



ATTORNEY'S REPORT

Spring 2013

SOCIAL MEDIA FOR ATTORNEYS **How *Not* to Get in Trouble**

Sure, social media offers a brave new world of opportunity for attorneys - from marketing and business development to collaborating with colleagues.

Yet the fact remains that Facebook, LinkedIn and the like are a potential minefield for unwitting attorneys. Ultimately, anything you post, tweet or otherwise share online is there for the world to read - whether it's opposing counsel, judges or even your own current and potential clients.

This has resulted in a few social media-attorney horror stories, such as the attorney who called a Florida judge an "Evil, Unfair Witch" in a blog post. This exercise in "free speech" resulted in a reprimand and a fine from the Florida Bar.

But it's not just attorneys getting in trouble for imprudent remarks on social media. A North Carolina judge was reprimanded for ex parte communication via Facebook with defense counsel in a child custody case. Then there's the litigator who requested a continuance to care for an ailing family member. Disciplinary proceedings commenced after vacation photos surfaced showing the attorney enjoying the nightlife in Cancun during this time!

Social media offers a brave new world of opportunity, yet the fact remains that Facebook, LinkedIn and the like are a potential minefield for unwitting attorneys.

7 Tips for Safe Social Networking

Confidentiality obligations and ethics rules can make using social media a challenge for lawyers. But plenty are making it work by studiously avoiding overlap between their personal and professional lives. Consider these seven tips for safely tapping the potential of social media in your law practice:

1 Control what the world can see. When it comes to sites like Facebook, the challenge is to master the constantly evolving privacy and personalization settings. By fine-tuning these controls, you can determine how you connect with other users, tags, applications and external sites — as well as control and limit who can see past posts and images.

Action: Set a default level of visibility by clicking on the gear wheel in the uppermost right-hand corner of your Facebook home page, then clicking on privacy settings in the pulldown menu. AllFacebook, the Unofficial Facebook Blog, suggests that after you've tweaked your privacy settings, you should view your public profile as everyone else will see it to ensure that you haven't missed any cringe-worthy pictures or posts.

2 Watch your online connections. Linking and "friending" is what makes social media, well, social. But be careful about connections or endorsements that a savvy opposing party could dredge up some day as evidence of a conflict of interest.

Action: Keep professional and personal contacts segregated in different networks. For example, use LinkedIn strictly for professional connections and professional friends, and restrict Facebook connections to friends and close colleagues.

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How *Not* to Get in Trouble, Cont'd.

3 Keep a close eye on your blog. Law blogging, or “blawging,” is a viable way to raise your and your firm’s professional profiles. It works very well in conjunction with Twitter and LinkedIn, and is a powerful tool for online reputation-building. Yet, it’s easy for anyone with an axe to grind (or fake Viagra to sell) to leave a highly visible comment on your law blog.

Action: Make sure you approve all comments before they are posted.

4 Avoid charges of unauthorized practice. Guard against charges of practicing law outside of your jurisdiction by being clear about where you are licensed and admitted to practice. Start by making sure you understand who you are communicating with online and their geographic location.

Action: Include disclaimers in online communications that clearly establish your licensure and geographic limitations on where you can practice.

5 Be careful with online advertising and client solicitation. There’s a difference between using online attorney- client matching services (i.e., websites that match participating attorneys with potential clients seeking representation) and outright advertising and solicitation of clients online. Ethics guidelines are still emerging and can be quite unclear. For example, some state bars require attorneys to maintain copies of any ads used, including copies of web pages used for advertising purposes. Others require specific disclaimers in online communication.

Action: There is little doubt that the Internet is a “public medium” in which attorneys are permitted to advertise. The key is to keep up with ethics opinions and rules in the state in which you practice. If you practice in more than one state, consider following the advertising rules of the most restrictive state in which you are licensed.

6 Don’t provide legal advice online. Participating in real-time chat forums and listservs can be a viable means of generating business. But there are dangers - from the unintended creation of an attorney-client

relationship to the risk of a malpractice claim from a reader who relies on the “advice” you supply and sustains a loss or damages.

Action: If you do answer a question online, include a disclaimer saying that you are not providing legal advice and specifically disclaim any attorney-client relationship.

7 Don’t say or post anything stupid. Your online posts, pictures and comments live forever. So don’t say anything online that you wouldn’t say to someone’s face, whether it be a client or opposing counsel.

Action: Exercise some editorial discretion before hitting the “return” button on your keyboard. If you’re not sure, wait a couple of hours, or even overnight. And make sure you can back up anything you say online - either as a legal proposition or a factual assertion.

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Build Your Online Reputation

In a sense, social media is simply another tool to attract new clients and new business to your practice. Ultimately, building a solid online reputation boils down to establishing yourself as the helpful expert in a particular area of the law.

The best advice might simply be this: Make great impressions by being professional in everything that you say and do online - and by offering value to those who you connect or interact with.

Source: 2012 ABA Legal Technology Survey Report

WHEN BUSINESS OWNERS DIVORCE

The Dangers of Double Dipping

In marital dissolutions, “double dipping” refers to the supposed unfairness that results when a marital asset is counted twice - once in the division of property and again for purposes of determining support.

If an interest in a closely held business is among the marital assets to be divided, a host of additional valuation and equitable distribution issues comes into play. Here, family law attorneys may benefit from assistance from outside professionals who can help with the valuation and division of business assets.

A Hypothetical Scenario

Let's look at a hypothetical situation to see how a double-dip scenario might play out: Bob Connors owns a flooring business that produces net income before owner compensation of \$300,000 and pays him \$150,000 in salary per year. In light of an impending divorce, a valuation expert is engaged to determine the value of the business and the earnings of both parties as a basis for calculating equitable distribution and spousal support payments.

Here, it is determined that the business is worth three times cash flows in excess of compensation, resulting in a value of \$450,000 (\$300,00 net income - \$150,000 salary x 3). But the valuation expert opines that the salary Mr. Connor is paying himself is higher than market value, and that fair compensation should actually be \$100,000.

When this \$50,000 difference is added back into the company's earnings, the resulting value is raised to \$600,000 (\$300,000 revenue - \$100,000 salary x 3). The adjustment for reasonable compensation

has raised the value of the business by \$150,000 - a substantial difference.

The valuation expert contends that the adjusted value of \$600,000 represents the fair market value of the company and is the figure that should be used for equitably dividing the business in the divorce. But the court bases spousal support upon the actual \$150,000 salary, not the adjusted reasonable compensation amount of \$100,000.

In theory, the \$150,000 has already been capitalized through the business valuation and is being equitably distributed to Mrs. Connors through her share of the business. Therefore, since the spousal support calculations are not based on the same compensation assumptions as the business valuation, she is double-dipping into the business.

Challenges to Equitable Distribution

A variety of issues arise to further complicate equitable distribution and the avoidance of double dipping.

Jurisdictional issues – For example, depending on the state in which the divorcing spouses live, some or all of the company's goodwill may be excluded from the marital estate when dividing assets - but only if the non-monied spouse receives alimony. Some courts reject the double dipping argument outright. For example, in *In re Marriage of White*, the California Court of Appeals dismissed the double-dipping argument as a “fallacy,” noting that “spousal support considerations are separate and distinct from property division concepts.”

Does Social Media Really Work?

- In firms with at least 500 attorneys, 4.2 percent say they have been retained due to blogging or social media actions.
- In firms with between 100 and 499 attorneys, 13.6 percent say they have been retained due to blogging or social media actions.

WHEN BUSINESS OWNERS DIVORCE

The Dangers of Double Dipping, cont.

Normalization issues – Normalization adjustments are customary when valuing a controlling interest in a private business using the income or market approach. For example, a company's historic income stream might be adjusted for revenues and expenses that are nonrecurring, unusual, or recorded at above- or below-market rates.

Family law attorneys may benefit from assistance from outside professionals who can help with the valuation and division of business assets.

How a CPA Can Help

Successful handling of delicate and complex matters such as these requires an interplay between the legal and the financial. To accomplish this, a family law attorney can benefit from teaming with a CPA who is experienced in matrimonial work and can assist both parties in coming to a fair and equitable resolution.

In particular, an experienced accounting professional can:

- Determine what documents are needed to complete a proper business valuation.
- Uncover the true cash flow and the underlying value of the business.
- Conduct a forensic analysis, if necessary, to “follow the cash.”
- Assist with determining equitable distribution and calculating support.
- Determine reasonable compensation and other normalization adjustments.

Because alimony payments are presumably based on the monied spouse's salary, the reasonableness of that compensation must be evaluated. When the monied spouse is underpaid or overpaid, alimony may be too low or too high.

Double dipping is a complex issue requiring the services of an accounting professional. Please feel free to contact our office for further guidance in this area.

Protecting Client-Attorney Privilege for CPA Services

The case of *United States v. Kovel* established that the attorney-client privilege can be extended to cover communications between a client and someone his or her attorney retains to provide accounting-related services. Here, the court noted that just as secretaries and clerks have been recognized as necessary to providing legal services, so should accountants.

But this privilege can be inadvertently waived under a variety of situations, making any resulting work product and communications discoverable.

For example, a client may unwittingly send attorney-client privileged information and work product to a CPA retained by his attorney "to look over." Conversely, a CPA who is busy calculating business losses may unknowingly waive the attorney-client privilege by e-mailing preliminary computations or a proposed strategy directly to the client, rather than sending it to the attorney.

To maintain this important privilege, consider these basic safeguards:

- **Engage** – In most cases, the attorney should engage the CPA as an agent utilizing a written agreement that specifies how the work relates to and furthers the provision of legal services.

- **Ensure** – In addition, all parties should take steps to ensure that privilege is not waived by disclosure - intentionally or inadvertently - to a third party not considered sufficiently involved in providing legal services. By having the client and CPA communicate only through the attorney, the attorney-client privilege can be preserved.

- **Strengthen** – To strengthen the case for privilege, attorneys should make sure that the retained accountant carefully documents the work he or she does and how it relates to providing legal services. The legal purpose of accounting services should be documented at the time a service is sought, provided and billed.

Sources: The Journal of Accountancy and the American Accounting Association.

Mueller Prost PC is a team of CPAs and business advisors headquartered in St. Louis. From humble beginnings on a ping-pong table in 1983, the corporation has grown into one of the leading CPA and business advisory firms in the area, operating out of two locations with more than 90 staff members. By **Advising with Vision**[®], we offer clients new and unique ways to look at their businesses. Our forward-thinking CPAs and advisors stand ready to provide depth of expertise, strategies and resources required to help clients set and achieve their goals at every stage of the business lifecycle. As a member of PKF North America (an association of independent CPA firms), our team has the ability to leverage national resources when needed to benefit client engagements.

Our firm offers a full range of professional tax, audit, accounting, litigation support and management advisory services to the legal community.

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