



THE OBJECTION

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the Objection is distributed electronically to all members of the MDLA. the Objection accepts submissions on all topics of interest to new attorneys. Please contact the editorial staff for submission information.

In Limine: From the Editors

[Jennifer Daugherty](#)

Larson • King, LLP

On behalf of the MDLA New Lawyers Section, we are pleased to present you with the second issue of *the Objection*. Thank you to everyone who has provided us feedback since the publication of our inaugural issue in February of 2006. We would especially like to thank Ken Kimber and Sean Mickelson for their contributions and leadership as co-chairs of the MDLA New Lawyers Section this past year, and Deb Oberlander for her continuing support and assistance in developing this e-newsletter.

the Objection is a bi-annual publication that will be published around the Mid-Winter Conference in February and the Annual TTS in August. Our goal is to create a publication that contains practical articles and information specifically geared towards newer lawyers. In order to sustain *the Objection* (bad pun intended!), we need the help of the many talented MDLA lawyers, both new and experienced alike, to submit articles for publication. Please consider utilizing your expertise to draft a short article on specific practice pointers or a primer on a substantive area of law. Tony Smith and I look forward to serving as Editors of *the Objection* for another year, so please email us at jdaugherty@larsonking.com or asmith@murnane.com if you are interested in writing an article.

Jennifer Daugherty
Editor-In-Chief

News and Notes from the MDLA New Defense Lawyers Committee

[Sean Mickelson](#)

Terhaar, Archibald, Pfefferle & Griebel, LLP

The New Lawyers are proud to bring you the second edition of *the Objection*, an on-line publication launched earlier this year. This publication is but one example of the New Lawyers' commitment to being involved in MDLA and providing opportunities for our members to be actively involved with the organization.

Since the last issue of *The Objection*, we continued the Brown Bag series of

CLEs. In March, Richard Scattergood and Jessica Wymore of Rider Bennett presented a start to finish guide to No-Fault Arbitrations. This presentation was followed in May by Bowman and Brooke's George Soule providing insight on the economic loss doctrine. We encourage those who have not attended a Brown Bag seminar in the past to consider doing so when the series starts up again this fall. The seminars offer an opportunity to share lunch with your peers and earn 1.5 CLE credits in the process.

For the second year, the New Lawyers conducted the Mid-Winter Warm Up in connection with MDLA's annual Mid-Winter Conference. Marcus Sanborn and Jennifer Daugherty of Larson • King delved into the defense of construction defect claims. This was coupled with a presentation by Chris Angell and Tony Smith of Murnane Brandt on handling water intrusion cases. Kathryn Downey of Murnane Brandt and Chad Hintz of Burke & Thomas provided common malpractice pitfalls facing new lawyers. Krista Durrwachter and James McAlpine from Quinlivan & Hughes offered tips for avoiding common mistakes made by new lawyers and related advice gained from judges and more experienced members of the defense bar. Although attendance was down slightly from the inaugural New Lawyers "Mid-Winter Warm-Up," the seminars were definitely worth the early arrival. We look forward to this event serving as the kickoff for the Mid-Winter Conference for years to come and strongly encourage our membership to become involved in the program.

The New Lawyers committee also displayed a less serious side by providing opportunities for our members to step away from the office and enjoy socializing with our peers. The third annual St. Paul Saints outing took place on July 27, 2006. The event provided an opportunity for good old-fashioned tailgating and outdoor baseball. The New Lawyers also hosted a social at the Corner Table in south Minneapolis on June 1, 2006.

Leadership of the New Lawyer Committee will be officially handed off to Amy Amundson of Rider Bennett, and Lacey Anderson of Larson • King, at the TTS. We look forward to an exciting year under their direction as Co-Chairs. The New Lawyers are also pleased to announce that Kathryn Downey and Christine Mennen of Halleland Lewis Nilan & Johnson, have been elected as incoming Co-Vice Chairs.

We would like to again thank Jennifer Daugherty and Tony Smith for their continuing efforts in publishing *the Objection*. We encourage all new lawyers to get involved in the New Lawyers section. It is a rewarding experience and provides a great opportunity to form friendships with your colleagues.

Upcoming Events

September 12, 2006 – MDLA Insurance Law Committee Meeting, 12:00 Noon,

Bassford Remele, 33 South Sixth Street, Suite 3800, Minneapolis

September 18, 2006 – MDLA Construction Law Committee Meeting, 4:00 p.m.
The Local, 931 Nicollet Mall, Minneapolis

October 11 – 15, 2006 – DRI Annual Meeting, San Francisco Marriott

October 25, 2006 – MDLA Insurance Law Seminar, Marriott Minneapolis West,
9960 Wayzata Blvd., St. Louis Park, MN

January 11 – 13, 2007 – DRI North Central Regional Meeting, Charleston, SC

January 26 – 27, 2007 – 2007 North Central Regional Trial Academy, Oak Brook
Hills Hotel & Resort, Oak Brook, IL--**GREAT OPPORTUNITY FOR NEW
DEFENSE LAWYERS!**

February 9 – 11, 2007 – MDLA 42nd Annual MWC, Arrowwood, Alexandria –
watch for information this fall

April 19, 2007 – 2007 Medical Malpractice Conference, Radisson Plaza Hotel,
35 South Seventh Street, Minneapolis

October 10 – 14, 2007 – DRI Annual Meeting, Marriott Wardman Park,
Washington, D.C.

Uncovering Anonymous E-Mailers

[Edward Beckmann](#)

Fafinski Mark & Johnson P.A.

In the last edition of *The Objection*, Jennifer Lurken of Larson • King correctly observed that e-mail has become the “smoking gun” of the 21st century. When lawyers contemplate obtaining e-mails, they typically know the author or who is storing the e-mails (i.e. an employer). Yet the internet provides tools for individuals to anonymously author e-mails that can be important evidence in litigation, or even lead to litigation.

Several large technology companies offer the public free e-mail accounts for use anywhere the public can obtain internet access. Microsoft Corporation, Yahoo! Inc. and AOL, LLC, provide four of the most commonly used free internet-based e-mail accounts: Hotmail, MSN, Yahoo and AOL. When an individual registers for these accounts, the “e-mail providers” require disclosure of the identity of the individual creating the account. Microsoft, Yahoo and AOL are willing to produce this “subscriber information” in response to a subpoena. Yet there are few, if any, procedures established by the e-mail providers for verifying the accuracy of the subscriber information, and as a result, individuals can provide fictitious

names and begin e-mailing. The e-mail account created with fictitious information is, in a sense, a “blind account” created for sending anonymous e-mails. For example, a disaffected employee may anonymously create a blind account for use by himself and other disaffected employees to disparage or defame the employer. Uncovering the identity of the subscriber and authors using the blind account requires strategies more involved than typical written discovery requests and depositions.

The Electronic Privacy Communication Act

The Electronic Privacy Communication Act (“EPCA”) protects against unlawful access to electronically stored communication. 18 U.S.C. § 2701. A company providing electronic communication service to the public shall not divulge the content of communication it holds. 18 U.S.C. 2702(a)(1); Sega Enterprises v. Maphia et. al., 948 F. Supp. 923, 930 (N.D. Cal. 1996). E-mail providers are subject to the EPCA as they store electronic communications held in account created by the public. While subscriber information can be disclosed pursuant to the EPCA, there is no known authority whereby a court ordered an e-mail provider to disclose the content of e-mail messages in a civil action unless certain statutory exceptions applied. Jessep-Morgan v. America Online, Inc., 20 F.Supp.2d 1105, 1108 (E.D. Mich.) (subscriber information but not “contents” may be disclosed). Any motion to order an e-mail provider to disclose the content of e-mails for a civil action would be difficult to win and should draw a vigorous objection from the e-mail provider who will have capable legal counsel.

Two important exceptions to the EPCA provide that an e-mail provider may disclose the content of e-mails sent by an “originator” or e-mails received by an “addressee.” 18 U.S.C. § 2702(b)(3); 18 U.S.C. § 2701(c)(2); Sega Enterprises, 948 F. Supp. at 930. For example, authors of e-mails which were sent to a blind account may obtain their e-mail messages from the e-mail provider. Individuals receiving anonymous e-mails from a blind account may also retrieve e-mails they received. These exceptions may be helpful when an “originator” or “addressee” has deleted sent or received e-mails from his e-mail account since the blind account may still contain the e-mails. The e-mails may expressly disclose the identity of the person who registered for the blind account and authors using it, or contain language helpful in identifying the authors. In addition, the original, electronically stored e-mail should still have the Internet Protocol Address (“IP Address”) that establishes the internet connection used to send the e-mail and may record from where it was received. An affidavit can be prepared and sent to the e-mail provider that authorizes the release of the content of e-mails involving an originator or addressee.ⁱ

Internet Protocol Addresses

An IP Address can be the most important piece of information for identifying the author of an anonymous e-mail from a blind account. In response to a well-crafted subpoena or court order that respects the boundaries of the EPCA, e-mail

providers should disclose useful information in addition to subscriber information. Microsoft will produce a log of dates and times when the blind account was accessedⁱⁱ and the IP Address that establishes the internet connection used to access the account. Since ownership of an IP Address is public information, the internet provider who owns the IP Address can be readily ascertained. Subpoenas may then be served on the internet provider to determine which customer it has assigned the IP Address in question. This information may establish the identity of the individual who registered for the blind account and the authors if they accessed the blind account from their computers at home or their employer.

E-mail providers should disclose the name of their customers pursuant to a subpoena. Yet TimeWarner, who provides internet service with its cable television service, has an internal policy of refusing to provide this information in response to a subpoena, relying primarily on the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Privacy Act"), 47 U.S.C. § 551(c)(1). TimeWarner's position is that internet service which is co-mingling with cable television service arguably invokes the Cable Privacy Act. TimeWarner will require a court order to release the subscriber information. This order should address the EPCA and Cable Privacy Act to protect TimeWarner from liability.

In 2005, the Maine Supreme Court held that non-governmental parties in civil litigation can obtain a court order to disclose subscriber information. Fitch v. John or Jane Doe, 869 A.2d 722, 728-729, 2005 ME 39 (ME 2005), citing CSC Holdings, Inc. v. Redisi, 309 F.3d 988 (7th Cir. 2002). The internet/cable subscriber must disclose the information so long as it gives notice to the subscriber. *Id.* at 729. In Fitch, an e-mail was sent from an e-mail address purportedly owned by Ronald Fitch. *Id.* at 724. The true Ronald Fitch filed a complaint alleging that an unknown person misappropriated his identity. Fitch filed a motion to compel disclosure of the subscriber information because Time Warner Cable refused to release subscriber information in absence of a court order. The trial court ordered the motion served on Time Warner, and counsel for "John Doe" made an appearance to opposing the disclosure motion. Time Warner did not appear at the hearing. The trial court granted the order and Doe appealed; during the appeal Time Warner tendered the subscriber information to the trial court where it stayed pending the appeal. The Maine Supreme Court held that the disclosure order was valid and enforceable because private parties may obtain a Court order for disclosure of subscriber information pursuant to 47 U.S.C.A. § 551(c)(2)(B) of the Cable Privacy Act. *Id.* 729.

Other recent authority is helpful in arguing that the Cable Privacy Act does not pertain to subscriber information for internet service provided with cable service. The United States Supreme Court recently upheld a Federal Communications Commission ruling that "cable modem service" (internet service) is not regulated as a "telecommunications service" pursuant to the Federal Communications Act. National Cable & Telecommunications Assoc. v. Brand X Internet Services, 125

S. Ct. 2688, 162 L. Ed. 2d 820, 73 U.S.L.W. 4659, 05 Cal. Daily Op. Serv. 5731, 5 Daily Journal D.A.R. 7749, 36 Communications Reg. (P&F) 173, 18 Fla. L. Weekly Fed. S. 482.ⁱⁱⁱ The Ninth Circuit decision appealed to the Supreme Court includes discussion helpful in segregating the Cable Privacy Act from internet service. The prevailing authority should allow litigants to obtain a court order and require companies that provide cable and internet service to disclose internet subscriber information. As in Fitch, Time Warner and other internet/cable providers may not object to a well-crafted motion.

Additional Strategies

Creative individuals determined to disparage or defame others may access a blind account using an IP Address available to the public rather than from their home or office. Libraries and coffee shops often provide internet access to patrons. Many facilities will record the user of their internet service which may identify the subscriber and authors using the blind account. If a facility does not record the internet user, it may be wise to subpoena receipts from the facility and match the date and time of purchases with the date and time the blind account was accessed. Credit card receipts are stored for a longer period than one may suspect, especially smaller companies, franchisees, public facilities, etc. that do not regularly purge their electronic records. The date and time of the credit card receipts may correspond to the dates and times when the account was accessed using the IP Address assigned to the same facility as the credit card purchase.

A strategy for uncovering the subscriber of a blind account and authors using it should not assume that the client has possession of all offensive e-mails sent from the blind account. For example, disaffected employees of your client may have sent e-mails disparaging or even defaming e-mails that have not found their way to the employer. The account may have even been used to communicate confidential and proprietary information. In response to a court order that respects EPCA boundaries, Microsoft for one will produce redacted e-mails still held in the account.^{iv} The subject line and content will be redacted, yet the remaining information can be very useful. For example, if redacted e-mails remain in the "sent" box of the blind account (one box that often contains more e-mails than "inboxes" because users forget to delete e-mails from their sent box) their production can illuminate previously unknown recipients of e-mails from the blind account, or addressees. These addressees can be contacted and they may produce the content of the redacted e-mails, or if they have deleted the e-mails, they may be willing to sign an affidavit verifying ownership of their e-mail account and authorizing the e-mail provider to disclose the content of the subject e-mail. (See *Supra*, FN 1).

Redacted e-mails from the blind account's inbox will be particularly interesting. The redacted e-mail should record the e-mail address of the addressee, any name attached to the e-mail address, and the date and time the e-mail was sent to the blind account. The header may record the IP Address from where the e-mail was sent and where it was received. The author of e-mails located in the

blind account's inbox is an originator who, like an addressee, may be able to produce the e-mail redacted by the e-mail provider. The originator may also authorize disclosure of the e-mail. The originator may turn out to be an opposing party, and simply knowing the volume of e-mail traffic with the blind account will be helpful. At trial, the opposing party could be asked this potentially powerful question: what are you communicating to the blind account?

Conclusion

Investigative work to determine the author of anonymous e-mails from blind accounts can be time consuming work, but may yield important evidence your client will appreciate.

Endnotes

i. The e-mail provider may require lengthy steps to verify that the individual signing an affidavit indeed operates the account from which e-mails were sent to the blind account. For example, Microsoft will not accept, by itself, an affidavit that attests to ownership of a particular e-mail account. A court order may be necessary which should identify the operator or addressee of the e-mail account that has sent e-mails to the blind account, and should order production of his or her e-mails.

ii. Any free, internet-based e-mail account is accessed, or entered, by an individual by submitting to the e-mail provider the user name and password which is only known by the e-mail provider, the subscriber of the account, and anyone receiving this information from the subscriber.

¹ The Supreme Court interpreted Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, FCC Declaratory Ruling, 17 F.C.C.R. at 4802. Authority that is also helpful is a 2004 federal district court case, the parties agreed that cable modem service is not a "cable service." Chicago v. Comcast Cable Holdings L.L.C., (7th Cir. 2004).

iii. The Supreme Court interpreted Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, FCC Declaratory Ruling, 17 F.C.C.R. at 4802. Authority that is also helpful is a 2004 federal district court case, the parties agreed that cable modem service is not a "cable service." Chicago v. Comcast Cable Holdings L.L.C., (7th Cir. 2004).

iv. Microsoft, Yahoo and AOL have very limited capabilities in retrieving e-mails deleted by the user. For this reason, the timing of serving subpoenas and court orders must be carefully contemplated. Devious defendants or third-parties may delete e-mails from the blind accounts if they receive notice of your efforts before the e-mail providers. Fortunately, at least Microsoft and Yahoo will "freeze" information held in an account upon receipt of subpoenas.

So You've Been Asked to Serve on a Board of Directors for a Non-Profit – Now What?

[Kenneth A. Kimber](#)

Hanft Fride, P.A.

One of the more satisfying components of practicing law is that most individuals within the legal profession possess a commitment to serve the communities in which they practice. Attorneys serve their communities in a variety of ways—coaching a mock trial team, running for political office, coaching their son or

daughter's athletic team, providing *pro bono* legal representation for those in need, and serving on a board of directors for a non-profit organization.

Non-profit organizations commonly seek individuals to volunteer their time to serve in leadership roles in their organization. There is a heightened interest for attorneys to serve in these leadership roles. With this general expectation that the attorney will provide a certain area of expertise in his or her role on the board of directors, a young attorney who is asked to serve on a board of directors is faced with what can seem like a daunting task of educating him or herself about the intricacies of the non-profit and acting as an effective participant on the board of directors. While this author would strongly discourage attorneys from providing legal advice to a board of directors of a non-profit on which he or she serves, an effective participant on a board of directors of a non-profit must still be aware of the details of Minnesota non-profit law.

Because of the breadth and depth of non-profit law in the State of Minnesota, this primer article will focus on particular elements of the Nonprofit Corporation Act. The article is intended to be a statutory primer for individuals who may be beginning to serve on the board of directors of a non-profit for the first time and for those attorneys who may need to refresh their memories.

1. Background of the Minnesota Nonprofit Corporation Act.

Statutory law for non-profits in the State of Minnesota is governed by the Minnesota Nonprofit Corporation Act, Minnesota Statutes Chapter 317A ("MNCA"). Originally enacted in 1951, the MNCA underwent a significant revision in 1990 for updating, clarifying ambiguities and inconsistencies, and completing otherwise incomplete portions. Minn. Stat. § 317A.001, Preface to Reporter's Notes.

For those familiar with the Minnesota Business Corporation Act, the MNCA "follows the [same] general organization format and statutory coding." *Id.* The MNCA does not apply to "cooperative associations, public cemetery corporations and associations and private cemeteries" as well as "religious corporation[s]" in certain circumstances. Minn. Stat. § 317A.051. A religious corporation may elect to be governed under the MNCA or certain sections of the MNCA. *Id.* at subd. 2.

A non-profit can be incorporated "for any lawful purpose" in the State of Minnesota. Minn. Stat. § 317A.101.

2. The Board of Directors.

In Minnesota, a "board of directors" is statutorily defined as a "group of persons vested with the general management of the internal affairs of a corporation." Minn. Stat. § 317A.011, subd. 4. The "business and affairs of a corporation must be managed by or under the direction of" the board of directors. Minn. Stat. § 317A.201. All directors have voting power and have equal rights, unless otherwise provided in the articles of bylaws. *Id.* The board must have three or

more members, as designated in the articles or bylaws. Minn. Stat. § 317A.203. Directors may not serve terms of more than ten years and are elected or appointed according to the articles or bylaws. Minn. Stat. § 317A.207. The number of terms is not limited. Id. at General Comment.

“A director may resign at any time by giving written notice to the corporation.” Minn. Stat. § 317A.221. The resignation does not need to be approved and can be made effective at a later date. Id. at (a). Directors can also be removed with or without cause. Minn. Stat. §§ 317A.223, 317A.225. The method for removal of directors varies according to whether there are members with voting rights and if the director is appointed or elected. See id.

3. Other Relevant Terms.

The board of directors is regulated both by the “articles” as well as “bylaws.” Minn. Stat. § 317A.011. The “bylaws” are “the code adopted for the regulation or management of the internal affairs of the corporation.” Id. at subd. 5. Bylaws are not mandatory. Minn. Stat. § 317A.181, subd. 1. Within the corporation, there are also individuals, “members,” who retain membership rights in the corporation as defined under the articles or bylaws. Id. at subd. 12. Members can have voting rights, depending on the bylaws or articles.

4. Incorporation.

If you are helping start a non-profit, there are certain provisions that are required in the articles of incorporation and additional provisions that can be modified either in the articles or bylaws. See Minn. Stat. § 317A.111. There are special provisions governing private foundations (see Minn. Stat. § 317A.113), selecting the name for the non-profit (see Minn. Stat. § 317A.115), reserving the name with the State of Minnesota Secretary of State (see Minn. Stat. § 317A.117), and designating a registered office and registered agent (see Minn. Stat. § 317A.121).

When a non-profit corporation is already formed, additional statutes govern changes in the registered office or registered agent (see Minn. Stat. § 317A.123) and amendment of articles (see Minn. Stat. § 317A.131). Specific procedures must be followed to amend the articles. See Minn. Stat. § 317A.133 and § 317A.139.

Importantly, articles of incorporation and articles of amendment must be filed with the Secretary of State and are not effective until they are filed with payment. Minn. Stat. § 317A.151 at subd. 2. Once the articles of incorporation are filed with, the non-profit retains the ability to act like any other business. Minn. Stat. § 317A.161. The non-profit can sue and be sued, own or lease property, dispose of property, trade in securities, make contracts, invest, make donations, and pay pensions or other benefits. For a more complete list of what powers a non-profit has, see Minn. Stat. § 317A. 161.

5. Board meetings.

Board meetings must be held as provided in the articles or bylaws of the non-profit. Minn. Stat. § 317A.231, subd. 1. There must be at least one board meeting per year. Id. If no place is designated, the meeting will take place at the registered office of the non-profit. Id. Meetings can be held by “remote communication,” i.e. a telephone conference. Id. at subd. 2. Board meetings may be called by any director with five days notice of the date, time and place of the meeting. Id. at subd. 4 (a). The date, time and place can also be pre-designated in the articles or bylaws. Id. at subd. 4 (b). E-mail, facsimile and other electronic means are sufficient methods for notice. Id. at subd. 4 (c). Notice can be waived. Id. at subd. 4 (d).

A meeting may not move forward unless there is a quorum of directors at the meeting. Minn. Stat. § 317A.235. The percentage of directors that constitutes a quorum can be modified in the articles or bylaws but may not be less than 1/3 of the directors currently holding office. Id. Board actions are taken by an affirmative vote of a majority of the directors present at the meeting, unless the bylaws or articles require a larger number. Minn. Stat. § 317A.237. Actions can also be taken if the directors approve of the action by an authenticated electronic communication. Minn. Stat. § 317A.239, subd. 1. Any written action taken without a meeting is effective upon approval by the required number of directors. Id. at subd. 2.

By resolution and majority vote, the board of directors may also approve to form committees that have the authority of the board to conduct or manage certain business for the non-profit. Minn. Stat. § 317A.241, subd. 1. Minutes must be kept and made available upon request. Id. at subd. 4.

6. Standard of Conduct, Conflicts of Interest and Liability for Directors.

In this era of heightened scrutiny of corporations in general, Minnesota has enacted a specific standard of conduct for directors of non-profits. Directors are required to “discharge the duties of the position of director in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.” Minn. Stat. § 317A.251, subd. 1. While the terms contained in this definition seem somewhat amorphous, it reinforces a reasonable person standard. There is no liability for a director who performs these duties. Id. In fulfilling these duties, directors may rely on certain information provided to them by qualified persons, unless they have actual knowledge otherwise. Id. at subd. 2. Assent to board action is presumed for an individual director unless the director specifically dissents according to the provisions contained in Minn. Stat. § 317A.251. Id. at subd. 3. Unpaid directors cannot be held civilly liable for “an act or omission by that person if the act or omission was in good faith and within the scope of the person’s responsibilities. .

.and did not constitute willful or reckless misconduct.” Minn. Stat. § 317A.257. Despite this apparent immunity from liability, it is not absolute. Id. Thus, an unpaid director can still be sued by the attorney general for breach of fiduciary duty, or causes of action based on federal law, causes of action based on an express contractual obligation, an action based on a breach of a public pension plan fiduciary responsibility, or death or physical injury personally and directly caused by the individual.

Minnesota has also adopted specific rules regarding conflicts of interest for directors. Minn. Stat. § 317A.255. Non-profits cannot enter into contracts or other transactions between the non-profit and: (1) a director or family member of a director; (2) a director of a related organization or family member of a director of a related organization; or (3) an organization “in or of which the corporation’s director, or a member of the family of its director, is a director, office, or legal representative or has a material financial interest.” Id. at subd. 1. No conflict exists if: (1) the contract or transaction was fair and reasonable when entered into; (2) the material facts regarding the contract or transaction and the conflict of interest are fully disclosed and two-thirds of the members vote in good faith to approve the transaction; or (3) the material facts regarding the contract or transaction and the conflict of interest are fully disclosed and a majority of the board or committee voting ratifies the transaction. Id. at subd. 1 (b)(1)-(4). The terms “material financial interest,” “member of the family” and “related organization” are further defined in the MNCA. See Minn. Stat. §§ 317A.255, subsd. 2 and 4; and 317A.011, subd. 18. Overall, it is better for a non-profit not to enter into a transaction or contract with a relative of a director, employee or director.

7. Officers.

Under the MNCA, non-profits must have officers, including a president and treasurer. Minn. Stat. § 317A.301. Other officers are possible to the extent allowed by the articles or bylaws. Minn. Stat. § 317A.311. An individual may hold more than one office at a time. Minn. Stat. § 317A.315. These officers must be elected or appointed by the board of directors, unless otherwise provided in the articles or bylaws. Minn. Stat. § 317A.301. The duties of the president and treasurer are more fully outlined by the statute, but generally speaking, the president is responsible for general active management of the non-profit and the treasurer handles the financial aspects of the non-profit. Minn. Stat. § 317A.305, subsd. 2 and 3. The officers may delegate their responsibilities to other persons. Minn. Stat. § 317A.351. That being said, the delegating officer still remains subject to the same standard of conduct for an officer regardless of delegation. Id. The standard of conduct for officers is identical to that for directors, as cited in Minn. Stat. § 317A.251, subd. 1. Minn. Stat. § 317A.361.

As with directors, officers may resign or be removed. Minn. Stat. § 317A.341. Resignation must be written and removal may occur by the board of directors or the members, whichever elected or appointed the officer, unless modified by the

articles or bylaws. Id. at subd. 1 and 2.

8. Members.

Non-profits are not required to have members. Minn. Stat. § 317A.401, subd. 1(a). In fact, the default provision, if not otherwise stated in the bylaws or articles, is that a non-profit corporation will not have any members. Id. If a non-profit decides to have members, these members can be grouped into one or more membership classes. Id. The criteria for membership should be displayed in the articles or bylaws. Id. at subd. 2. Membership cannot be granted without the consent of the person who will become a member. Id. Members are granted one vote and equal rights unless otherwise stated in the articles or bylaws. Id. at subd. 4. Membership cannot be transferred by the member unless otherwise stated in the articles or bylaws. Minn. Stat. § 317A.405 (b).

If a non-profit has members, there must be at least one annual meeting of the membership. Minn. Stat. § 317A.431, subd. 1. If no meeting is held within the preceding 15 months and a sufficient number of members request a meeting in writing, the board must have a meeting of the members. Id. at subd. 2. At the meeting, the members may elect successor directors, must be given a report on the activities and financial condition of the corporation, and other miscellaneous business consistent with the notice of meeting requirements. Id. at subd. 4. In certain circumstances, voting members can call special meetings. Minn. Stat. § 317A.433. At special meetings, the members may conduct only the business identified in the notice of the meeting. Id. at subd. 4. A district court of the county where the corporation's registered office is located may also order a meeting of members to be held in certain circumstances. Minn. Stat. § 317A.434, subd. 1. A quorum for a meeting of members is ten percent of the members entitled to vote. Minn. Stat. § 317A.451, subd. 1. Before a meeting, the non-profit must prepare a membership list identifying "the address and number of votes of each member. . . entitled to vote at the meeting. Minn. Stat. § 317A.439, subd. 1. This list can be inspected by a member, the member's agent or the member's attorney prior to the meeting. Id. at subd. 2.

Members cannot be held personally liable "for the acts, debts, liabilities, or obligations of the corporation." Minn. Stat. § 317A.407, subd. 1. However, members, or the attorney general can seek equitable remedies against the corporation or an officer or director for a violation of the MNCA. Minn. Stat. § 317A.467. The non-profit can charge dues or fees for membership. Id. at subd. 2. Certain individuals can act as delegates on behalf of some or all of the members as long as it is authorized by the articles or bylaws. Minn. Stat. § 317A.415.

As with officers and directors, members can resign or be terminated at any time. Minn. Stat. §§ 317A.409 and 317A.410. Resignation does not relieve the member of any dues, fees or other monies owed at the time of resignation. Minn. Stat. § 317A.409. If members are to be expelled, terminated or suspended, the

non-profit must have a “procedure that is fair and reasonable and is carried out in good faith.” Minn. Stat. § 317A.410. Although the statute is somewhat vague as to what procedures are “fair and reasonable” for the termination of members, there are two mandatory items that make the termination procedure “fair and reasonable:” (1) 15 or more days written notice, including the reasons for the adverse action; and (2) “an opportunity for the member to be heard, orally or in writing, not less than five days before the effective date” of the adverse action. Id. at subd. 2. If a member wants to challenge the adverse action, the challenge proceeding must begin within one year of the adverse action. Id. at subd. 3. As with a resignation, the adverse action against the member does not relieve the member of any dues, fees or other monies owed. Id. at subd. 4. The non-profit can purchase the membership, as long as purchases of memberships are authorized by the bylaws or articles. Minn. Stat. § 317A.413.

Actions of members are ratified by an affirmative vote of the majority of the members, subject to the bylaws and articles. Minn. Stat. § 317A.443. Votes can be cast orally or in writing. Id. at subd. 2. Unanimous action can be taken by members without a meeting “by written action, signed, or consent to by authenticated electronic communication, by all of the members entitled to vote on that action.” Minn. Stat. § 317A.445. Actions by members may also be taken by ballot (see Minn. Stat. § 317A.447), via “remote communication” (see Minn. Stat. § 317A.450), by proxy if allowed by the articles or bylaws (see Minn. Stat. § 317A.453), or via a voting agreement between two or more members as long as the agreement is consistent with the corporation’s purposes (see Minn. Stat. § 317A.457 (a)).

Members and directors are entitled to inspect documents located at the registered office, including articles, bylaws, financial statements, accounting records, voting agreements and minutes of certain meetings. Minn. Stat. § 317A.461, subs. 1 and 2.

9. Loans and Obligations.

A non-profit also retains the ability to lend money or to guarantee or pledge assets as security or financially assist a person if approved by the board of directors. Minn. Stat. § 317A.501. A loan or guarantee cannot be made to a director, officer, or employee of the corporation or a related organization or certain family members. Id. at subd. 2. The MNCA does allow for a corporation to “advance money to its directors, officers, employees or agents to cover expenses reasonably anticipated to be incurred by them in the performance of their duties for which they would be entitled to reimbursement in absence of an advance.” Minn. Stat. § 317A.505. Indemnification is possible in special circumstances also. See Minn. Stat. § 317A.521.

10. Merger, Consolidation or Transfer.

A “merger” combines two corporations into one of the existing corporations while

a “consolidation” combines the two corporations to form a new corporation. Minn. Stat. § 317A.641, subd. 2 (1). If two non-profits seek to merge or consolidate, specific sections of the MNCA govern. Minn. Stat. § 317A.601. The non-profits must put together a plan of merger and consolidation. For further details on devising a plan of merger or consolidation, see Minn. Stat. § 317A.611. The plan of merger or consolidation must be approved and adopted by the non-profit. Minn. Stat. § 317A.613. If a non-profit has members with voting rights, the board of directors can adopt a resolution by a majority vote of all directors for approval of the proposed merger and direct that the resolution be put to a vote at a meeting of the members with voting rights. Id. at subd. 2. If there are no members with voting rights, the plan can be approved by a majority of votes of all directors. Id. at subd. 3.

Once a merger or consolidation is approved, articles of merger/consolidation must be approved, signed and filed with the Secretary of State. Minn. Stat. § 317A.615. Even if the merger or consolidation is approved, it can later be abandoned. Minn. Stat. § 317A.631. If the articles of merger/consolidation are filed with the Secretary of State, the merger or consolidation is effective. Minn. Stat. § 317A.641. Of note, there are separate rules governing a merger/consolidation with a foreign corporation. Minn. Stat. § 317A. 651.

Ultimately, the assets of the non-profits must be combined and this combining of assets may be required by members or voting members. Minn. Stat. § 317A.661. The new corporation cannot divert assets from its originally intended use. Minn. Stat. § 317A.671.

11. Dissolution.

Regrettably, sometimes non-profits must dissolve. Dissolution of non-profits used to only occur in two manners: (1) out of court if there were no substantial assets; or (2) under court supervision. Minn. Stat. § 317A.701, Reporter’s Notes. Non-profits can now be dissolved by the incorporators, by the board and members with voting rights, by order of a court, or by the Secretary of State. Minn. Stat. § 317A.701.

Incorporators can only dissolve a non-profit if the first board of directors has not been named, designated or appointed. Minn. Stat. § 317A.711, subd. 1. Dissolution by the incorporators requires, among other items, a majority of the signatures of the incorporators on articles of dissolution which then must be filed with the Secretary of State. Id. at subd. 2-4. For further information regarding the required contents of the articles of dissolution and the effect when filed, see Minn. Stat. § 317A.733. The Secretary of State will subsequently issue a certificate of dissolution. Minn. Stat. § 317A.733.

Dissolution by the board may occur by majority vote adopting a resolution of dissolution, which must include a plan of dissolution. Minn. Stat. § 317A.721, subd. 2. If there are members with voting rights, the resolution and plan of

dissolution must be submitted to the members. Id. Once the resolution is approved, a notice of intent to dissolve must be filed with the Secretary of State. Minn. Stat. § 317A.723. The dissolution proceedings may be stopped. Id. at subd. 2; and Minn. Stat. § 317A.731. The notice of intent to dissolve, once filed, must proceed as soon as possible and the directors or officers must: (1) collect or make provision for the collection of debts due and owing to the corporation; and (2) pay or make provision for the payment of debts, obligations, and liabilities of the corporation according to their priorities. Minn. Stat. § 317A.725, subd. 1. Assets can be transferred without a vote of the members and must be consistent with Minn. Stat. § 317A.735. Id. at subd. 2. In certain situations, a supervised voluntary dissolution is possible using court supervision upon application by the corporation, the attorney general, a creditor, or a percentage of the members. Minn. Stat. § 317A.741.

Notice of intent to dissolve may also be provided to creditors or claimants against the non-profit. Minn. Stat. § 317A.727. Specific procedures must be followed in providing notice to these creditors or claimants. Id. at subd. 2. Once the creditor or claim receives notice, the non-profit has 30 days from receipt of the claim to accept or reject the claim in writing. Minn. Stat. § 317A.729. A creditor or claimant whose claim is rejected has 60 days from date of rejection, 180 days from the filing date of the notice of dissolution, or 90 days after it received notice of the dissolution to pursue other remedies. Id. If notice is not provided to a creditor or claimant, claims must be brought within two years after the notice of intent to dissolve is filed. Minn. Stat. § 317A.730. If a party fails to file a claim or pursue a remedy within the time outlined in the MNCA, they are barred from pursuing the claim. Minn. Stat. § 317A.781, subd. 1. The court may require creditors and claimants to file their claims under oath with the court or a receiver. Minn. Stat. § 317A.759, subd. 1.

A court may “grant equitable relief it considers just and reasonable in the circumstances or may dissolve a corporation and liquidate its assets and business as provided” in Minn. Stat. § 317A.751. Minn. Stat. § 317A.751, subd. 1. Judicial intervention is available in actions by directors or members with voting rights, by creditor, or by attorney general. Id. at subds. 3-5. The procedures for involuntary or supervised voluntary dissolution are more fully outlined in Minn. Stat. § 317A.753. At the end of an involuntary or supervised voluntary dissolution, a decree of dissolution will be issued and the corporation will subsequently be dissolved. Minn. Stat. § 317A.763. The court administrator is responsible for filing the decree with the Secretary of State. Minn. Stat. § 317A.765. If there are assets that may be distributable to persons unknown or persons with disabilities, the assets must be reduced to money and deposited with the Commissioner of Finance. Minn. Stat. § 317A.771. Additionally, even though a non-profit has been dissolved, there still may be a claim by or against the corporation. Minn. Stat. § 317A.783.

12. Corporate Registration.

In Minnesota, the MNCA outlines procedures for the initial corporate registration (see Minn. Stat. § 317A.821) as well as the annual corporate registration (see Minn. Stat. § 317A.823). A non-profit must file its registration annually and failure to do so will result in dissolution of the non-profit. Minn. Stat. § 317A.823. The annual registration should be submitted to the Secretary of State and should be in the form outlined in Minn. Stat. §§ 317A.821 and 317A.823. Minn. Stat. § 317A.825. That said, even if the form is in substantial compliance with these sections, it will be accepted by the Secretary of State. Minn. Stat. § 317A.825. If the corporation is dissolved under Minn. Stat. § 317A.823, it can simply be retroactively reinstated by filing a single annual registration. Minn. Stat. § 317A.827.

13. Special Provisions.

Non-profits formed for the following purposes are governed by particular statutes: chambers of commerce, boards of trade and exchanges (Minn. Stat. § 317A.905); corporations to secure or maintain homes for dependent children (Minn. Stat. § 317A.907); and corporations for religious purposes (Minn. Stat. § 317A.909).

14. Conclusion.

As stated above, this article is intended to be a primer on Chapter 317A, the statutory law governing non-profits in the State of Minnesota. Attorneys are encouraged to do their own individual research on non-profits in Minnesota with the understanding that many of the provisions Chapter 317A can be modified by the articles or bylaws of that specific non-profit. This review of statutes is not comprehensive but will help those seeking to become involved in non-profits or those who simply may need a refresher of non-profit law.

To Compel or Not Compel, That is the Question!

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As a new lawyer, it can be difficult to determine when it is appropriate to seek assistance from the court in resolving discovery disputes. It can be equally difficult to negotiate the procedural intricacies set forth in the Minnesota Rules of Civil Procedure regarding such disputes.

Minnesota Rule of Civil Procedure 37.01 “provides the exclusive basis for enforcing discovery obligations.” 1A David F. Herr & Roger S. Haydock, Minnesota Practice, § 37.1 (West 2005). It is important to note that while a party always has an option to bring a Motion to Compel, parties have an obligation to try and resolve discovery disputes without judicial intervention. Only once such efforts have been exhausted can a party bring such a motion. This article is

intended to address the following issues: 1) when a party should bring a Motion to Compel; 2) the procedural requirements; 3) the substantive requirements; 4) the award of attorney fees; and 5) sanctions available for failing to answer discovery.

I. When is it appropriate to bring a Motion to Compel?

Under the Rules, discovery can be conducted through several different methods. Pursuant to Rule 30, discovery can be conducted through oral examination of witnesses. Rules 31 and 33 allow for discovery through written requests. Rule 34 allows for discovery through production of documents and demands for inspections. Rules 30, 31, 33 and 34 also set forth specific deadlines for discovery responses.

If discovery is served, but not answered, a party can bring a Motion to Compel. A motion can also be brought if the opposing party provides evasive or incomplete answers. Minn. R. Civ. P. 37.01(C) (West 2006). An evasive or incomplete answer is treated as a “failure to disclose, answer or respond.” *Id.* Often, the opposing party will provide answers to discovery but will limit answers based on objections or privileges. If the party receiving the discovery disagrees with opposing counsel’s objections, a Motion to Compel can be brought to clarify a party’s legal ability to withhold information.

II. The procedural requirements for bringing a Motion to Compel Discovery.

In order to bring a Motion to Compel, a party must schedule a hearing before a court and timely serve motion papers in compliance with Minn. R. Civ. P. 37.01(b) and General Rule of District Court 115.05.

1. Where should the Motion to Compel be filed?

Pursuant to Rule 37.01(a), a Motion to Compel must be made to the “court in which the action is pending.” *Id.* As such, if a suit has already been filed in a Minnesota state court, the motion should be filed before that court. If a lawsuit has been served, but not yet filed (pocket service), the suit must be filed with the court before the motion can be heard.

2. What documents need to be filed with the court and what are the briefing deadlines?

A Motion to Compel is a non-dispositive motion. The briefing deadlines are governed by General Rule of District Court 115.04. *See generally* Minn. Gen. R. Prac. 115.04 (West 2006). This Rule requires the moving party to file the following documents with the Court: 1) Notice of Motion and Motion, 2) Proposed Order, 3) any affidavits and exhibits to be submitted in conjunction with the motion; and 4) any memorandum of law. *Id.* The original motion must be filed

with the court, and a copy must be served on the opposing party, at least 14 days prior to the hearing. *Id.* at 115.04(a).

If the party on whom the motion is served seeks to file a Response, the responding party is required to submit: 1) a memorandum of law; and 2) any relevant affidavits and exhibits. *Id.* at 115.04(b). The original Response must be filed with the court, and a copy served on the opposing party, at least seven days prior to the hearing. *Id.*

The moving party has the right to submit a Reply memorandum regarding issues raised in the Response. Under the rule, the Reply is “limited to new legal or factual matters raised by an opposing party’s response to a motion.” *Id.* at 115.04(c). The original Reply memorandum must be filed with the Court, with a copy served on opposing counsel, at least three days prior to the hearing. *Id.*

III. The substantive requirements for a Motions to Compel.

Rule 37 outlines the substantive requirements for Motions to Compel. The requirements are relatively simple.

1. The memorandum of law and motion must set forth what the moving party seeks to compel.

Motions to Compel require the moving party state, with specificity, how the opposing party has failed to fulfill its discovery obligations. For example, if a party has failed to answer interrogatories served under Minn. R. Civ. P. 33, the motion should set forth the following facts: 1) the date the interrogatories were served; 2) the date answers were due under the Rule 33.01(b); 3) the text of the specific request(s) and any response(s); and 4) an affirmative assertion that discovery is still outstanding as of the date the motion was filed.

2. The “meet and confer” requirement.”

Rule 37 specifically requires that the motion include a “certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.” Minn. R. Civ. P. 37.01(b) (West 2006). It has been held that merely sending a letter to opposing counsel stating that discovery is overdue does not constitute a “meet and confer” under the Rule. *Sears, Roebuck & Co. v. County of Dakota*, 2005 WL 2143731, *1 (Minn. Tax. Regular Div. 2005). “The good faith requirement of this rule requires a genuine attempt to resolve the discovery dispute through non-judicial means.” *Id.* The rule is intended to “lessen the burden on judicial resources when the parties could have resolved the dispute.” *Id.*

“Meeting and conferring” requires “that the parties actually engage in conversation attempting to resolve the discovery dispute and act in good faith.”

Id. It has been held, however, that if the party that served discovery “has in good faith attempted to confer with the other party but has been unsuccessful then it may bypass the actual conversation by certifying that it did attempt in good faith to confer with the other party and was unable to do so.” *Id.*

The “meet and confer” requirement means, for example, that if interrogatories are served on opposing counsel, and no answers are served under the rule imposed deadline, the moving party must make some effort to communicate with the opposing party before bringing a motion. As explained above, a single letter complaining that discovery is overdue does not satisfy the “meet and confer” requirement.

If a party attempts to resolve discovery disputes through verbal communications, written confirmation of the contents of such conversations should follow all discussions. Written follow up on such communications provides the only “evidence” that the parties have attempted to resolve disputes without court intervention. Always remember that letters are often used as exhibits to show that the movant has made efforts to resolve such disputes. As such, these letters should always be civil and professional. If a letter regarding a discovery dispute is submitted to a court, the Judge will read it. Also note that if efforts are made to communicate with the opposing party, and the opposing party fails to respond, letters regarding unreturned phone calls and unanswered letters should be written. Copies of these letters can be used to show that the opposing party will not “meet and confer.”

IV. Attorney’s fees and costs for Motions to Compel.

Minnesota Rule of Civil Procedure 37.01(d) provides, in relevant part, that a party, upon reasonable notice to other parties and all persons affected thereby, may obtain attorneys fees as a matter of right upon prevailing on a motion to compel discovery:

(d) Expenses and Sanctions

(1) If the motion is granted, or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion...to pay to the moving party the reasonable expenses incurred in making the motion, including attorney’s fees, unless the court finds that the motion was filed without the movant’s first making a good faith effort to obtain the discovery without court action....

Minn. R. Civ. P. 37.01(d)(1) (West 2006). If a party’s motion to compel is granted in part, but denied in part, the court may apportion the award of attorney’s fees. Minn. R. Civ. P. 37.01(d)(3).

From a practical standpoint, attorneys must be mindful of the fact that the rule pertaining to attorney's fees "applies equally to both sides in a discovery dispute," and that the party opposing the motion may make the same request if the motion to compel discovery is denied. Minn. Pract. §37.6; Minn. R. Civ. P. 37.01(d)(2) (West 2006).

An award of attorney's fees can generally not be denied simply because the violating party complied with the discovery order at the very last minute. See Minn. R. Civ. P. 37.01(d)(1) (allowing costs when "the requested discovery is provided after the motion was filed.") The rationale behind this rule is that a Motion to Compel would not have been filed but for the violating party's failure to comply with the discovery requests in the first place. As such, the fees and costs associated with the filing of the Motion to Compel do not disappear simply because the violating party decided to belatedly comply.

V. Sanctions imposed for discovery misconduct .

In addition to the award of attorneys fees the trial court has the discretion to impose sanctions for a party's failure to comply with any discovery order. If a court grants a Motion to Compel and the discovery is still not forthcoming by the violating party, the party seeking the discovery may request the imposition of sanctions against the recalcitrant party for failure to comply with the order..

Under Minnesota Rule of Civil Procedure 37.02(b), the court has the discretion to determine which sanction it will impose for discovery misconduct, including but not limited to the following:

1. the imposition of costs;
2. permitting certain facts to be deemed established for the purposes of the claim;
3. limiting scope of examination to matters previously disclosed
4. preclusion of evidence or testimony
5. striking of pleadings
6. staying further proceedings until court order is obeyed or a continuance
7. dismissing a claim;
8. rendering of default on a claim; or
9. civil contempt of court.

Minn. R. Civ. P. 37.02(b) (West 2006).

Of course, the most drastic of the sanctions are dismissal and default. These sanctions are traditionally reserved for situations in which the noncompliance with a discovery order is intentional or willful, flagrant, in bad faith, and/or ongoing. See *R&L Lumber Co. v. Summit Fidelity & Sur. Co.*, 170 N.W.2d 594 (Minn. 1969). In addition, drastic sanctions are proper where the failure to provide the discovery requested will result in prejudice with the party asserting the violation.

See *Gebhard v. Niedzwiecki*, 122 N.W.2d 110, 115 (Minn. 1963).

In drafting the Motion to Compel, the moving party should draft an order specifying the supplementation they expect to receive and the date by which compliance is expected and a statement of the sanction to be imposed if the order is not obeyed. See *O'Neil v. Corrick*, 239 N.W.2d 230 (Minn. 1970); *Sudheimer v. Sudheimer*, 372 N.W.2d 792 (Minn. Ct. App. 1985). This helps the Court identify the “sanction which will be imposed if the order is not obeyed and which provides a streamlined process for the party obtaining the order to have the sanction imposed if the order is not obeyed.” Minn. Pract. §37.7 (West 2003).

VI. Conclusion.

Minnesota Rule of Civil Procedure 37 and General Rule of District Court 115.04 set forth the elements necessary to enforce one's discovery rights. The rule provides the essential elements of a Motion to Compel and the process to ensure good faith compliance with the rule. In addition the rule provides for the award of attorney's fees and costs to the moving party and the available sanctions the court may impose if the opposing part does not comply with the court's discovery order. Remember, Courts do not like Motions to Compel and a decision to pursue such motion should only be made after all reasonable efforts to compromise the dispute have been exhausted.
