

Names for Business Entities

To be “available,” a name must contain a different sequence of letters or numbers than names of active domestic corporations, limited partnerships, and limited liability companies and foreign corporations, limited partnerships and limited liability companies authorized to transact business in Michigan. However, availability does not always mean that the preferred name will be permitted to be used. Lawyers and their clients are frequently frustrated when notified that the name selected contains a word or phrase that is restricted or prohibited or, taken as a whole, implies a purpose other than a purpose permitted by articles of incorporation, articles of organization, or certificate of limited partnership. Foreign corporations, limited liability companies, and limited partnerships may transact any business a domestic entity could, as set forth in the foreign entity's application. A foreign entity may use a name that could be used by a Michigan corporation, limited liability company, or limited partnership and the name must be consistent with the purpose stated in the foreign entity's application for certificate of authority or application to register. If a foreign entity is unable to obtain a certificate of authority or registration in its corporate name, it may adopt and use in the state a name otherwise available for use.¹

Restricted Word List

A list of words and phrases restricted in use by law, rule, or public policy has been posted on the Corporation Division's Web site for several years. Generally, the list identifies limitations that are outside the statutes administered by the Corporation Division. Recently, the list was reviewed, revised, and updated to include current information and statutory citations for limitation or restriction. The restricted word list is available on the Web at www.michigan.gov/corporations

under “Forms & Publications” and then “Publications.”

The Business Entity Search feature will be upgraded to include name availability searching. If any words or phrases on the restricted word list are in the name being checked the program will identify the word or phrase and refer the user to the restricted word list. This additional feature will allow the person searching for name availability on the Web site to be aware if there are restrictions or limitations on the use of some words or phrases.

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Names Implying Services in a Learned Profession

For several years, if a corporation or limited liability company that did not provide services in a learned profession wanted to use a name or include purposes in its governing documents that implied they were providing such services, the documents were filed if the articles included a provision stating that the entity would not engage in activities that may only be performed by one of the learned professions. The option was crafted for situations in which an entity had a business reason for using the name but indicated that the entity was not offering to the public services of a learned profession. The Bureau of Commercial Services (Bureau) is aware that several entities that included such a declaration do, in fact, provide services in a learned profession and have exceeded their authority.

The Bureau is taking several steps to increase awareness that profit cor-

porations and limited liability companies providing services in a learned profession must be formed as professional service corporations and professional limited liability companies. The Corporation Division staff has been instructed to be more careful and ask more questions before accepting for filing documents with names or purposes that imply the entity is providing services in a learned profession. The Division is reviewing its records and may contact corporations and limited liability companies if the information in the record indicates that the entity may be improperly formed or exceeding its authority. The Bureau is reviewing its policies regarding such situations and will consider modifications that will increase the likelihood that entities will be formed and operate under the appropriate statute.

Frequently, an inconsistency between the purposes and the proposed name will result in the document being rejected. For example, filing delays may occur if a company that will be a management company or landlord has purposes or a name that imply that it is a health care provider. The purposes and name should accurately reflect what the entity is actually doing. If the articles have an all-purpose clause and the name implies the entity is providing services in a learned profession, a further inquiry into the business to be conducted will be made.

When to Form a PC or PLLC

The Bureau is frequently asked which services may only be provided by professional service corporations or professional limited liability companies. Section 201 of the Limited Liability Company Act, MCL 450.4201, specifically provides that a limited liability company formed to provide services in a learned profession must form as a professional limited liability company. “Services in a learned profession” is defined in section 102(p) of the Limited Liability Company Act, MCL 450.4102(p), as “services rendered by a dentist, an

osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law.” Attorney General Opinion No. 6592 held “that a corporation formed under the Business Corporation Act may not engage in activities that may only be performed by one of the learned professions” and defines the learned professions as medicine, law, and divinity. Profit corporations and limited liability companies providing professional services within these definitions must form as professional service corporations and professional limited liability companies.

The question of whether an entity must form as a PC or PLLC frequently comes up regarding the practice of medicine and health care. If professional services included within the Public Health Code fall within the “learned professions,” as those terms are defined in MCL 450.4102(p) and in OAG No 6592 (July 10, 1989) the organizers are precluded from forming a profit corporation or limited liability company unless it is formed as a PC or PLLC.

Professions outside of the learned professions can generally choose the type of entity they wish to use. However, if an entity is formed as a PC or PLLC, the requirement that all shareholders and all members and managers be licensed will apply. For professional services within the Public Health Code, all shareholders and all members or managers must be licensed in Michigan to render the same professional service. If there are restrictions on the services a specific licensed profession may provide to the public, the limitations on the activities of the licensee will restrict the options available to the licensed person.

Microdermabrasion falls within the definition of the practice of medicine, for example, and is not within the scope of practice of licensed cosmetologists or estheticians. Public Act 144 of 2004 added section 16276 to the Public Health Code and specifically provides that the use of lasers for dermatological purposes must be under the supervision of a physi-

cian.² MCL 333.16215 provides that acupuncture may be performed under the supervision of allopathic physician or osteopathic physician. Filing delays may occur if the name or purposes indicates that microdermabrasion, the use of a laser for skin treatment, or acupuncture services are provided but the entity is not a PC or PLLC.

Professional Service Included Within the Public Health Code

Section 4 of the Professional Service Corporation Act, MCL 450.224, and section 904 of the Limited Liability Company Act, MCL 450.4904, provide that if the professional service being provided to the public is included in the Public Health Code, all shareholders and all members and managers must be licensed in Michigan to render the same professional service. The Bureau of Commercial Services will defer to the Bureau of Health Professions for a determination of whether there should be any exceptions to the general rule. OAG No 7151 (March 9, 2004) held that chiropractors are not “physicians and surgeons” and a chiropractor may not organize a professional service corporation with an allopathic or osteopathic physician for the purpose of providing medical and chiropractic services.

Exceeding Authority

The powers of a corporation or limited liability company are in furtherance of the entity’s purposes. The powers do not expand the corporation’s or company’s authority and must be consistent with the act under which it is formed, other statutes of the state, and the articles of the entity. Provisions in the articles cannot expand an entity’s authority beyond the authority granted in the act under which the entity is formed.

If an entity exceeds its authority and engages in activities that are unlawful for that entity, prompt action is needed to remedy the situation. Frequently, the document may be corrected by simply amending the articles to include the activity within the purposes. For example, if an

existing profit corporation should have been formed as a professional service corporation and the shareholders are all qualified to be shareholders of a professional service corporation, the situation may be remedied with restated articles to switch from a profit corporation to a professional service corporation. Another option is to form a professional service corporation and merge the profit corporation into the professional service corporation. However, if the shareholders would not be qualified to be shareholders in the professional service corporation, major changes may be required. Changing the way an entity does business will be more difficult to remedy than correcting documents.

The statutes provide the state with draconian remedies if an entity exceeds its authority. For example, section 821 of the Business Corporation Act, MCL 450.1821, provides that the Attorney General may bring an action to dissolve the corporation on the ground that the corporation “repeatedly and willfully exceeded the authority conferred upon it by law” or “repeatedly and willfully conducted its business in an unlawful manner.” The Limited Liability Company Act has similar provisions. *See* MCL 450.4803. On March 4, 2005, the Michigan Attorney General issued a press release regarding a quo warranto action filed on March 3, 2005, in Macomb county to dissolve Complete Makeover Center/ Complete Makeover Management LLC. The company, which was formed as a limited liability company with an all-purpose clause, was not formed as a professional limited liability company and was alleged to lack authority to operate a plastic surgery center. The press release may be found at <http://michigan.gov/printerFriendly/0,1687,7-164-34739-111923--,00.html>.

NOTES

1. *See* MCL 450.1212 and 450.2016; MCL 450.2212 and 450.3011; 450.4204 and 450.5003; MCL 449.1102 and 449.1904.

2. MCL 333.16276.

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Licensing Watchdogs Get Tough

Imagine that you are listening to two men talking in a radio commercial while driving to work. One of the men, clearly involved in information technology, is venting to the other that his company is asking him to do unethical things. The company wants him to install software for which it does not have valid licenses. Easy solution, says the other, call 1-888-NO-PIRACY and turn your employer in!

Farfetched? Hardly. The scene is from a recent radio commercial being broadcast in Michigan and sponsored by the Business Software Alliance (BSA). The BSA and the companies that participate in the antipiracy campaigns sponsored by the BSA are becoming more aggressive and active across the country. There are many ways for you and your clients to avoid problems with software infringement, and this column discusses the background, strategies for addressing licensing issues, and dealing with the BSA.

Background

Software is protected by a variety of intellectual property laws. Like most creative works that are published, computer software is specifically protected by the U.S. copyright laws.

As many people are aware, one doesn't buy software at the store or over the Internet. What one obtains is the right to use the software in form of a license. Whether the license is formally signed with a vendor or entered into by clicking "I Accept" when the license agreement is displayed on the computer screen while loading software, these agreements are enforceable for both individuals and businesses. From a business standpoint, the company may be liable for software installed on its computers even if it was done without the knowledge or direction of the company's management. Things can be much worse if the illegal installation of software is done with the

knowledge or at the direction of company's management.

Under the copyright laws, the copying of software without a valid license is an infringement, and statutory damages may be assessed for as much as \$150,000 for each program copied to a computer without a valid license.

Licensing Compliance Strategies

There are four steps that each company should take to ensure software licensing compliance. Adherence to these steps will help protect the company in the event that the BSA or an individual software company comes knocking at your door.

Document Your Licenses. Software can be licensed in a number of different ways. Some is licensed along with a computer that is purchased through a vendor (such as Windows), while other software may be licensed with a computer or obtained separately from the computer itself (such as Microsoft Office). Other software can be licensed separately from the computer itself, especially software that is run on a corporate network. In any case, each entity needs to know the scope of the licenses it has, how the software is allowed to be installed or shared on a corporate network, and what versions of software are actually licensed.

Note that some licensing programs allow a company to install updated versions of the software across a corporate network, with licensing fees being paid for each individual user or computer node. Other software may be licensed on a concurrent user basis, whereby the number of users that are allowed to use the software at the same time is typically monitored by security software built in to the program. In any of these cases, however, having an accurate snapshot of your authorized licenses is important.

Installation Inventory. The second

step is to have a process to inventory the actual installation of software on your network. This can be done through the use of automated tools or through a physical inventory done at each computer serving the company. The inventory allows the company to make a comparison of the actual licenses available versus the installed software in the corporate environment. Hopefully, each installation is properly licensed. If not, the company has a legal obligation to either delete the unlicensed software or to obtain proper licenses for each installation.

Periodic Inventory of Software. Once one has done the first inventory and determined that the company is in compliance, the process is not finished. Because corporate environments change on a regular basis, one needs to do a periodic review of the computers on the company's network, especially after the acquisition of additional computers or the upgrades of software. This periodic review should become a standard operating procedure and should be a responsibility of the company's chief information officer or other person charged with technology responsibilities.

Company Policies. Having an appropriate company policy by which the company clearly states to its employees that illegal copying or use of software is prohibited by the company is a good first step. The policy should tell the employees that the installation of software (including downloading from the Internet) without the permission of the IT department is a prohibited practice. The better practice would be to have a network that functionally prohibits users from installing software without permission. Because that is a practical impossibility, diligent monitoring and the use of proper corporate policies can be effective to limit liability.

The BSA provides a number of resources on its Web site

(www.bsa.org), including its Software Management Guide. This guide includes sample policies and compliance suggestions.

Strategy if the BSA Comes Knocking at Your Client's Door

It is important to remember that the vast majority of inquiries from software companies directly or acting through the BSA are the result of a "tip" by current or former employees of the company that the company is illegally using software. To add insult to injury, tips to BSA often come from the very employee who was responsible for the illegal copying. (The sanctioning or termination of such an employee is often followed by his or her call to the BSA.) The knowledge by the company that an employee has engaged in this activity should result in immediate actions to rectify the situation before a request for an audit comes from the BSA.

So what really happens? The first communication to a company usually comes from a law firm retained to represent the BSA on behalf of several vendors, or on behalf of a specific software company. The initial inquiry will request that the company cooperate in performing a self-audit and an internal investigation because the vendor has been advised that the company is illegally using software. The law firm will not ask for the ability to inventory or audit the company's systems itself, but will request that the company conduct a self-audit of its systems and provide the results to counsel for the vendor. As part of the request for a self-audit, the vendor will demand that the company maintain its systems in the same condition as they existed on the date they were first contacted. While questionable authority exists for that demand, it is important to cooperate at this point in the discussions because the matters are invariably settled between the vendor and the company.

This inquiry should be taken seriously. Because the copyright laws

contain both criminal and civil penalties, company management should not disregard this inquiry. At this stage, most experienced counsel will recommend that a formal inquiry be established under the direction of the general counsel's office or outside counsel in order to establish a privilege for the conduct of the audit. Once the results of the audit are determined, those results should similarly be kept within the parameters of the control group in order to maintain the privilege.

Counsel will now have the difficult task of explaining the seriousness of the situation to the client. In the past, I have had clients compare the problem to a speeding ticket. Using the same type of analogy, this is closer to driving while impaired *and* without insurance or a driver's license. The BSA will typically look for damages in a settlement equal to two to three times the total cost of licensing all of the unlicensed products, plus an additional amount to help "fund" the cost of compliance programs around the country. In a large organization, this can easily reach several hundred thousand dollars. For these reasons, having a good understanding of the negotiating position and the rights and responsibilities of the parties in the negotiations are important.



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