subpoena demanding unpublished information and/or the identities of confidential sources. However, they resulted no significant legal confrontations.

For the most part, subpoenas came from prosecutors or criminal defense attorneys seeking to dragoon journalists into providing information the attorneys considered useful for their cases. In nearly every instance, however, the subpoenas were voluntarily withdrawn or a compromise was worked out before a court needed to intervene, after the news organization invoked the reporter's privilege found in the Minnesota Free Flow of Information Act, Minn. Stat. §§595.021–025.

Administrative Subpoenas. There does seem to be increased use of administrative subpoenas, which can be issued by prosecutors without court involvement (and before any litigation has been commenced). Most often, they have been seen when investigators are seeking information about people who post comments on Web sites. However, the permitted scope of an administrative subpoena is very narrow, and it cannot properly be used to obtain such information.

Minnesota law retains a strong reporter's privilege, covering not only the identity of a confidential source but unpublished information as well. In criminal cases, the privilege can be overcome only when the party seeking the information demonstrates a compelling need (e.g., that there is no other possible source, and that the information is critical to the case). With respect to civil litigation, the Minnesota privilege nullifies virtually all subpoenas outside the very narrow category of defamation actions.

Federal Shield Law Initiative. Some efforts continue at the national level to convince Congress that a federal shield law should be enacted. But with the divided Congress, and influential opposition, prospects for enactment any time soon seem pretty dim.

Protecting Third-Party Commentators. Should news organizations protect the identities of third-party commentators on their Web sites? No consensus has emerged on this topic among journalists. Increasingly, law enforcement officials and others are serving subpoenas on news organizations, demanding those identities, in situations where they believe the commentator may have information helpful to a legal case or claim.

A number of newspapers around the country have asserted the protections of state shield laws in resisting subpoenas for the identities of third-party commentators, and a few courts have ruled that those laws do indeed protect newspapers from having to identify the commentators.

However, a few courts have employed what might be a more attractive approach, deciding that a news organizations did not have to divulge the identities of individuals who posted anonymous comments. But instead of applying the reporter's privilege, these courts have looked more to the historic protections afforded by the First Amendment regarding anonymous speech, concluding that the *news organizations* could assert the First Amendment rights of *the third parties* who had posted the comments on their Web sites. The courts then looked to whether, under the specific facts of each case, the anonymous speech rights of the commentators outweighed the rights of the plaintiff in the lawsuits who had issued the subpoenas to obtain their identities.

Although a number of Minnesota news organizations have received similar demands, at this point there is no known litigation in the state involving subpoenas for the identities of third-party commentators on Web sites.

E. ACCESS TO COURTS
The Cameras Pilot Project and its Challenges

In 2009, the Minnesota Supreme Court went against the recommendations of an advisory committee it had appointed, and decided to launch a pilot project in order to test the use of audio and video devices in courtrooms. This ruling represented a significant breakthrough, and came in response to the petition filed by the state's news media (led by MNA).

However, the Court then asked its advisory committee to come up with a means of credibly evaluating the use of cameras in courtrooms–especially the possible impact on victims and witnesses. But that issue proved to be very difficult, and the Court was required to delay the pilot's start as the result of problems that the committee encountered in designing a viable method of evaluating the pilot.

The committee had been working with a distinguished group of academics to design and perform the evaluation, but the recommendation they eventually submitted called for study that would cost over $700,000 and involve complex research procedures. The advisory committee seemed lukewarm about this proposal, but forwarded it on a closely divided vote to the Supreme Court.

Last January, the Court finally issued an Order implementing the pilot project, and it was distinctly problematic. Unsurprisingly, it rejected the expensive study, this left the Court in a difficult position. On the one hand, it had basically promised the opponents of cameras (particularly the powerful lobby for crime victims) that before any final rule was adopted, there would be a careful study of

the impacts of cameras. On the other hand, the Court had stated in 2009 that it would proceed with a pilot covering both civil *and* criminal proceedings.

The Court really had few good options, and sought to extricate itself from the dilemma by issuing an Order that initially allows liberalized access for cameras and other electronic devices only in *civil* proceedings (excluding certain categories such as family court actions). A request for electronic coverage only needs to be approved by the presiding judge, and not by the attorneys and parties, unlike the prior rule. The pilot took effect on July 1, 2011.

While this is definitely an improvement over past practice in Minnesota, it's nonetheless frustrating, for the simple reason that the great majority of "news" generated by the courts–as defined by editors and reporters–occurs in criminal proceedings. Furthermore, civil proceedings can be harder to cover, because the court schedules tend to be much more changeable and unpredictable than in criminal cases.

The result has been that few civil cases anywhere in the state have prompted requests for electronic coverage. Consequently, after six months operating with the pilot rules, there really hasn't been enough experience obtained to make useful judgments.

F. OPEN MEETINGS
Not Much New from the Courts or from IPAD

In the past year, there were no significant reported appellate court decisions involving the Minnesota Open Meeting Law (Minn. Stat. Chapter 13D). There were however two advisory opinions issued by the Commissioner of Administration (pursuant to Minn. Stat. §13.072) relating to the OML. They are summarized below.

OML ADVISORY OPINIONS

Starting a Public Meeting Early Violates Open Meeting Law, but Votes Valid. County Regional Rail Authority (OCRRA) Board publicly noticed a regular meeting to be held on January 18, 2011 at 4:15 pm, but the meeting was actually called to order at approximately 3:30 pm. Advisory Opinion held that Board violated OML by starting meeting before announced time, but that votes taken during the meeting were nonetheless valid and binding, based on Minnesota Supreme Court precedent. *Opinion #11-004.*

County Fair Board is Subject to Open Meeting Law. Dakota County Agricultural Society Board (which runs county fair) is subject to the Minnesota Open Meeting Law, given that Society is

subject to the requirements of Minnesota Statutes, Chapter 13 [MGDPA], receives public monies, and has authority (eminent domain power and tax levy power through the county) similar to that of the public bodies specifically referenced in Open Meeting Law, and is therefore an "other public body" as mentioned in OML, §13D.01, subd. 1. *Opinion #11-012.*

G. OPEN RECORDS (DATA PRACTICES)
A Supreme Court Ruling, Several Advisory Opinions, and Concern about the OAH Procedure

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In the past year, there was a noteworthy decision from the Minnesota Supreme Court construing the public access rules found in the Minnesota Government Data Practices Act, Minn. Stat. Chapter 13. And, the new expedited procedure for resolving data practices claims using the state Office of Administrative Hearings (OAH) processed several cases, though the rulings haven't been particularly encouraging.

In addition, a number of important advisory opinions were issued by the Commissioner of Administration (pursuant to Minn. Stat. §13.072) relating to data privacy and public access issues. They are summarized below.

A. KSTP-TV, et al. vs. Ramsey County, Minnesota Supreme Court ___ N.W.2d ___ [2011 Westlaw 5554836] (November 2011)

Supreme Court Rules that Unopened Absentee Ballots are Not Accessible

Background. The November, 2008 election for Minnesota's U.S. Senate seat left a considerable controversy in its wake. A major component of that controversy related to absentee ballots. Throughout the state, almost 13,000 of those ballots were rejected and therefore never counted. In fact, they still remain sealed in their return envelopes. In early 2009, KSTP-TV began investigating the absentee ballot issue in an effort to examine whether the state laws governing the casting of those ballots could be improved. Part of that process was determining how the uncounted ballots might have affected the outcome of the election.

After all 87 counties denied KSTP's request to examine the rejected ballots–which alone don't identify the voters–and its request that officials separate the ballots from their envelopes to enable the inspection, KSTP-TV and affiliated stations filed suit against Ramsey County, seeking a declaration that under familiar principles of the Data Practices Act, the

ballots once separated should be publicly accessible. The County vigorously opposed KSTP's arguments.

Decisions. In late December, 2009, the district court ruled that the ballots were indeed public, and that the County was required to open the return envelopes, separate the ballots from the envelopes in order to protect voter confidentiality, and then to allow the ballots to be publicly examined. The court held that state law contains a presumption of public access to all government records, that in close or questionable cases, the presumption means that doubt is to be resolved in favor of public access, and that where public and private data are mixed together, the government agency is required to separate the data. Ramsey County then appealed.

In August, 2010 the Court of Appeals reversed the district court, and in a perfunctory and simplistic analysis of data practices rules, held that "Because Minn. Stat. § 13.37, subd. 2 unambiguously provides that sealed absentee ballots are nonpublic or private data until opened by an election judge, rejected absentee ballots that have never been opened by an election judge are nonpublic or private data."

The Supreme Court accepted that decision for review, but in November, 2011 affirmed it. The Court's interpretation of the applicable portions of the Data Practices Act was superficial and unconvincing. Ignoring undisputed factual data acquired over decades showing that even election officials had not interpreted the law as Ramsey County claimed it should be construed, and fudging the legislative history regarding the key issue of when election judges served, the high court brushed off the TV stations' claim that §13.37 *was* ambiguous, and essentially embraced the argument used by the Court of Appeals. After reading the opinion, it's hard not to conclude that the Court just didn't want to again open up the issue of the 2008 senatorial election, regardless of how the Data Practices Act might apply.

This case involved an important test of the principle that, even in difficult or politically sensitive situations, the presumption of public access is a strong one and should prevail, unless the law *clearly* states otherwise. And not for the first time, other powerful considerations apparently took precedence.

D. New Data Practices Enforcement Procedure (Minn. Stat. §13.085) and 2011 Decisions

Overview: The 2010 Legislature approved an expedited alternative to district court lawsuits for those seeking to enforce the requirements of the Minnesota Government Data Practices Act and other statutes providing for access to government records. It authorizes the state Office of Administrative Hearings (OAH) to hear and decide claims that those laws have not been complied with. The new procedure should allow cases to be resolved within three months or less, at far less expense.

The OAH process is available for virtually any dispute involving requests for public access to the records of state, regional, or local government agencies. Importantly, OAH has the authority to decide factual disputes, in contrast to the advisory opinion process available through the Department of Administration.

The new law requires a filing fee of $1000. While at first glance this tends to seem pricey, it really isn't that bad. District court fees have steadily increased, and frequently can total several hundred dollars. And under the new law, where a person "substantially prevail[s]," all but $50 of the filing fee is refunded, and the balance is then billed to the respondent. If the complainant loses, the OAH keeps the portion of the filing fee sufficient to cover its costs–which in most cases will likely be the entire fee.

The new law also provides that a "rebuttable presumption shall exist that a complainant who substantially prevails on the merits . . . is entitled to an award of reasonable attorney fees," to a maximum of $5000.

OAH DECISIONS IN 2011

In 2011, OAH heard six complaints filed under the new procedure. Of those, four dealt with public access issues, three of which were of some consequence. They are summarized below:

A. OAH 11-0305-21754-DP -- KSTP-TV Complainant, vs. Minnesota Department of Corrections and Minnesota Department of Public Safety, Bureau of Criminal Apprehension.

In this case, KSTP-TV sought information about the thousands of individuals who have been required to submit biological specimens to law enforcement agencies as part of their criminal sentencing. Those specimens are maintained by the BCA for purposes of DNA testing. The station did not ask for any data about the DNA testing results, but only for the names of the persons submitting the specimens, arguing that the BCA classification statute applied only to the scientific test results, not to the names. OAH disagreed, and dismissed the complaint in August.

B. OAH 8-0305-22121-DP -- Dan Sherburne, Complainant, v. Mayor, City of Big Lake, Respondent.

Dan Sherburne asked for a copy of a report that had been prepared concerning problems and issues in the police department. Some disciplinary action had been taken, and Sherburne claimed that the report was therefore public as "data documenting the basis of a disciplinary action" under Minn. Stat. §13.43, subd. 2(a)(5). The OAH judge disagreed, however, finding that the report had not been relied on in making the disciplinary decision. He therefore dismissed the complaint in October.

C. OAH 8-0305-22159-DP -- Marshall Helmberger, Complainant, v. Johnson Controls, Incorporated, Respondent.

In this action, Helmberger and Timberjay Newspapers continued their efforts to obtain certain data generated by Johnson Controls and its subcontractors in conjunction with work on a large project for a public school district in St. Louis County. Helmberger and Timberjay argued that the data was public pursuant to Minn. Stat. §13.05, subd. 11, which extends the reach of the Data Practices Act to certain records held by private vendors when doing work for government agencies and performing a governmental function. They had earlier obtained two favorable advisory opinions in the same context from IPAD (see below). However, the OAH judge dismissed the complaint in October, adopting an extremely narrow definition of "governmental function" which not only conflicted with a series of advisory opinions, but also with a well known Court of Appeals decision from 2003. Helmberger then asked for reconsideration, and the Chief Judge of OAH reversed the initial ruling, finding that there was probable cause to believe that Johnson Controls failed to comply with the Data Practices Act. However, the case was returned for further proceedings to the original administrative law judge, and it now appears that he will dismiss the case again, basically on the same grounds.

DPA ADVISORY OPINIONS

In 2011, the state Commissioner of Administration, through the Information Policy Analysis Division, issued 17 advisory opinions addressing open records and data practices issues. Those of significance to journalists are summarized below.

Private Contractor Doing Work for Public Schools Required to Provide Contract-Related Data. Newspaper requested certain information about school construction project from school district, and was told some of the information had been "taken back" by the contractor (Johnson Controls), which claimed it was proprietary (detailed construction budgets for both of the new school projects). Newspapers's request to contractor for this information was denied. In advisory opinion, Commissioner held that since the Data Practices Act does not classify "proprietary information," and since contractor cited no other valid basis for refusing access, contractor was required to provide the requested data which contractor maintains but the school district does not. *Opinion #11-001; Timberjay Newspapers.*

Private Contractor's $3900 Fee for Public Data Request not Reasonable, and Trade Secret Claim Unjustified. Newspaper requested certain additional contract information from private contractor with school district, after obtaining earlier and favorable advisory opinion [see #11-001]. Contractor denied request, claiming that newspaper owed contractor $3,900 in connection with previous request. Contractor also claimed requested information was not public because it consisted of trade secrets. Advisory Opinion held that

$3900 charge was not reasonable, that MGDPA does not contain a provision that allows a government entity (or its contractor) to withhold government data on the basis of an unpaid, disputed copy charge, and that contractor had failed to demonstrate that requested information fell within "narrow" trade secret exception to public access. *Opinion #11-005; Timberjay Newspapers.*

[Note: The requests addressed in the two Timberjay Opinions are now the subject of a contentious proceeding before the Office of Administrative Hearings; see summary above.]

Emails to Elected Officials Constitute Government Data, but are Public Only where Sender or Recipient Disclose. School board chair received an email from a member of the general public which contained information regarding writer's perceptions about the performance and conduct of one of the finalists for the open superintendent position while employed by another school district. Board chair did not disclose the email to any other board member, nor did he share it with school district administrators or employees. This finalist was not offered the position, and shortly thereafter, he requested a copy of the email as public data. The Advisory Opinion first held that because email was received by chair of the governing body of a school district and sent to him in that capacity, email was government data. Then, the Opinion held that the email was private data, because Minn. Stat. §13.601, subd. 2, classifies "correspondence between individuals and elected officials" as private data, and that both the elected official and the sender are the subject of the correspondence, but not the person discussed in the email. Though statute also provides that the correspondence "may be made public by either the sender or the recipient," in this case, neither party wanted the email disclosed. The Opinion also concluded that §13.601, subd. 2 only "classifies as private the 'correspondence,' not the data within the correspondence." And if the correspondence were disclosed to the government entity (other board members or employees), §13.601, subd. 2, would no longer apply. *Opinion #11-006.*

Emails to Multiple Elected Officials from Citizens are Private Data, Unless Disclosed by Senders or Recipients. Members of organization sent emails to school board members, prompting request from citizen for access to the emails. In response to request for opinion from district's attorney, Commissioner held that Minn. Stat. §13.601, subd. 2 applies even to situations in which there may be more than one sender and/or more than one recipient of particular correspondence (which includes emails), and that assuming neither the sender nor board member(s) had previously made the emails public, they are private. However, under §13.601, subd. 2, if either a sender or a recipient of correspondence shares it with a person or entity other than the District, the correspondence is public, and upon request, it must be provided to the requester. *Opinion #11-019.*

All Documentation Submitted in Connection with Building Permit Application may be Withheld under Security Data Exception. Planned Parenthood asked City of St. Paul to prohibit public access to virtually all submissions it made in connection with its building permit application for new facility, including architectural plans (which are normally public data) after City received a request for copies of the architectural plans for the project. Planned Parenthood claimed all submissions should be considered "security data" under Minn. Stat. §13.37. City sought advisory opinion, which held that City could withhold essentially everything submitted by Planned Parenthood–not only the construction plans and specifications, but also "the identity and contact information for the entire design and construction team" and documents showing "the identity of various suppliers, manufacturers and vendors associated with the project." *Opinion #11-011.*

By Participating in Public Athletic Events, Players Waive Privacy Classification. City of Faribault abruptly stopped allowing newspaper access to softball score sheets collected by umpires after city league adult softball games, claiming the names of players were private "social recreational data" under Minn. Stat. §13.548. In response to newspaper's opinion request, Commissioner held that even if names might technically be private data, the players "have implicitly given consent to release of their names and associated game data by participating in games that are open to the public." Thus the score sheets were publicly accessible. *Opinion #11-014; Faribault Daily News.*

City Could not Evade Public Access Requirements by Returning Financial Data to Private Company Receiving Grant of Public Funds. The City of Sauk Rapids, in partnership with the Minnesota Department of Employment and Economic Development, arranged a $500,000 forgivable loan to a private company for an expansion of its Sauk Rapids factory. The loan funds would come from public sources. Newspaper learned of proposed "financial information agreement" requested by company stating that government staff and private consultant would review company financial documents as part of the city's due diligence in deciding whether to make the loan, but would then return all of the financial documents to the company before advising the City Council on whether the documentation supported a decision to proceed with the loan. The city refused to make any of the records received from the company public, arguing that it would no longer have them in its physical possession when the loan was approved by the city council. In response to newspaper's opinion request, Commissioner held that the City did not comply with Data Practices Act or the Official Records Act (Minn. Stat. §15.17), when it denied access to data about the private company that the City relied on in determining whether to provide financial assistance to the company. *Opinion #11-016, St. Cloud Times.*

6. LEGAL ISSUES RELATED TO THE INTERNET
The Drama of the Commenters Continues

A. Section 230 Immunity. Much of the conversation among journalists regarding Internet law continues to revolve around the scope of the immunity granted by Section 230 of the Communications Decency Act of 1996 (which is codified in federal law at 47 U.S.C. §230). The statute creates a very formidable protection for Internet service providers (i.e., pretty much anyone who operates a Web site) against claims arising from content *supplied by third parties*.

The immunity provided by Section 230 has been difficult for traditional journalists to acknowledge—and rightly so. Under its protection, a news organization may allow third-party comments on its Web site that contain the most vile expressions of defamation, invasions of privacy, and other forms of noxious communication, with no legal liability whatsoever to be concerned about. However, the immunity does *not* extend to the persons who post such comments—they can be sued. In practical terms, however, because the offenders often have limited resources or cannot even be identified, such suits are rare.

Editing is okay. The most common misconception about Section 230 immunity is that it will somehow be lost or compromised if a news organization edits third-party comments or selectively removes them from its Web site. This is simply not true, except in very unlikely instances, such as where the news organization's editing makes a comment *more* injurious.

Some violations not covered. There are a few types of legal violations that are not immunized by Section 230. Probably the most common is copyright infringement, where a third party posts copyrighted material on your Web site. Even here, however, there are other provisions of federal law that limit the news organization's liability. In effect, you do not need to police third-party comments for copyright violations; but if you are notified by the copyright-holder that infringing material is being displayed through your Web site, you should make an attempt to remove it.

Court decisions. Over the past few years, there have been a handful of major court decisions around the country addressing the scope of Section 230 liability. Almost without exception, these decisions have construed the statute in a way that makes the immunity very strong. To date, however, there have not been any such decisions in Minnesota.

B. Copyright and Other Intellectual Property Issues. Without question, the most common legal violation encountered on the Internet is copyright infringement. While this outline could not possibly address all of the intellectual property issues and their permutations prompted by the growth of the Internet, the basic rule to remember is very simple: **there is no exception to copyright law simply because materials (photos, graphics, artwork, or articles) are displayed on the Internet.**

In particular, such display conveys *no implication whatsoever* that the materials are in the public domain and free for anyone else to use without permission. Absent explicit notice otherwise, you should always assume that when materials of this kind appear on a Web site, they are every bit as subject to copyright law as if they were in printed or other tangible form.

C. Protecting the Identities of Third-Party Commentators. One rapidly evolving Internet issue for news organizations is whether those organizations, when with a subpoena or other formal request from law enforcement officers and private attorneys, should try to protect the identities of individuals who post comments through their Web sites. At the present time, there is no consensus among journalists as to whether these commentators might, for example, fall within the protections of the reporter's privilege and state shield laws. A more detailed discussion of this issue appears above in the section of the outline on reporter's privilege.

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7. POSSIBLE LEGISLATION IN 2012
Probably Nothing Dramatic

Possible legislation of special interest to Minnesota journalists that may be addressed in the 2012 session includes the following. However, because the session will be relatively short and focused, it's unlikely that proposals which generate significant controversy will have any chance of being enacted.

a. IPAD Proposals. The Information Policy Anaysis Division office has drafted a bill proposing several amendments to the Data Practices Act and the Open Meeting Law. Most of them are mainly technical in nature, and would improve the function of the law. Among the proposals are a requirement that where an agency claims particular information can be withheld because it is "security data," the responsible official must provide a written description of the necessity; shifting classification rules about data on most elected officials out of the personnel data section and into a separate statute; and expanding the list of public data about applicants for appointment to public positions.

b. Expungement of Criminal Records. Advocates for broader expungement of criminal records will again appear at the

Capitol in force, as they have for the past few years, contending that the easy availability of criminal history records unfairly prevents individuals who have reformed (or who never were legitimately accused) from escaping their past.

However, in the past year or two, there has been an increasing appreciation for the fact that because criminal history records are so easily obtained on the Internet, expanding state expungement laws would have little practical effect, since they would not reach those records. Other approaches may therefore to be attempted that don't involve sealing formerly public criminal files from public access. The most likely option is to make it illegal for employers, landlords, and others to refuse to deal with a person who was never convicted of a crime, or whose conviction is more than eight or ten years old.

c. Intelligence Data Classification. As they did last year, some law enforcement officials continue to advocate for a new data classification be added to the Data Practices Act, allowing them to restrict public access to so-called intelligence data —information collected by law enforcement agencies that is not necessarily connected to a criminal investigation of any one person or entity, but rather is part of broader efforts to prevent certain types of terrorist, gang-related, or organized criminal activity. The basic argument law enforcement officials make about this proposal seems legitimate. At this point, however, finding language that will reliably separate information that should be considered public from that which is legitimately kept confidential may be extremely difficult to accomplish, and the proposal is unlikely to be adopted this session.