

Hearsay

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If you have any questions about the newsletter or would like to submit an article for a future issue, please contact Shanda Pearson.

MSBA



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Greetings from the Chair

Dan Gilchrist

As my term as the chair of the MSBA New Lawyers Section comes to a close, it is both fitting and appropriate to reflect upon the many good things that the members of this organization have accomplished. Upon reflection, I am proud to state that during this term the MSBA New Lawyers Section continued to bring new lawyers together to strengthen the community and the legal profession.

I begin by offering my sincere thanks to all of the people and firms that donated their time, resources, and/or cash to make the New Lawyers Section's **Spring Social and food shelf fundraiser** a huge success. The event, held April 24th at Solera, raised nearly \$3,000 and collected over one hundred pounds of food for the Second Harvest Heartland food shelf. About 130 lawyers attended the event and, along with eight law firms, donated the cash and the food, which helped hundreds of local families. Thank you.

In addition to the food shelf fundraiser, this section accomplished the following:

- We provided free legal advice and guidance last fall to residents of southern Minnesota after massive flooding destroyed hundreds of homes (utilizing our own disaster preparedness manual).
- We visited several local high schools to encourage children of all backgrounds to "Choose Law" as a profession.
- We facilitated the training of volunteers that desire to provide free "Wills for Heroes."
- We conducted several free CLE sessions for our members.
- We raised over \$4,000 and collected dozens of toys for the Toys For Tots drive in December.
- We recruited law students to join the MSBA by means of various joint networking events.
- We increased attendance at our monthly meetings and saw more members become involved in activities.
- We organized the Late Night Social and Hospitality Suite for the MSBA Convention.
- We sent delegations to the ABA Young Lawyers Division conferences.
- We published four great issues of the *Hearsay*.

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| <h3>UPCOMING EVENTS</h3> <ul style="list-style-type: none">• ABA Annual Meeting in New York City, August 7-9.• MSBA-NLS monthly Council meetings resume in September. |  |
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The Confidential Informant Privilege in Criminal Proceedings

Benjamin Bejar¹

Law enforcement often rely on known, but unnamed, “concerned citizens”² or confidential informants³ to gather information on criminal suspects’ activities, to aid criminal investigations, and to establish probable cause to search for evidence of a crime or arrest a suspect. Based on legitimate concerns for the informants’ safety or to protect the integrity of ongoing or future investigations, law enforcement often need to withhold the identity of their informants.⁴ This article discusses the standards under Minnesota law for withholding or disclosing the identity of a confidential informant as part of a criminal proceeding.

It is well settled that the State maintains an evidentiary privilege to withhold the identity of persons who provide information of criminal activity to the police.⁵ “The informant privilege is designed to protect the identity of government informers so as to shield them from retribution and to preserve their usefulness for future operations.”⁶ Thus, “[n]o fixed rule with respect to disclosure is justifiable.”⁷ Rather, a district court must, on a case-by-case basis, balance a defendant’s fundamental right to fairness in preparing a defense with the State’s recognized public interest in effective law enforcement by protecting the flow of information to law enforcement regarding criminal activity.⁸ Minnesota “cases reflect that the emphasis in this inquiry is on fundamental fairness.”⁹

“The defendant has the ultimate burden of establishing the need for the disclosure of the informant’s identity.”¹⁰ A defendant must make a sufficient showing of

necessity for disclosure by demonstrating a “reasonable probability” that the informant’s testimony is necessary to a fair trial.¹¹ A defendant seeking disclosure may not speculate as to the helpfulness of the informant’s testimony but instead “must explain precisely what testimony he thinks the informant will give and how this testimony will be relevant to a material issue of guilt or innocence.”¹² But even upon a prima facie showing, a district court should first conduct an *in camera* examination of the informant before making a determination that disclosure of the informant’s identity is material to the defendant’s guilt or innocence.¹³

The circumstance in which a confidential informant is used by police is also significant. A marked difference exists between relying on informants to establish probable cause to support the issuance of a search warrant and relying on informants who actively participate in criminal investigations by, for example, conducting a controlled purchase of narcotics.¹⁴ In the latter context, disclosure may be required if, for example, the informant is the *only* witness to the transaction, and the defendant properly establishes a factual dispute regarding the transaction’s occurrence. In the former context, only “[i]n rare cases [will] a criminal defendant’s interest in learning the identity of a police informant outweigh[] the state’s privilege not to disclose the identity.”¹⁵ Disclosure of an informant who merely provides police with information is therefore permitted only “when the defendant has sufficiently challenged the veracity of the

affidavit of the applicant for the search warrant and disclosure is necessary to complete the evidentiary attack.”¹⁶ But absent the requisite showing of “police perjury or recklessness in obtaining [the] search warrant,” disclosure of the identity of an informant relied on to establish probable cause in a search warrant is not required.¹⁷

To properly evaluate whether disclosure of an informant’s identity is necessary to a fair determination of a defendant’s guilt, the Minnesota Supreme Court identified the following four factors that a district court should consider: (1) whether the informant is a material witness; (2) whether the informant’s testimony will be material to the issue of guilt; (3) whether the State’s evidence or supporting testimony is “suspect;” and (4) whether the informant’s testimony might disclose entrapment.¹⁸ “These four factors, however, are not exclusive” and should instead be used to inform a district court’s analysis of the balancing between “the defendant’s right to prepare a defense and the public’s interest in effective law enforcement.”¹⁹ The decision to withhold or to disclose the identity of an informant is within the district court’s discretion.²⁰

The first factor in determining whether disclosure is warranted is the informant’s materiality as a witness, namely, the degree of the informant’s presence and/or participation in the criminal transaction.²¹ Where an informant is a “mere transmitter of information” and not a material witness to the crime, the informant’s identity generally need not be disclosed.²² But an informant may not necessarily be a material witness even where an informant was involved in an earlier part of the crime, either as a participant or a witness.²³ “[I]t is not sufficient to show that the informant was present during the alleged criminal

offense without also indicating some dispute as to what occurred at that point.”²⁴ Rather, a defendant must provide some basis for “believing that there was a material factual dispute concerning the . . . transaction.”²⁵ Additionally, disclosure of an informant’s identity is generally not required when the only participation by the informant in the crime is to bring together the defendant and an undercover government agent.²⁶

The second factor, the materiality of an informant’s testimony to a defendant’s guilt, will be determined by many of the same considerations underlying the first factor. Additionally, when evaluating this factor a court should consider the nature of the criminal charges and the evidence relating to them.²⁷ If the State could readily proceed to trial without the informant’s testimony based on, for example, the discovery of narcotics and related evidence during the search of the defendant’s residence, or the testimony of the undercover police officer who participated in the narcotics transaction, an informant’s testimony will not be necessary. In that instance, the State could effectively introduce evidence that officers acted upon information received in obtaining a search warrant without providing the substance of the informant’s tip.²⁸ Disclosure is not required, therefore, where it is unlikely that an informant’s testimony would help the defendant overcome an element of the crime charged.²⁹ But an informant’s testimony need not by itself be dispositive on an element of the charge; instead, it simply needs to be helpful to the defense in overcoming a charge.³⁰ Still, even when a defendant demonstrates the *helpfulness* of an informant’s testimony, disclosure will not be warranted unless the defendant also shows that disclosure is “*necessary* for him to have a fair trial.”³¹

The third factor for consideration is whether the State's evidence or the testimony of the police officers is "suspect."³² Generally, a defendant must provide the court with "some good reason to doubt the credibility of the officers who testify against the defendant" to justify an *in camera* examination of the informant by the court.³³ But absent some exceptional issue with the chain of custody, narcotics evidence seized from the defendant and analyzed by a forensics lab would rarely be deemed suspect. Additionally, where a defendant is, for example, charged only with narcotics possession, even though an informant purchased narcotics from the defendant, disclosure of the informant's identity will typically not be required.³⁴ Similarly, evidence will not be considered suspect where the evidence used to prove the defendant's guilt is seized during the execution of a search warrant and not through an informant.³⁵ As previously noted, a defendant may not speculate as to the informant's degree of involvement with the evidence when alleging the evidence is somehow suspect.³⁶

The fourth and final factor, involving allegations of entrapment, also places the burden squarely on the defendant.³⁷ Inducement amounting to entrapment must go beyond mere solicitation by an informant and requires "something in the nature of persuasion, badgering or pressure by the state."³⁸ And the use of informants alone during controlled drug purchases does not support a claim of subjective entrapment.³⁹ Additionally, a defendant could not readily assert that an informant's testimony would reveal entrapment where the defendant is charged with only a possessory crime rather than an allegedly induced sale of narcotics. Similarly, an allegation of entrapment will not suffice where the

evidence shows that the defendant was "an active willing participant" in the planning or commission of the crime.⁴⁰

Because courts must balance important competing interests between the defense and prosecution when determining whether to maintain the confidential informant privilege, it is important for criminal law practitioners to analyze the four factors as thoroughly as possible. The use of informants is a critical, long-standing tool for law enforcement that merits protection from unwarranted disclosure. But where a defendant's fundamental right to a fair trial is truly at risk absent disclosure, the privilege must yield at the appropriate time in the proceedings if the State seeks to prosecute the defendant.

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Notes

¹ This article represents the opinions and legal conclusions of its author only and not necessarily those of the Rice County Attorney's Office.

² "A 'concerned citizen' is a[] [non-anonymous] informant who provides information in his or her capacity as a witness to a crime, for whom a law enforcement officer is relieved of having to establish credibility and veracity independently through

corroboration. The motive to supply information to police distinguishes a concerned citizen from other informants who are motivated by a desire for leniency or immunity from prosecution.” *State v. McGrath*, 706 N.W.2d 532, 540 (Minn. Ct. App. 2005) (citation omitted).

³ By contrast, a “confidential informant” is a non-anonymous person with a criminal history and/or ongoing participation in criminal activity who supplies information to police about other criminal activity and “whose credibility and reliability must be bolstered by statements regarding a history of providing accurate information in prior criminal investigations.” *McGrath*, 706 N.W.2d at 541-42. When officers refer to an informant as a “confidential reliable informant,” this connotes that the informant has a proven track record of providing reliable information about criminal activity to the police that has furthered investigations or led to arrests, seizure of contraband, and/or criminal convictions. *See State v. Ross*, 676 N.W.2d 301, 304 (Minn. Ct. App. 2004) (listing six factors for determining the reliability of confidential, but not anonymous, informants).

⁴ *See State v. Moore*, 438 N.W.2d 101, 106-07 (Minn. 1989) (noting that nature of the crime may require heightened concern for protecting informant’s identity); *State v. Purdy*, 153 N.W.2d 254, 262 (Minn. 1967) (noting that routine disclosure of informant’s identity would “seriously hamper effective law enforcement”).

⁵ *Roviaro v. United States*, 353 U.S. 53, 59-60 (1957); *State v. Litzau*, 650 N.W.2d 177, 184 (Minn. 2002); *Syrovatka v. State*, 278 N.W.2d 558, 560 (Minn. 1979); *see also* Minn. R. Crim. P. 9.01, subd. 3(2) (permitting prosecutor to file certification withholding disclosure of certain witnesses’ identities until trial if disclosure may subject such witnesses or other persons to physical harm, intimidation or coercion, or jeopardize ongoing or future investigations). There is also a statutory privilege providing that “[a] public officer shall not be allowed to disclose communications made to the officer in official confidence when the public interest would suffer by the disclosure.” Minn. Stat. § 595.02, subd. 1(e) (2006).

⁶ *State v. Rothstein*, 422 N.W.2d 300, 303 (Minn. Ct. App. 1988).

⁷ *State v. Luciw*, 308 Minn. 6, 15, 240 N.W.2d 833, 839 (1976) (quoting *Roviaro*, 353 U.S. at 62).

⁸ *Roviaro*, 353 U.S. at 59; *State v. Houle*, 257 N.W.2d 320, 323 (Minn. 1977).

⁹ *State v. Rambahal*, No. A07-512 ___ N.W.2d ___, ___, 2008 WL 2445498, at *4 (Minn. June 19, 2008) and cases cited.

¹⁰ *State v. Ford*, 322 N.W.2d 611, 614 (Minn. 1982).

¹¹ *See Syrovatka*, 278 N.W.2d at 562.

¹² *State v. Brunes*, 373 N.W.2d 381, 385 (Minn. Ct. App. 1985).

¹³ *Id.* While a defendant need only make a minimal showing of a basis for inquiry to justify an *in camera* review, something more is required than mere speculation by the defendant that examination of the informant might be helpful. *Moore*, 438 N.W.2d at 106; *State v. Smith*, 448 N.W.2d 550, 556 (Minn. Ct. App. 1989) (noting that state’s interest in protecting informants in drug world is strong); *see also Rothstein*, 422 N.W.2d at 303 (cautioning against ready use of *in camera* proceeding absent proper grounds because of deterrence on effective law enforcement and acknowledgment of difficulty maintaining informant’s confidentiality even with *in camera* hearing).

¹⁴ *See Rambahal*, 2008 WL 2445498, at *5 (noting that cases distinguish among informants who are participants in criminal activity, eyewitnesses to crime, or who simply report information to police).

¹⁵ *Moore*, 438 N.W.2d at 106 (upholding district court’s refusal to compel disclosure of informant’s identity where no material misrepresentations in supporting search warrant affidavit that would require disclosure); *see also Purdy*, 153 N.W.2d at 262 (noting that informant need not be disclosed when information used merely as basis for probable cause to search or arrest).

¹⁶ *Moore*, 438 N.W.2d at 106.

¹⁷ *Id.* As the supreme court noted in *Moore*, “[t]he only reason for disclosing the identit[ies] of the informant[s] would have been to allow defense counsel to conduct a fishing expedition in the hope of discovering other possible misrepresentations on which to attack probable cause for the warrant.” *Id.*

¹⁸ *Ford*, 322 N.W.2d at 614.

¹⁹ *Rambahal*, 2008 WL 2445498, at *4.

²⁰ *State v. Martinez*, 270 N.W.2d 121, 122 (Minn. 1978).

²¹ *State v. Villalon*, 234 N.W.2d 189, 191 (Minn. 1975).

²² *Houle*, 257 N.W.2d at 323; *see State v. Marshall*, 411 N.W.2d 276, 280 (Minn. Ct. App. 1987) (holding that disclosure not required where informant merely a tipster and neither a participant in nor a witness to the crime). But the fact that an informant simply provides information to the police will not be dispositive in all cases and analysis of the other factors may be necessary under the “fundamental fairness” rubric. *See Rambahal*, 2008 WL 2445498, at *5 (noting that even though informant merely supplied information, “fundamental fairness” required court to consider whether informant’s identity might be “helpful” to defense in context of materiality of informant’s testimony).

²³ *Ford*, 322 N.W.2d at 614.

²⁴ *State v. Solheim*, 477 N.W.2d 785, 787 (Minn. Ct. App. 1991) (rejecting claim of informant’s materiality as witness) (emphasis omitted).

²⁵ *Id.*

²⁶ *State v. Medal-Mendoza*, 718 N.W.2d 910, 919 (Minn. 2006) (citing *State v. Werber*, 301 Minn. 1, 7-9, 221 N.W.2d 146, 150 (1974)).

²⁷ *Rambahal*, 2008 WL 2445498, at *5.

²⁸ *See State v. Hardy*, 354 N.W.2d 21, 25 (Minn. 1984) (noting testimony to the effect that police acted upon information received, without revealing hearsay, sufficient to explain police presence and conduct at scene); *United States v. Williams*, 133 F.3d 1048, 1052 (7th Cir. 1998) (providing that police may reconstruct steps taken in response to tip in criminal investigation and describe events leading to defendant’s arrest so long as police do not disclose hearsay substance of conversation with informant).

²⁹ *Syrovatka*, 278 N.W.2d at 562. The supreme court has cautioned, however, that this factor should not be considered limited only to circumstances where a defendant proffers pretrial that the informant will provide admissible evidence at trial, and a district court should still evaluate the nature of the informant’s information in its balancing analysis. *Rambahal*, 2008 WL 2445498, at *5.

³⁰ *Rambahal*, 2008 WL 2445498, at *6 (admonishing against construing second factor too narrowly and requiring examination of potential helpfulness of informant’s testimony in overcoming element of charge).

³¹ *Id.* at *7. Demonstration of the helpfulness of an informant’s testimony, however, may suffice to require

an *in camera* hearing to consider affidavits or to interview the informant as part of the disclosure determination. *See id.* at *8 (finding defendant met lesser burden of basis for *in camera* inquiry based on showing of potential helpfulness of informant’s information). *But see supra* note 13.

³² *Ford*, 322 N.W.2d at 614.

³³ *Syrovatka*, 278 N.W.2d at 562. During the *in camera* hearing, the court determines whether the informant’s testimony would be necessary to a fair determination of the defendant’s guilt. *Id.*

³⁴ *See State v. Galde*, 306 N.W.2d 141, 143 (Minn. 1981) (finding that disclosure of informant not normally required where defendant not charged with selling narcotics to the informant and where state did not elicit evidence of the controlled purchase at trial).

³⁵ *See Ford*, 322 N.W.2d at 614 (holding that where informant not involved with any evidence on which state relied to establish defendant’s guilt, defendant did not meet burden justifying even *in camera* review).

³⁶ *See id.* (finding defendant’s speculation as to informant’s involvement, which was unsupported by defendant’s testimony or other evidence, insufficient to require disclosure).

³⁷ *See Rothstein*, 422 N.W.2d at 302-03 (holding that defendant must make prima facie showing of entrapment to warrant *in camera* hearing).

³⁸ *See State v. Olkon*, 299 N.W.2d 89, 107 (Minn. 1980).

³⁹ *State v. Grilli*, 304 Minn. 80, 93, 230 N.W.2d 445, 454 (1975).

⁴⁰ *Ford*, 322 N.W.2d at 614.

A Few Tips to Better Represent Your Government Clients

Stacie Christensen

Many attorneys know something about the federal Freedom of Information Act, or have at least heard the phrase “freedom of information.” However, some attorneys may not know that Minnesota has its own similar laws, they just have different names. This article will provide some basic information to help increase the understanding of these Minnesota laws commonly known as the Data Practices Act and the Open Meeting Law.

Minnesota Government Data Practices Act

As with any other business, the government relies on collecting, creating, keeping, and disseminating data to operate programs and provide services. However, the way that government must treat its data is, at times, very different from private sector businesses. All government entities are subject to the Minnesota Government Data Practices Act,¹ which regulates all government data. The

Data Practices Act also states that all government data are presumed to be public and accessible for inspection or copying unless there is a state statute or federal law that classifies the data as not public.² In complying with the Data Practices Act, all government entities, including state agencies, cities, counties, and school districts, must work to balance the government's need to have and use data to do its work, the public's right to know about the activities of their government, and the privacy rights of certain individuals about whom the government has data. It is important when representing any type of government entity to properly assist them with understanding and complying with this law. The following are a few common questions about the Data Practices Act that you may receive from government clients.

1. How does a government entity know what data are available to the public and what data must be protected as not public?

The presumption in the Data Practices Act is that all government data are public.³ In Minnesota, the Legislature makes the policy decisions about what government data should be classified as not public and those decisions are enacted into law. It is important for all government entities to know the classifications of the data they collect and maintain.⁴ If there is not a specific state or federal law that classifies the data as not public, then the data are public.

2. How should a government entity respond when it receives a request for government data?

The answer depends on who is requesting the data.

- If an individual makes a request for government data about him/herself,

the entity must respond to the request immediately, if possible, or within ten business days.⁵ The entity can charge the actual cost of providing copies of the data to that individual.⁶

- If a member of the public (who is not the subject of the data) makes a request for data, the entity is required to respond in an appropriate manner within a reasonable amount of time.⁷ The entity can charge up to 25¢ per page if a request is for 100 or fewer black and white copies that are on legal or letter size paper.⁸ For all other copies, including color copies, photos, faxes, etc., the entity can charge the actual cost for providing copies of the data.⁹

Inspection of data is always free.¹⁰

3. If a law enforcement agency is conducting a criminal investigation, may it protect the investigative data from disclosure?

Generally, the answer is yes. Criminal investigative data are classified as confidential or protected nonpublic while the investigation is active or ongoing.¹¹ This means that the law enforcement agency is not required to release the data to anyone, including the subject of the investigation. However, most of the data revert to public when a criminal investigation becomes inactive or when the data are presented as evidence in court.¹² It is important to note that there are certain law enforcement data that are always public, even if there is an active criminal investigation. Arrest data, request for service data, and response or incident data are always public.¹³ Those data were specifically listed as public by the Legislature to ensure that they could not be withheld from the public as active criminal investigative data.¹⁴

4. Government entities may be faced with situations when it becomes necessary to discipline an employee. How are data related to employee discipline classified?

If someone makes a complaint about a government employee, there are limited data about the situation that are public while the entity is investigating. Specifically, only the existence and status of the complaint or charge is public.¹⁵ In other words, only the fact that someone has made a complaint or charge and that it is being investigated are public. All other related data are private.¹⁶ If the entity finds no basis for the complaint – that it was without merit – no additional data become public, they remain private.¹⁷ However, if the investigation substantiates the complaint or charge, the following data become public: the final disposition of discipline, the specific reasons for the action, and data documenting the basis of the action.¹⁸

5. Are government entities required to notify individuals if there is a breach in the security of private or confidential data maintained by the entity?

Yes; however, this requirement only applies to state agencies.¹⁹

The Open Meeting Law

The Open Meeting Law (“OML”) describes the requirements placed on public bodies when they conduct meetings.²⁰ By requiring meetings to be open to the public, the OML ensures the public’s right to be informed about the government’s activities. The following are a few common questions about the OML that you may receive from government clients.

1. The OML uses the term “public body.” What is a public body?

The OML requires meetings of a public body to be open to the public, but it does not define “public body.”²¹ To help interpret the law, the Minnesota Supreme Court has said, “[i]n common understanding, ‘public body’ is possibly the broadest expression for the category of governmental entities that perform functions for the public benefit.”²² The Minnesota Court of Appeals also weighed in by discussing entities that might not be subject to the OML. An advisory committee established by the Board of Regents at the University of Minnesota was not subject to the OML because (1) the committee only had power to recommend, (2) the committee members were not members of the governing body, and (3) the committee was not a quorum of the public body.²³ Also, a gathering of public officials is not subject to the OML unless they can exercise decision-making powers of the public body.²⁴

2. Which meetings of public bodies are subject to the OML?

The OML states that “[a]ll meetings . . . must be open to the public.”²⁵ However, it does not define “meeting.” The Minnesota Supreme Court has provided some interpretation stating, “. . . ‘meetings’ subject to the requirements of the Open Meeting Law are those gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body.”²⁶ The Court noted, “. . . in formulating a definition of ‘meetings’ that must be open, the public’s right to be informed must be balanced against the public’s right to the effective and efficient administration of public bodies.”²⁷

The Supreme Court has also said that the OML does not apply to chance and social gatherings.²⁸

3. What must a public body do before closing a meeting to the public?

A public body must make a statement on the record describing the specific grounds that permit the meeting to be closed and the subject to be discussed.²⁹ The statement must include the specific statutory authority permitting closure of the meeting.³⁰

4. Are there penalties for violating the OML?

Yes, but a court must find an intentional violation for the penalties to apply.³¹ A person who intentionally violates the OML is personally liable for a penalty of up to \$300.³² A person who intentionally violates the OML three or more times must forfeit the right to serve on the public body.³³ Minnesota courts have held that reversing a public body's action taken in an improperly closed meeting is not a remedy under the OML.³⁴

5. Can “not public” data be discussed at an open meeting?

Generally, public bodies can discuss “not public” data at open meetings without liability, if necessary to conduct public business.³⁵ Data discussed at an open meeting retain their “not public” classification, but a record of the meeting is public.³⁶

6. What are some common misunderstandings about the OML?

- The only notice requirement in the OML for regular meetings is a schedule kept on file at the public body's primary offices.³⁷

- There is not a requirement in the OML to use Robert's Rules of Order or other parliamentary processes at meetings.³⁸
- The OML does not require a public body to:
 - close a meeting to interview job applicants;³⁹
 - allow the public to speak at an open meeting; or
 - prepare meeting minutes and agendas.

Conclusion

When trying to understand the nuances of these laws, providing advice to government clients can, at times, be challenging. However, there is a place to turn to for help. The Minnesota Department of Administration's Information Policy Analysis Division is available to answer questions about the Data Practices Act and the Open Meeting Law. You can locate a number of resources about these laws by visiting www.ipad.state.mn.us.

Stacie Christensen is an attorney at the Minnesota Department of Administration's Information Policy Analysis Division where she provides technical assistance and consultation on Minnesota's Data Practices Act, the Open Meeting Law, and other state and federal information policy laws and regulations. She can be contacted at stacie.christensen@state.mn.us or (651) 201-2500.

Notes

¹ Minn. Stat. Ch. 13 (2007).

² Minn. Stat. § 13.01, subd. 3 (2007).

³ Minn. Stat. § 13.03, subd. 1 (2007).

⁴ Minn. Stat. § 13.05, subd. 1 (2007), requires the responsible authority in each government entity to prepare a public document that lists all private and confidential data maintained by the entity, which must be updated annually.

⁵ Minn. Stat. § 13.04, subd. 3 (2007).

⁶ *Id.* Copy charges may not include searching for and retrieving the data or separating public and not public data.

⁷ Minn. Stat. § 13.03, subd. 2 (2007); Minn. R. 1205.0300, subp. 3 (2007).

⁸ Minn. Stat. § 13.03, subd. 3(c) (2007).

⁹ *Id.* Copy charges may include searching for and retrieving data, but may not include separating public and not public data.

¹⁰ Minn. Stat. § 13.03, subd. 3(a) (2007); Minn. Stat. § 13.04, subd. 3 (2007).

¹¹ Minn. Stat. § 13.82, subd. 7 (2007).

¹² *Id.* One example of data that do not revert to public are those protected by Minn. Stat. § 13.82, subd. 17 (2007).

¹³ Minn. Stat. § 13.82, subd. 2 (2007); Minn. Stat. § 13.82, subd. 3 (2007); Minn. Stat. § 13.82, subd. 6 (2007).

¹⁴ Minn. Commr. of Admin. Op. 94-015 (Mar. 11, 1994) (available at www.ipad.state.mn.us/opinions/1994/94015.html); Minn. Commr. of Admin. Op. 00-024 (Jun. 29, 2000) (available at www.ipad.state.mn.us/opinions/2000/00024.html).

¹⁵ Minn. Stat. § 13.43, subd. 2(a)(4) (2007); Minn. Commr. of Admin. Op. 94-042 (Oct. 14, 1994) (available at www.ipad.state.mn.us/opinions/1994/94042.html); *Navarre v. South Washington County Sch.*, 652 N.W.2d 9 (Minn. 2002).

¹⁶ Minn. Stat. § 13.43, subd. 4 (2007).

¹⁷ *Id.*

¹⁸ Minn. Stat. § 13.43, subd. 2(a)(5) (2007); Minn. Stat. § 13.43, subd. 2(b) (2007); Minn. Stat. § 13.43, subd. 2(e) (2007) (discussing disciplinary data about public officials); Minn. Commr. of Admin. Op. 95-027 (Jun. 6, 1995) (available at www.ipad.state.mn.us/opinions/1995/95027.html) (discussing disciplinary data about government employees not covered by collective bargaining agreements).

¹⁹ Minn. Stat. § 13.055 (2007); Minn. Commr. of Admin.

Op. 08-005 (Apr. 16, 2008) (available at www.ipad.state.mn.us/opinions/2008/08005.html).

²⁰ Minn. Stat. Ch. 13D (2007).

²¹ Minn. Stat. § 13D.01 (2007).

²² *Star Tribune Co. v. Univ. of Minn. Board of Regents*, 683 N.W.2d 274, 280 (Minn. 2004).

²³ *Minn. Daily v. Univ. of Minn.*, 438 N.W.2d 189 (Minn. Ct. App. 1988).

²⁴ *Sovereign v. Dunn*, 498 N.W.2d 62 (Minn. Ct. App. 1993).

²⁵ Minn. Stat. § 13D.01, subd. 1 (2007).

²⁶ *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983).

²⁷ *Id.* at 517.

²⁸ *St. Cloud Newspapers v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1, 7 (Minn. 1983).

²⁹ Minn. Stat. § 13D.01, subd. 3 (2007).

³⁰ Minn. Commr. of Admin. Op. 06-020 (Jun. 23, 2006) (available at www.ipad.state.mn.us/opinions/2006/06020.html).

³¹ Minn. Stat. § 13D.06 (2007).

³² Minn. Stat. § 13D.06, subd. 1 (2007).

³³ Minn. Stat. § 13D.06, subd. 3 (2007).

³⁴ *Sullivan v. Credit River Township*, 217 N.W.2d 502, 507 (Minn. 1974); *In the Matter of the Petitions of D & A Truck Line, Inc.*, 524 N.W.2d 1, 6 (Minn. Ct. App. 1994).

³⁵ Minn. Stat. § 13.03, subd. 11 (2007); Minn. Stat. § 13D.05, subd. 1(b) (2007).

³⁶ Minn. Stat. § 13D.05, subd. 1(c) (2007).

³⁷ Minn. Stat. § 13D.04, subd. 1 (2007); Minn. Commr. of Admin. Op. 07-018 (Sept. 26, 2007) (available at www.ipad.state.mn.us/opinions/2007/07018.html).

³⁸ Minn. Commr. of Admin. Op. 04-004 (Feb. 3, 2004) (available at www.ipad.state.mn.us/opinions/2004/04004.html).

³⁹ Minn. Stat. § 13D.03, (2007); Minn. Stat. § 13D.05, (2007) (discussing meetings that may or must be closed); Minn. Commr. of Admin. Op. 06-031 (Nov. 14, 2006) (available at www.ipad.state.mn.us/opinions/2006/06031.html).

Ten Tips for New Family Law Lawyers

Colin Kreuziger

I have had the privilege of serving as law clerk to the Honorable Bruce A. Peterson, Presiding Judge of the Family Court Division for the Fourth Judicial District of the State of Minnesota since August of 2006. During that time, I have observed and experienced mostly good lawyering, some

bad lawyering, and everything in between from seasoned veterans and rookies alike.

At the risk of engaging in a bit of hubris, I would like to commemorate my time in Family Court, which will soon come to a close, by offering the following practical

suggestions to practitioners who may be new to family law.¹ While some of these suggestions may seem obvious, I believe that they are worth repeating in light of the number of times I have observed or experienced practitioners of all levels ignoring them.²

- 1. Settle the case.** Use your best efforts to settle the case before bringing it to the court. Recognize that the relationship of the parties will likely continue well into the future. Settling the case provides a positive start to the new relationship that the parties will need to craft, either as parents, or perhaps as reticent financial partners. In addition, your chances of declaring all-out victory at the end of the proceedings are low, and the cost of pursuing the proceedings all the way to the finish may be prohibitive for your client. In the event that you are forced to proceed all the way to trial or an evidentiary hearing, it always helps to demonstrate to the court that you made honest efforts to settle the case, particularly if you are requesting conduct-based attorney fees.³ In addition, if the proceeding occurs after entry of the Judgment and Decree, the Decree itself may require some form of alternative dispute resolution before filing a motion with the court. Finally, Minnesota law requires certain settlement efforts prior to filing any motion with the court, except motions for temporary relief.⁴
- 2. Do not call the court's clerks for legal advice.** Do your own legal research. This includes questions that involve interpretation of court rules, such as filing deadlines.
- 3. Do call the court's clerks with procedural questions that are not addressed by cases, statutes, and court rules.** Do not assume that you know the answer when you call the judge's chambers. Simply state your question. For example, does the judge prefer an informal telephone conference to resolve discovery issues, or does he/she prefer a formal motion hearing? How does the judge handle motions for temporary relief? Does the judge permit letter argument in lieu of filing a motion?
- 4. Resist any temptation to "poison the well."** Do not call the court's clerks and recite the nastiest allegations you can think of about opposing counsel and/or their client en route to asking your question. Your efforts will be in vain because the clerks will not pass on your ex parte diatribe to the judge. Moreover, your credibility in the eyes of the clerk will suffer and your client pays extra for the time that you spend bad-mouthing opposing counsel and/or their client.
- 5. Call the court's clerks before sending any written correspondence to the court.** Many judges do not accept any unsolicited correspondence.⁵
- 6. Raise discovery issues before trial or a hearing.** Remember that the Rules of Civil Procedure apply in Family Court.⁶ If you are engaged in informal discovery and hit a roadblock, consider initiating formal discovery procedures. If in doubt, call the court's clerk to inquire as to whether the judge will address informal discovery disputes. If you have already served discovery requests on the other party and they fail to comply, file a motion to compel

and obtain an order directing the other party to comply with your requests.⁷ If the party disregards the order, move for sanctions.⁸ If you have not followed the steps described above, do not appear at the hearing without evidence and assume that the court will automatically order the sanction that you are now requesting.⁹ It is always preferable to present a specific discovery order to the court that the other party has not followed. Moreover, recognize that obtaining sanctions may not entitle you to victory on your underlying claim. Presenting evidence at a hearing is always better than presenting no evidence and requesting discovery sanctions.

7. **Provide clear, legible, courtesy copies of pleadings, exhibits, etc. to the court in advance of your hearing or trial.** Do not rely on the mail or court administration to ensure delivery of the original document to the judge. Hand delivery of a courtesy copy to chambers is the surest way to guarantee that the judge receives your paperwork in time to consider it *before* the hearing. Make sure that your exhibits are well-organized and clearly tabbed and marked for quick reference by the court. If your client can afford it, it is helpful to make a courtesy copy of voluminous exhibits for the court's clerk as well.
8. **Trial/motion practice tips:**
 - a. **Prepare your client and make sure they attend (on time).** Your client knows more about the case than anyone, and they need to attend every proceeding. Do not assume that the judge will not ask your client questions at a motion

hearing (or, for that matter, any other proceeding). Preparing your client for questions has at least two benefits to you. First, it prepares you and your client for the hearing. Second, it forces you to confirm your client's position on a variety of issues and allows you to craft alternative proposals or arguments if the court does not accept your preferred argument.

- b. **Document your facts.** The court needs to have evidence upon which to base its ruling. You need to provide the evidence. For example, if you argue that your client should be reimbursed for medical expenses paid on behalf of the parties' child, you need to document that your client actually incurred the expenses, and that your client actually paid them. Do not assume that the court will believe your client's testimony over that of the other party without documentary evidence to bolster your client's claim.
- c. **Be organized.** Do not present a jumble of complex information without a concise summary. Voluminous documentation may be necessary to support a claim, but the information is far more effective if it is summarized and quickly accessible by the court.
- d. **Do not dwell on the facts at oral argument.** Your client's affidavit should give the court facts from which to draw a conclusion and you need not dwell on the details unless the court asks questions about them. Focus your argument on why the facts as you have

presented them compel the conclusion that you want the court to reach.

- e. **Submit a memorandum of law with your motion and your client's affidavit.**¹⁰ This has three desired effects. First, it provides a concise legal argument to the court and focuses the court's attention on any legal issues that must be resolved. Second, it should shorten your client's affidavit, because you do not need to make legal argument in your client's affidavit and your memorandum of law. Third, writing a memorandum of law forces you to consider whether your argument has a legal basis. You should clearly identify the authorities upon which you expect the court to rely to rule in your favor. Do not assume that the court is familiar with the statute, case, rule, etc., that constitutes the linchpin of your argument.
- f. **Propose a solution.** Do not simply describe the problem and expect the court to fix it. Present a concrete solution in your memorandum of law or oral argument that the court can accept, reject, or modify. For example, if your client is requesting modification of the other party's maintenance obligation, you should have an actual number, based on documentary evidence and testimony, to propose to the court. If your client wants expanded parenting time, tell the court what the new schedule should be, and why. Judges like to hear or read your proposed solution; it gives them something to work with.

g. **Be courteous to everyone.** This includes the judge, his/her staff, opposing counsel, and the opposing party. Do not give in to the temptation to become emotionally involved in any dispute, no matter how big or small. It only serves to undermine your credibility before the court.

9. **Do everything you can to avoid requesting ex parte relief.**¹¹ It is difficult enough to make decisions on the basis of diametrically opposed testimony with little or no corroborating evidence. It is nearly impossible to make decisions on the basis of one party's statements alone. Most ex parte requests can be more effectively addressed by a motion and supporting affidavit for an accelerated hearing. If you must seek ex parte relief, make an effort to inform the other party that you are doing so and try to procure their attendance. It is better to have the other party available for the judge to contact than to expect the judge to issue an ex parte order.
10. **Be aware of the proper mechanisms for enforcing the court's Decree.** Family Court cases are rarely "over" after the Decree is issued. For example, contempt is generally not available to collect money¹² or personal property owed to your client by the other party.¹³ Conversely, nonpayment of child support or maintenance is grounds for contempt.¹⁴ Unpaid child support and maintenance obligations are judgments as a matter of law and may be docketed in an expedited fashion.¹⁵ Happily (or not, depending on who your client is), unpaid attorney fees are also proper subjects for contempt proceedings.¹⁶

Colin Kreuziger is a 2006 graduate of the University of Minnesota Law School. His practice interests include family law, bankruptcy law, animal cruelty and farmed animal law, and environmental law.

Notes

¹ This article reflects the opinions of the author alone. The opinions presented in this article should not be attributed to the Honorable Bruce A. Peterson, the Fourth Judicial District of the State of Minnesota, or any division thereof.

² By offering these suggestions, I do not mean to denigrate the family law bar, which generally does an excellent job of providing quality legal representation to clients in a state of crisis.

³ See Minn. Stat. § 518.14, subd. 1(3) (2007) (permitting the court to award “fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding”).

⁴ See Minn. Gen. R. Prac. 303.03(c).

⁵ Note that some forms of unsolicited correspondence are permissible. See, e.g., Minn. Gen. R. Prac. 115.11 (permitting two page letter to court for purpose of requesting permission to make a motion to reconsider).

⁶ See Minn. Gen. R. Prac. 301 (“Rules 301 through 313 and, where applicable, the Minnesota Rules of Civil Procedure shall apply to family law practice except where they are in conflict with applicable statutes or the Expedited Child Support Process Rules, Minn. Gen. R. Prac. 351 through 379.”).

⁷ See Minn. R. Civ. P. 37.01 (detailing proper procedures for filing motion to compel discovery).

⁸ See Minn. R. Civ. P. 37.02 (describing available sanctions for failure to comply with court orders related to discovery).

⁹ See Minn. R. Civ. P. 37.04 (stating that the court “may make such orders as are just, including any action authorized in Rule 37.02(b)(1), (2), and (3)”) (emphasis supplied).

¹⁰ See Minn. Gen. R. Prac. 303.03(a) (setting forth documents that may be filed with the court in connection with a motion).

¹¹ Minn. Gen. R. Prac. 303.04 governs ex parte relief in Family Court proceedings.

¹² See Minn. Stat. § 550.02; *Burgardt v. Burgardt*, 474 N.W.2d 235, 237 (Minn. Ct. App. 1991).

¹³ See *Behr v. Behr*, No. C8-95-428, 1995 WL 497337, at *2 (Minn. Ct. App. Aug. 22, 1995).

¹⁴ See Minn. Stat. § 518A.72.

¹⁵ Minn. Stat. § 548.091.

¹⁶ See *Burgardt*, 474 N.W.2d at 237.

Expanding Your Job Search Horizons

Caroline Riss

When I set out to find a job as a newly licensed lawyer, I turned to trusted mentors for their insight and advice on finding the “right” job in public interest law. After reading the following commentary, one may conclude that I took one mentor’s advice too literally. In early 2007, this mentor — Ms. Hauwa Ibrahim — suggested that I expand my geographic scope beyond Minnesota to include the entire globe in my search for a job. Since April 2007, I have moved around the world—from Minnesota to Ukraine and from Ukraine to Montana. And, it is not until today as I sat down to write this article that I fully began to grasp the life-changing experiences that ensued as a result.

Before Ms. Ibrahim gave me her advice, she had spent a considerable amount of time listening to my “post graduation blues”: I graduated from William Mitchell College of Law in May 2006 and passed the Minnesota Bar Exam that October. I then spent the following nine months of my life scouring Minnesota for my first legal job, believing that my only options for work were within the same state where I had passed the bar.

At first I was cautious to pursue her suggestion. I had just spent the past three years in law school networking with various non-profits and government agencies around the Twin Cities. I was determined to work in

the public interest sector. Although Ms. Ibrahim was not suggesting that I concede on this, I was nervous that my chances of finding a job in the field were limited, given the general lack of work opportunity for newly-licensed attorneys within my own geographic comfort zone of Minnesota. I questioned why my job search would be more successful elsewhere.

Despite my concerns, I followed Ms. Ibrahim's advice and spent the following two months researching national and international legal non-profit organizations. Many of the fascinating opportunities that I found on the Internet, however, presented the same hurdles as paid positions, i.e. requiring at least five to ten years of legal experience. I was somewhat disillusioned until two other mentors steered me to a prospect that seemed compatible with my interests: the American Bar Association-Rule of Law Initiative ("ABA-ROL"), which offers an International Volunteer Internship Program.¹

I learned that ABA-ROL is stationed in over 40 countries in the regions of Africa, Asia, Europe and Eurasia, Latin America, the Caribbean and the Middle East. The mission of the organization is to "promote the rule of law through programs focused on anti-corruption, criminal law reform and human trafficking, gender issues, human right and conflict mitigation, judicial reform, legal education reform and legal profession reform."² Their internship opportunities are based in the countries of Azerbaijan, Morocco, Ukraine and Jordan – all of which excited me.³

I applied to the four internships, as each offered a very unique agenda for the rule of law issues specific to their locale. Within a month's time, I received a call from Shelley Wieck, the Country Director for ABA-ROL Ukraine. She was very interested in my

international and volunteer work with Ms. Ibrahim and the Minnesota Justice Foundation.⁴ Ms. Wieck explained the duties of an international volunteer intern and the responsibilities of working with twenty Ukrainian attorneys. She noted that I would be just one of two Americans in the office. Ms. Wieck also confirmed that ABA-ROL prefers at least a three month commitment from their interns. I offered ABA-ROL eight months of my time, strongly believing that a longer commitment would be more constructive for ABA-ROL, as well as for my own professional interests. After Ms. Wieck's review of many other applicants, I was offered the job, and I happily accepted. I had less than one month's time to organize my life in the United States and get ready for the unknowns of Eastern Europe.

I was a bit nervous when I landed in Kyiv, a city of over four million people. Before applying to the ABA-ROL program, I knew little about the country and its people. Other "small" issues added to my anxious arrival, including the fact that I did not speak Ukrainian (a language that uses an entirely different alphabet), I had no set living arrangements, and other than a name, I had no idea who would be waiting for me upon my arrival.

Despite my initial worries, my experiences in Ukraine were more than I could have hoped for. Interning with ABA-ROL provided me with excellent legal experiences. Ms. Wieck, a licensed attorney in North Dakota with over sixteen years of experience, proved to be a dedicated advisor with vast international knowledge. Ms. Wieck and the Ukrainian attorneys were eager to have me join their team, which made my new environment very welcoming. I spent much of my time assisting on various Rule of Law Programs, including legal education reforms. I researched and wrote about international

legal education standards, as Ukraine has over 500 law schools but no standard curriculum or testing methods. I also gave seminars on legal writing to Ukrainian law students, attorneys and judges. Further, I assisted in planning numerous “roundtable” events on a wide range of topics including xenophobia and anti-corruption reform. Ukrainian governmental leaders and NGO executives attended these events and spoke about issues facing Ukraine.

Additionally, former Supreme Court Justice Sandra Day O’Connor visited our program while I was there. I listened to her speak to the Ukrainian attorneys at our office and again to a larger audience at a seminar on judicial reform. I had the chance to talk with the Justice about my own experiences in Ukraine. I certainly never thought that I would meet Justice O’Connor—and definitely not while living in Ukraine. It was truly inspiring and a tremendous, unexpected bonus to my internship experience.

While living in Kyiv, I was able to explore and take advantage of Ukraine’s proximity to many fascinating places. I took “sleeper” trains across Ukraine (a country the size of Texas) to visit the small villages of the Carpathian Mountains and to see the famous Black Sea. Throughout my travels, I met many wonderful Ukrainians who opened their homes and shared their customs with me. The professional and personal experiences I enjoyed while abroad are countless. Although I cannot give them proper justice in this short essay, I can undoubtedly say that I would not trade my months in Ukraine for any other experience—even a paid one.⁵

After completing six of my eight-month commitment to ABA-ROL, I resumed my job search, both internationally and nationally. Although I was somewhat dreading the exercise, this second effort seemed much

more attainable. I was energized and enthused by my fresh experiences in Ukraine and had some solid work experience to offer employers. Within a month’s time, I had found and applied for several jobs, including a Judicial Clerkship in the 20th Judicial District of Montana. After an interview on a “voice over internet” service, I pondered whether Montana would be the home to my next adventures. Two days later, I received the job offer. Since the Judge was a strong advocate of pro-bono legal work, she supported my desire to finish my remaining two month commitment to ABA-ROL before beginning work in Montana.

After a brief visit with my family in New Hampshire, I drove across the United States to begin my new employment with the start of the new year. My work in Montana has allowed me to observe both young and experienced attorneys in court and to discuss a wide array of topics with the judges. Additionally, I’ve been able to continue my growth in the field of public interest law given local issues with which I am involved, such as assisting the court in developing legal services for low-income residents.

I write this article with the purpose of recommending to all new attorneys that you, too, consider my mentor’s advice: expand your geographic horizons when looking for your next job or a volunteer/pro-bono experience. The practice of law does not have to be limited by physical location, despite the hoops created by state bar exams. Be creative, think BIG and you will find rewarding opportunities beyond first glimpse. Remember that volunteer internships can offer rich experiences that will serve your career well. And keep in mind that sometimes moving beyond your comfort zone and your own backyard may provide just the boost needed to get your legal career rolling. I certainly found that it did.



Caroline Riss is a licensed member of the Minnesota State Bar. She recently spent eight months living in Ukraine as a volunteer with the American Bar Association-Rule of Law Initiative. Caroline is now serving as a judicial law clerk in the 20th Judicial District of Montana for the Honorable C.B. McNeil and the Honorable Deborah Kim Christopher.⁶ She plans to continue her career in public interest law both nationally and internationally and can be reached at criss@mt.gov.

Notes

¹ I would like to thank Nancy Paterson and Carrie Hunter for their advice, mentorship and assistance with my job search.

² Information about the ABA-ROL is available at: <http://www.abanet.org/rol/about.shtml>.

³ Information on ABA-ROL internships is available at: <http://www.abanet.org/rol/opportunities/internships.shtml>.

⁴ Ms. Hauwa Ibrahim is an internationally recognized human rights attorney from Nigeria. I worked as Ms. Ibrahim's law clerk in Washington D.C. during the summer of 2004. Ms. Ibrahim, Mike Tierney and I also formed the Nigeria Book Drive through the assistance of the Minnesota Justice Foundation and the Federal Bar Association. More information is available at <http://www.wmitchell.edu/news/articles/default.asp?articleId=10133>.

⁵ I was employed while in law school and found temporary jobs after law school; I used my savings to volunteer in Ukraine. Additionally, I put my law school loans in deferment for one year.

⁶ Other articles by Caroline Riss about international legal issues can be found at: <http://www.colby.edu/colby.mag/issues/current/articles.php?issueid=42&articleid=687&dept=fromthehill> And, at the Gould Academy Alumni Gazette, Summer 2007, No. 9, "Think Globally and Act Locally" at 12-13.

The Litigation Continuum - Cutting-edge Technology at Every Step

Joni Shogren

From preserving, reviewing and producing electronically stored information to filing an electronic brief with the court or giving a multi-media presentation to a jury, litigation today is more technically complex than ever before. Electronically stored information, commonly referred to as ESI, encompasses various forms of computerized data, which includes word documents, e-mail, excel spreadsheets and any other type of data that is stored electronically. As of December 1, 2006 the Federal Rules of Civil Procedure expressly include ESI as discoverable information, thereby making it more important than ever for the litigation team to be aware of cutting edge technology designed to assist with the ever growing quantity of ESI.

At every step of the litigation continuum -- pre-litigation, the commencement of litigation or an investigation, case management, discovery, trial and post-trial -- a modern practitioner must leverage advanced litigation tools and technology to gain the strategic edge for their client. Considering current statistics show that 93 percent of documents are created electronically and 70 percent never even migrate to paper, advances in litigation tools and technology make the once overwhelming process of dealing with ESI feasible. This article will address the various cutting edge technologies currently available to be leveraged throughout the litigation continuum.

Litigation Preparedness

The litigation lifecycle begins before a case is filed and focuses on preparation. Because no organization is ever immune to litigation, a company and its counsel must prepare for an investigation or litigation that may occur at any time. During this phase, it is important to:

- **Establish defensible document retention policies.** With the massive amounts of ESI created on a daily basis, it is simply infeasible to expect an organization to maintain everything indefinitely. Document destruction systems are established as a way to retain only what is important. The Federal Rule Amendments specifically recognize the delicate nature of ESI and therefore include a provision referred to as the safe harbor clause. This clause, found in Fed. R. Civ. P. 37(e), offers limited protection against sanctions for a party's inability to produce ESI due to the routine, good faith operation of an electronic information system. For the safe harbor to apply, an organization must establish a document retention policy that is reasonable, which depends on the organization and the type of business with which they are involved.
- **Formulate litigation hold strategies.** A litigation hold is a procedure for ensuring that relevant data is not destroyed and generally includes the suspension of a document destruction system. Upon reasonable anticipation of litigation, an organization must directly communicate with key players to establish the litigation hold, which should be actively monitored and periodically re-communicated.

- **Inventory data, including where it is stored and how it is indexed.** In order to search and produce all relevant data, it is important to be aware of the location of all data. The creation of a datamap, a document that details the location of all company data, will greatly increase the speed at which the legal team is able to determine what data may be relevant to pending litigation.
- **Create a policy for preservation, review and production of information.** A cross functional team consisting of outside counsel, corporate counsel, corporate security, human resources, business line managers, IT staff and perhaps an e-discovery vendor is best positioned to establish comprehensive policies.

Litigation professionals must also familiarize themselves with the intricacies of their client's computer use, networking and storage. Corporate data protocols and infrastructures are rarely static and varying departments may develop diverse applications, hardware and record management policies. A competent litigation professional will be attuned to each of these areas and be prepared to ask the right questions of the right people.

Failure to adequately prepare for litigation and comply with discovery obligations may lead to claims of spoliation. Spoliation occurs when a party intentionally, negligently or by mistake destroys, alters or conceals data relevant to pending or probable litigation. Sanctions can include an adverse jury instruction, monetary award, and, in extreme cases, default judgment. An organization that is adequately prepared with established document retention procedures is less likely to face sanctions.

Complaint Filed/Investigation Commenced

The next phase of litigation occurs once a complaint is filed or an investigation has commenced. This is the phase during which it is most important to preserve all relevant ESI to avoid claims of spoliation or risk destroying “smoking gun” evidence that has the potential to win the case for your client. One type of technology that practitioners may find useful during this phase is e-mail analysis software. The use of an e-mail analysis software tool will help counsel get a handle on who was involved in the matter and what was being communicated through e-mail by giving users a visual depiction of the individuals involved in, and the time frame of and topics discussed during the communications. These tools can increase the efficiency of determining keywords, key players and important time frames, which will allow practitioners to strategically leverage internal investigations to determine whether an incident of employee misconduct occurred and whether the conduct is actionable. E-mail analysis tools can also reduce the volume of information to process by eliminating irrelevant parties, thereby minimizing the cost of electronic discovery.

A computer forensic expert may also image key employees’ hard drives and begin a forensic investigation to look for digital clues of wrongdoing. Taking an image of a hard drive allows the investigator to review an exact replica of the machine without affecting its contents. Often times a forensic expert is able to recover information that the user attempted to delete or somehow manipulate in an effort to hide.

Case Management

As soon as a case commences, the litigation team should seek agreement on what tools will be utilized to manage case work product.

Today’s litigation arena involves more people, documents, meetings and correspondence than ever before. This is yet another example where technology can help to simplify the problems the technology itself has created.

One such new technology is a case portal. A case portal is an Internet-based repository for information, immediately accessible throughout the world by numerous users simultaneously. Most often they are either accessible on an Internet site by your entire legal team or posted to an extranet location for clients to access. These new case intranet and extranet portals can centralize contact information, tasks, schedules, pleadings, court orders, research and memos, which can greatly improve collaboration across the entire case team. Furthermore, these tools can automate administrative tasks, reducing time spent on organizing, locating and editing legal documents, calendar items, and contact information.

Discovery

The days of attorneys searching through file cabinets full of paper, photocopying documents relevant to the pending litigation, and then mailing them to opposing counsel are well on their way to becoming extinct. Discovery now includes not only paper documents, but also e-mails, word processing documents, spreadsheets, database files, and even voicemails. A robust review tool that can handle all three types of information – paper, electronic and audio – will be the most accurate and efficient method for conducting document review and preparing for document production to the opposing party. Furthermore, a review tool that is hosted online allows for multiple parties in different locations to review the same set of information at the same time without

affecting the other's review. Certain online review tools allow for review by custodian, topic or some combination thereof, which increases the speed of the review. The quicker the review, the quicker the legal team can begin settlement negotiations or preparations for trial, giving the prepared party the strategic advantage.

An additional feature of a robust review tool is conceptual search. Conceptual search allows the review team to enter a phrase or sentence that is conceptually relevant to the types of documents for which they are searching. Conceptual search will organize documents into groups, topics and subtopics based on not just the specified word, but rather by topic. A reviewer evaluating a set of documents that concern the same topic will be better positioned to make relevancy and privilege determinations with greater efficiency and precision, thereby decreasing the cost of the review.

Trial

Should your case progress to trial, it is important that you provide your client with every advantage to obtain a favorable outcome in court, which includes diligent preparation of trial materials. There will likely be massive amounts of evidence to present and the party that ultimately wins the case may not be the party with the most information, but rather the party with the most effective and persuasive presentation of that information. When introducing evidence, consider using cutting-edge presentation technology, complete with multi-media displays, graphics, animations and video services. Considering the majority of people glean most of their information from a screen, be it a computer or television screen, and that visual information tends to be more persuasive and memorable than purely audible information,

it is not too surprising that modern jurors expect to be wowed by technology in the courtroom.

Post-Trial

Regardless of the trial outcome, post-trial protocol is crucial to future matters. Web-based electronic briefing tools can be used to submit post-trial memos and briefs to provide the court instant and secure access through the web. Similar to e-filing, electronic briefing tools offer additional functionality, such as the ability to hyperlink to related documents such as affidavits, case citations and exhibits within the brief. Furthermore, access to the brief and related documents can be restricted to those authorized, thereby maintaining the requisite security level.

Conclusion

The practice of law in the United States is at a tipping point, driven by the technology revolution. Better able to handle the ever-increasing amount of ESI, practitioners who leverage new and developing technology will have a strategic advantage over those that do not. What better time than now to embrace technology tools at every step of the litigation continuum?

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Hennepin County Affiliate News

The HCBA New Lawyers Section has been busy over the last few months. The section's Social Committee collaborated with MSBA and RCBA for a Tri-Bar Spring Social that was successful in providing a 55-gallon barrel of food and \$2,930 in donations to Second Harvest Heartland. The section's CLE Committee provided noon CLE's entitled "Employment Law 101" in April and "Primer on Estate Planning" in May. Additionally, the Professionalism Committee held Recess with Judges events in April with Judge Dickstein and in May with Chief Judge Weiland. The Community Service Committee collected over 500 used books for "Books for Africa" and made a donation for shipping and distribution. Finally, the HCBA NLS was able to sponsor five new lawyers to attend the ABA Spring Social Conference in Washington, DC in April.

The end of the 2007-2008 bar year for the HCBA New Lawyers Section has arrived, and marks new beginnings for the Directors and Officers who were elected in May. For more information about how you can become involved in the upcoming year, visit www.hcba.org.

Cyrenthia Jordan was the Chair of the Hennepin County Bar Association New Lawyers Section for the 2007-2008 bar year. She can be reached at jorda382@umn.edu or 612-624-8511.

Ramsey County Affiliate News

The RCBA NLS has had a great bar year and plans to continue reaching out to the community this summer. The section will be teaming up with the RCBA Families First committee to help organize and run the Families First Picnic in late July 2008. We would certainly welcome any volunteers interested in helping to host a picnic for disadvantaged children.

Co-chairs for the 2007-2008 bar year were Mark Priore and Elyssa Weber. They can be reached at mark_priore@yahoo.com and eweber@lmnc.org.

11th District Affiliate News

The 11th District New Lawyers have registered a team in the North Shore Dragon Boat Festival, which takes place in Grand Marais the last weekend in July. Our group plans on conducting some fundraising events in order to raise the money to compete in the contest and is putting together a practice schedule. We will be camping in Cascade State Park for the weekend and are all very excited about enjoying northern Minnesota in the summer.

Our group conducted elections in June for a new President. Our numbers continue to expand with the addition of several new faces to our legal community.

Stephanie Balmer was the Chair of the 11th District New Lawyers Section for the 2007-2008 bar year. She can be reached at mbalmer@duluthtriallawyers.com.

6th District Affiliate News

The Sixth District is transitioning from having a variety of officers move out of the area. Casey Callahan, who has recently accepted a job with the Blue Earth County Attorney's office, has begun to take over the primary leadership role for the 6th District NLS. We have been meeting monthly, and will resume those meetings in the fall.

Mark E. Betters is the current Chair of the 6th District NLS. He can be reached at 507-387-5661 or betters@manahanbluth.com.

Rochester Area Affiliate News

No report submitted.

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