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Dangers in the Digital World

Navigating your remedies when the Web attacks

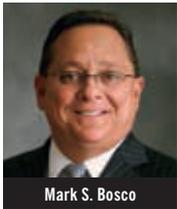
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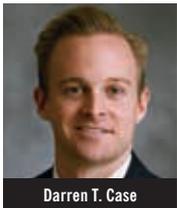
PROFESSIONAL AND PERSONAL ACHIEVEMENT

MARK S. BOSCO was recognized as an Az Business Leader (2015) by Az Big Media for his work in banking law. Az Big Media selects Arizona's most respected and influential business leaders in its annual publication, *Az Business Leaders*.



Mark S. Bosco

DARREN T. CASE was elected to serve as Vice President of Central Arizona Estate Planning Council for the 2015-2016 year.



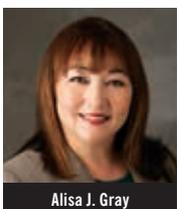
Darren T. Case

DAVID L. CASE is the 2014-2015 recipient of the State Bar of Arizona Probate and Trust Section Eleanor ter Horst Distinguished Service Award, presented at the 2015 Arizona State Bar Convention,



David L. Case

which is awarded to an attorney who has "demonstrated superior knowledge of the law of probate and trusts and the willingness to share his or her knowledge with the bar, the bench and the public." He was also the chair and a speaker for the Probate and Trust Section of the Arizona State Bar's annual "CLE By The Sea" program in San Diego. David organized the topics, speakers, and chronology of this three-day program for the third time in five years.



Alisa J. Gray

ALISA J. GRAY has been selected by *AZ Business Magazine* as one of the 50 Most Influential Women in Arizona Business for 2015. Alisa will also be speaking

at the September 2015 National Association of Elder Law Attorneys Conference regarding ethics and best practices, and participating in the Arizona Women Lawyer's Association Convention on November 13, 2015.

RICHARD G. HIMELRICK'S article entitled *Equitable Defenses Under Arizona Securities Law* is scheduled for publication in Volume 9 of the Arizona Summit Law Review. Rich



Richard G. Himelrick

also presented a program, *Raising Money, Regulation, and Litigation in Arizona*, at the Arizona State Bar Convention in June.

PAMELA L. KINGSLEY has been selected by the Greater Phoenix Chamber of Commerce to be a member of the Advanced Business & Financial Services Leadership Council, an industry-led collaboration committed to strengthening the named-sector in the greater Phoenix region by raising its profile and expanding its talent pool in high-growth areas. Still educating



Pamela L. Kingsley

clients and others on employment law, Pamela also made several presentations to various human resource groups during the first half of 2015, providing timely updates on new amendments to the National Labor Relations Board's regulations aimed at streamlining the union election process. The new rules apply in Arizona despite its status as a right-to-work state.

STEPHEN LINZER, head of the Automotive and R.V. Industry Practice Group at Tiffany & Bosco, P.A., was elected President of the National

Association of Dealer Counsel ("NADC") at its 11th Annual Member Conference held in April 2015. NADC is a nationwide, professional organization of attorneys who represent automobile and other vehicle dealers.



Stephen Linzer

MAY LU has been reappointed for a three-year term to the State Bar's *Arizona Attorney Magazine* Editorial Board.



May Lu

MICHAEL E. TIFFANY was selected by *Chambers USA* (2015) as one of the best real estate attorneys in Arizona. He was also recognized as an Az Business Leader (2015) by Az Big Media for his work in real estate law. Az Big Media selects Arizona's most respected and influential business leaders in its annual publication, *Az Business Leaders*.



Michael E. Tiffany

GREGORY L. WILDE has been reappointed for a third consecutive one-year term to the State of Nevada Foreclosure Mediation Program Advisory Committee. The Committee monitors and evaluates the effectiveness



Gregory L. Wilde

of the program and makes recommendations to the Nevada Supreme Court for proposed rule changes intended to improve the program for homeowners and lenders alike.

ANNOUNCEMENTS



Arizona Defense Verdicts

T&B ATTORNEYS ACHIEVE SIGNIFICANT JUDGMENTS

Arizona Attorney Magazine named seven significant defense verdicts of 2014 in its June 2015 issue. Among those defense verdicts were two Maricopa County Superior Court cases tried to juries by Tiffany & Bosco, P.A. attorneys.



Gregory E. Williams

GREGORY E. WILLIAMS tried *Veronica Monge v. Sun Valley Masonry, Inc., et al.*, CV2010-081037, a wrongful-death case involving a construction worker who was killed in a forklift accident. Greg defended the forklift driver and the driver's employer. The decedent's widow and six children sought more than \$14 million in damages. After the 10-day trial, the jury returned a total defense verdict after deliberating for only three hours.



Carlotta L. Turman

CARLOTTA L. TURMAN tried *Michelle Guarrera v. Bruce Sawyer, et al.*, CV2010-080615, a real estate matter involving the alleged failure to disclose pet odor and the number of pets that lived in the subject property over a 25-year period. Carlotta was on the defense team that defended the real estate agent. Ms. Guarrera sought \$306,531.62 in compensatory damages and \$612,000 in punitive damages. After the six-day trial, the jury returned a total defense verdict after deliberating for only a few hours.

Supporting Arts and Culture

The Financial Services department has once again agreed to serve as the presenting sponsor for the Scottsdale Cultural Council's Free Tickets to Veterans, Students, and Teachers program. To date, nearly 3,000 complimentary tickets have been provided through the program for a variety of events at the Scottsdale Center for the Performing Arts.

In addition to this very successful program, the Financial Services department is also sponsoring the new "29

Under" program, which provides arts lovers 29 years and under with a 50 percent discount of tickets for selected events. Tickets may be purchased online, by phone or in person using promo code 29UNDER.

Tiffany & Bosco, P.A. has a long history of supporting the arts throughout Arizona. Managing Attorney Mark Bosco states, "We are proud to continually support the Scottsdale Cultural Council and Scottsdale Center for the Performing Arts, and

FIRM NEWS

Shareholders Recognized as 'Best Lawyers in America'

Best Lawyers In America, a designation based entirely on peer-review and assessment of professional abilities from colleagues within the same geographic and practices areas, selected 11 Tiffany & Bosco attorneys for 2016:

Mark S. Bosco (Litigation - Banking and Finance; Mortgage Banking Foreclosure Law); **Michael A. Bosco Jr.** (Real Estate Law); **David L. Case** (Trusts and Estates; Litigation - Trusts and Estates); **James A. Fassold** (Litigation - Trusts and Estates); **Alisa J. Gray** (Litigation - Trusts and Estates); **Richard G. Himelrick** (Litigation - Securities); **Christopher R. Kaup** (Bankruptcy and Creditor Debtor Rights/Insolvency, and Reorganization Law; Litigation - Bankruptcy); **Leonard J. Mark** (Family Law); **Robert D. Mitchell** (Commercial Litigation); **James P. O'Sullivan** (Closely Held Companies and Family Businesses Law); and **Michael E. Tiffany** (Real Estate Law).

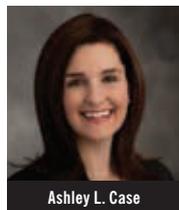


to provide even more opportunities for young arts lovers in Arizona. Investing in the arts not only improves quality of life, but also creates awareness of all the great cultural events in Arizona."

NEW FACES

ASSOCIATES

ASHLEY L. CASE joined the firm in May 2015. Ashley concentrates her practice



Ashley L. Case

in estate planning and probate. Before joining the firm, Ashley founded The Law Office of Ashley L. Case, P.L.L.C., which she successfully operated

for more than six years. Ashley graduated from Arizona State University with a degree in Marketing and a minor in Mass Communication in 2004. She received her Juris Doctor from Chapman University School of Law in 2008, where she was the founder and editor-in-chief of The Chapman Law Courier, the law school newspaper. Prior to starting her own law practice, Ashley trained judges, attorneys, and paralegals how to conduct legal research at numerous federal government agencies, including the Pentagon, the Executive Office of the President, the Senate, the District of Columbia Court of Appeals, and the United States Army and Air Force in Washington, D.C.

SARAH K. DEUTSCH joined the firm in April 2015. Sarah practices business and



Sarah K. Deutsch

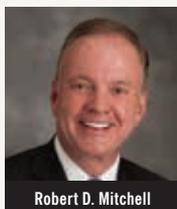
commercial litigation with an emphasis in securities litigation. Sarah received her Bachelor of Science in Justice Studies in 2004 from Barrett, the Honors

College at Arizona State University. She obtained her Juris Doctor in 2008 from the University of Wisconsin Law School, where she was an editor for the Wisconsin Law Review and an intern for Judge Barbara B. Crabb of the United States District Court, Western District of Wisconsin. Sarah is licensed in Arizona and Wisconsin (currently inactive).

MEGAN R. JURY joined the firm in May 2015. Megan concentrates her practice in commercial and business litigation, as well as securities and financial litigation.

SHAREHOLDERS

Tiffany & Bosco Adds Top Litigator



Robert D. Mitchell

ROBERT D. MITCHELL joined the firm as a Shareholder in April 2015. Robert represents clients in litigation and arbitration in Arizona, California, Texas, and Utah. Robert's areas of concentration include commercial and business litigation, securities and financial litigation, and business tort litigation. Robert is a graduate of the Arizona State University

College of Business (B.S., Accounting) and the Arizona State University Sandra Day O'Connor College of Law (Juris Doctor). Robert is rated AV-Preeminent by Martindale Hubbell, listed in *Best Lawyers in America* for Commercial Litigation, is a sustaining member of Arizona's Finest Lawyers, and a Southwest SuperLawyer.



Megan R. Jury

Previously, she practiced product liability defense litigation. She graduated *summa cum laude* from Northern Arizona

University in 2002 with a Bachelor of Science in Psychology. Megan received her Juris Doctor from Arizona State University, *magna cum laude*, in 2007.

LAURA L. WOCHNER joined the firm in June 2015. Laura received her

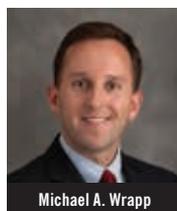


Laura L. Wochner

Juris Doctor from the Sandra Day O'Connor College of Law at Arizona State University. During law school, Laura was named a Willard H. Pedrick

Scholar for academic excellence, served as an Associate and Articles editor for *Jurimetrics: Journal of Law, Science, and Technology*, and graduated with a Pro Bono Distinction. Prior to law school, Laura had a successful career as an Arizona small business owner and is able to use the knowledge and experience she gained from running her own business to better serve her legal clients. Laura is licensed to practice in Arizona.

MICHAEL A. WRAPP joined the firm in May 2015. Michael focuses his



Michael A. Wrapp

practice in the areas of real estate and banking litigation and transactions, as well as financing, corporate law, business planning, and formations.

Michael earned his Bachelor of Arts degree (2010), his Juris Doctor (2014), and his Master of Business Administration (2014) from the University of Notre Dame. During law school, he served as an Executive Article Editor for the Notre Dame Journal of Law, Ethics & Public Policy, and his Note was published in the Journal. Michael's MBA background enables him to understand clients' issues from a business perspective in addition to a legal one. He is licensed to practice in Arizona and California.

FIND AN ATTORNEY

See the directory on the back page of this newsletter or visit us online at tblaw.com.

BUSINESS

Court is 'Now Open'

A new venue to litigate your business disputes

By AARON T. LLOYD

On July 1, 2015, the Maricopa County Superior Court joined approximately a dozen other jurisdictions in the United States by establishing a commercial or "business" court to hear civil disputes that arise in commercial settings. The commercial court is a three-year pilot program in Maricopa County. The Arizona Supreme Court may make the commercial court permanent in Maricopa County, or extend the program state-wide, if the court views the commercial court as a success.



Aaron T. Lloyd

A new lawsuit filed after July 1st in Maricopa County is eligible for inclusion in the commercial court provided: (1) at least one plaintiff and one defendant are business organizations; (2) the primary issues of law and fact concern a business organization; or (3) the primary issues of law and fact concern a business contract or transaction.¹

A common example of a commercial court case is one concerning the internal affairs of a limited liability company, partnership, corporation, or joint venture.² Other common examples include claims among members, partners, and shareholders, claims arising out of real estate transactions, claims arising out of a franchisor-franchisee relationship, claims involving trade secrets and misappropriation of intellectual property, and claims involving



the purchase or sale of securities or allegations of securities fraud.³ These types of cases can be heard in commercial court no matter how minimal the amount of money in dispute, provided the Maricopa County Superior Court jurisdictional amount is met.

Other cases, such as breach of a promissory note or those involving the sale of services by or to a business organization, may be heard in the commercial court provided the amount in dispute exceeds \$50,000.⁴ Cases filed before July 1st will remain outside the commercial court's jurisdiction.

Judges Roger Brodman, Dawn Bergin, and Christopher Whitten were appointed as the three judges to sit on the commercial court based, in part, on their knowledge and background in handling business cases. All commercial court cases will be heard in the downtown Phoenix court complex. The establishment of the commercial court will change the way business dispute cases are handled as the three judges have already said that they will place a heavy emphasis on the expeditious resolution of business disputes given the often costly nature of litigating these cases. The parties in a commercial court case will be required to follow new rules of procedure mandating early communication among the attorneys and the judge on matters relating to

scheduling and case management in order to assist the parties in meeting the goal of efficient and cost-effective dispute resolution.⁵

One especially unique aspect of the commercial court will be the repository of decisions issued by the judges. This database of helpful information will be available to the parties online and will assist the parties in understanding how the judges may rule on a particular legal issue. Another particularly helpful tool will be the heavy focus on handling electronically stored information (ESI) at an early stage in the case. With an increasing amount of relevant information being stored on electronic devices or in the cloud, the emphasis on the ESI issue at an early stage in the case by judges knowledgeable on the topic is expected to be very beneficial.

The litigators at Tiffany & Bosco, P.A. expect a significant portion of their cases to be heard in commercial court given the broad range of cases subject to inclusion in the new and mandatory program. Our attorneys are always available to discuss your commercial dispute with you and represent you or your company's interest inside and outside of the commercial courtroom.

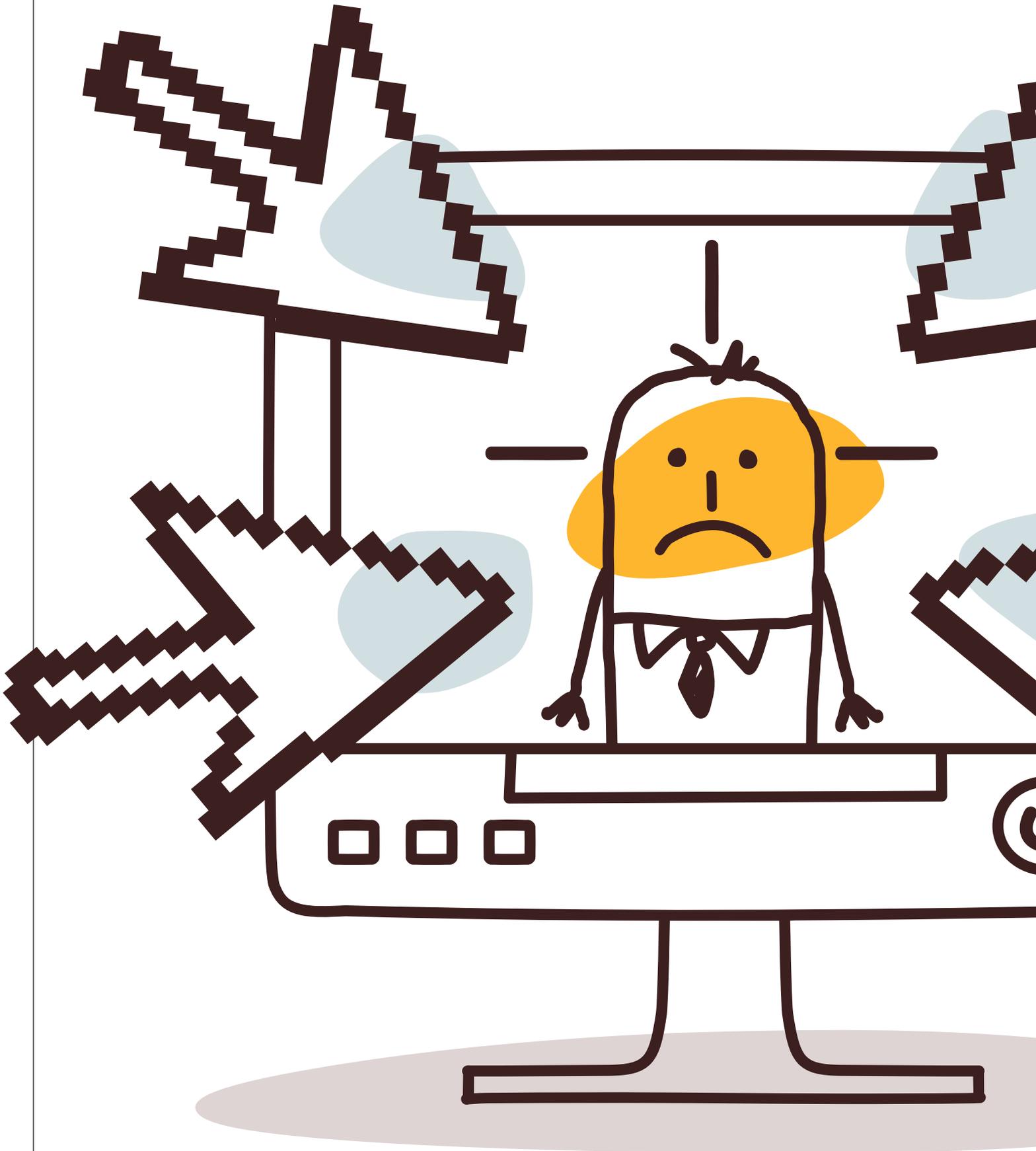
1 Experimental Rule 8.1(a)(1), Arizona Rules of Civil Procedure.

2 Experimental Rule 8.1(b)(1).

3 Experimental Rule 8.1(b)(2)-(9).

4 Experimental Rule 8.1(c).

5 Experimental Rule 8.1(f).



Dangers in the Digital

DIGITAL DEFENSE

By ROBERT D. MITCHELL

What can you do when you have been defamed on the internet?

Claude enjoyed dining at his neighborhood bakery, Twinkles & Crème (T&C). Claude particularly treasured the “Crème-de-la-Crème,” a two-pound doughnut baked with Spanish flour, stuffed with raspberry crème and sprinkled with fresh Hawaiian coconut. Claude devoured Crème-de-la-Crèmes until one day he opened the bakery’s doors in disbelief — Crème-de-la-Crèmes had been discontinued. Enraged, Claude anonymously posted on numerous Internet websites that T&C “baked with non-FDA approved ingredients” and “exploited child labor for profit” — neither being true.

T&C intends to sue the author of the websites and the statements for defamation, but because the statements were anonymous, T&C does not know the author’s identity and must find a way to obtain it. T&C also wants the statements removed from the websites. Are these achievable objectives?

CLAIMS AGAINST INTERNET SERVICE PROVIDERS

To properly allege defamation, T&C must show: (1) a false and defamatory statement; (2)

unprivileged publication; (3) fault; and (4) harm. In the Internet context, the Communications Decency Act (“CDA”), 47 U.S.C. § 230, *et seq.*, governs publication of another’s defamatory statement. Specifically, a provider or user of an “interactive computer service” (such as Internet websites) will not be treated as the publisher or speaker of information provided by another “information content provider” (those partially or wholly responsible for the content’s creation).

Consequently, the CDA immunizes the websites that published Claude’s defamatory statements provided they did not “create” any of the content. The CDA does not, however, protect the content’s author — if T&C can discover his or her identity.

continued on page 8 >>

GET ANSWERS

Please contact Tiffany & Bosco if you need assistance in, or have any questions regarding, this practice area.

continued from page 7 >>

OBTAINING AN ANONYMOUS INTERNET SPEAKER'S IDENTITY

While the First Amendment shields Claude's right to anonymity, defamation is never protected speech. T&C can therefore obtain Claude's identity by requesting a court order compelling disclosure — though this may not be as simple as it sounds. T&C must show: (1) Claude received adequate notice and reasonable opportunity to respond; (2) its claim could survive a summary judgment motion; and (3) balancing the parties' interests favors disclosure.

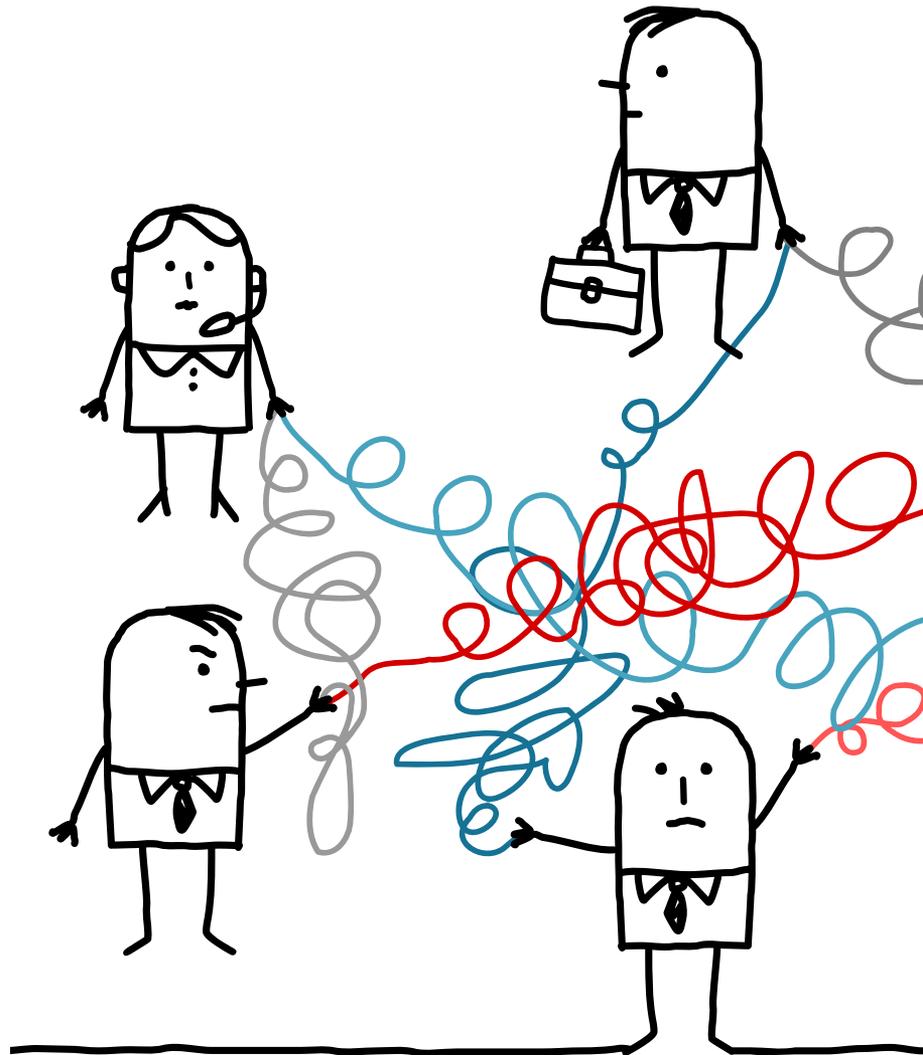
Directly responding to a defamatory statement generally satisfies the first element. For example, T&C could simply reply to the website postings and wait a reasonable time for Claude to respond. To meet the second element, T&C must show a genuine issue of material fact exists, such as whether the statements were actually defamatory. Lastly, because defamation is not protected speech, T&C's inability to proceed with its case likely outweighs Claude's loss of anonymity.

INJUNCTIVE RELIEF

T&C could obtain supplemental relief by requesting an injunction. This may be necessary if Claude refuses to cooperate with T&C's requests for identification of the author. If granted, the court could order Claude to remove the defamatory postings and enjoin him from making similar statements in the future.

CONCLUSION

In summary, the law views interactive computer service providers, such as complaint and review websites, as the "town square," and the town is not liable for what individual members of the public say in the town square, no matter how defamatory. The key to obtaining relief for Internet defamation is identifying and pursuing claims under traditional defamation theories against the author of the statement.



SO YOU WANT TO SUBPOENA YOUR ADVERSARY'S GMAIL, FACEBOOK POSTINGS, AND TEXT MESSAGES ...

BY WILLIAM M. FISCHBACH

E-mail and text messages are undoubtedly the preferred method of communication in today's business environment. Consequently, civil discovery often focuses on the retention and acquisition of these electronic communications. One party typically propounds a discovery request to its opposing party requesting the production of all relevant e-mails within a certain time frame, and the other party responds. The concern that often arises is whether the party responding to the request has provided every relevant electronic communication in the party's possession. The old Russian proverb *doveryai no proveryai* — "trust but verify" — would seem to apply. So how to verify?

When a party sends and receives e-mail in Microsoft Outlook or a similar application, she will likely maintain and have access to her own private e-mail server. In that instance, someone can typically image the data on the e-mail server to obtain relevant e-mails. A

SO YOU WANT TO SEE YOUR ADVERSARY'S PHONE RECORDS ...

BY ASHLEY N. ZIMMERMAN

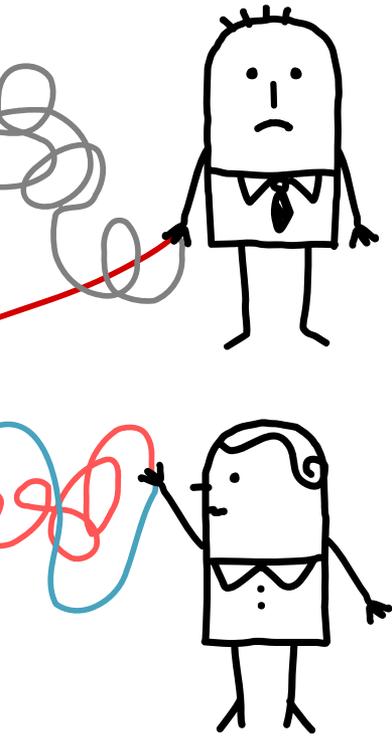
In addition to the restrictions imposed on the disclosure of cellular phone records by the Stored Communications Act ("SCA"), 18 U.S.C. § 2701, *et seq.*, cellular phone companies maintain disclosure and retention policies for data on their users.

Much like subpoenas to e-mail hosts, subpoenas to cellular phone companies must be directed to the company's dedicated subpoena division, and include user information such as the user's name, telephone number, Internet Protocol (IP) address, date and time of connection, and in some instances, time zone. Additionally, each individual cellular company maintains different information for different periods of time. For purposes of discovery, this may put litigants in a position where they seek information that is simply no longer available.

For instance, Verizon Wireless typically

stores call and text message detail records for only one-year, whereas Sprint typically stores this information for 18-24 months; T-Mobile stores this information for two years for a pre-paid user and five-years for a post-paid user; and AT&T "varies" on its retention. These "detail records" include only the number sent to and the date and time of the call or message. For text message content, Verizon Wireless typically stores this information for three to five days, whereas T-Mobile and AT&T do not retain message content.

Many cellular phone companies' subpoena divisions will attempt to notify the user its cellular phone data is being subpoenaed. The information will then be produced unless the court enters an order stopping the production. Whether looking to subpoena phone records or faced with a subpoena of your own records, you should consult with counsel to obtain or protect the information sought.



third party vendor can be retained to identify and disclose only those e-mails relevant to the dispute and to remove any privileged communications, such as e-mails to or from one's attorney or spouse.

But suppose your opposing party uses only web-based e-mail such as Yahoo or Gmail. You can ask that the opposing party produce all the relevant e-mails, but how do you know the party did not hold something back? Can you serve a subpoena on Yahoo or Gmail to obtain the e-mail communications?

The answer is, "Probably not." The reason is that web-based e-mail providers can invoke the Stored Communications Act ("SCA"), 18 U.S.C. § 2702, *et seq.* The SCA generally prohibits providers of electronic communication services from divulging "the contents of a communication" maintained by the provider. Although there are some exceptions to the rule — such as a subpoena issued by a law enforcement agency — every court that has addressed the issue has held that web-based e-mail providers cannot disclose electronic communications in response to civil subpoenas. This prohibition extends not only to e-mails, but also to text messages maintained by mobile phone carriers such as Verizon and AT&T Wireless. Some courts have also found that the

SCA prohibits the disclosure of private Facebook posts, i.e., posts visible only to your Facebook "friends," but does not prohibit the disclosure of Facebook posts that are viewable by all members of the public.

Note that the SCA prohibits only the disclosure of "the contents of a communication." It does not prohibit the disclosure of other information such as the identity of a particular account holder, IP address information, the date, time, and originating phone number of a text message, and other non-content information. This non-content information can be particularly useful in cases involving "hacking" or other unauthorized access to an electronic communication medium.

Finally, the SCA should not be viewed as a license to delete e-mails or other electronic communications that may be relevant to a brewing dispute. Litigants and potential litigants are obligated to preserve such information even in the absence of a formal request. This includes ensuring that relevant data is not overwritten in the normal course of business. Before disposing of e-mails or other electronic communications that may be relevant to a current or future dispute, you should always consult with counsel first.

LEGAL REVIEW

Keys to Navigating the Buy/Sell Highway

Keeping the “success” in succession planning

BY JAMES P. O’SULLIVAN & MAY LU

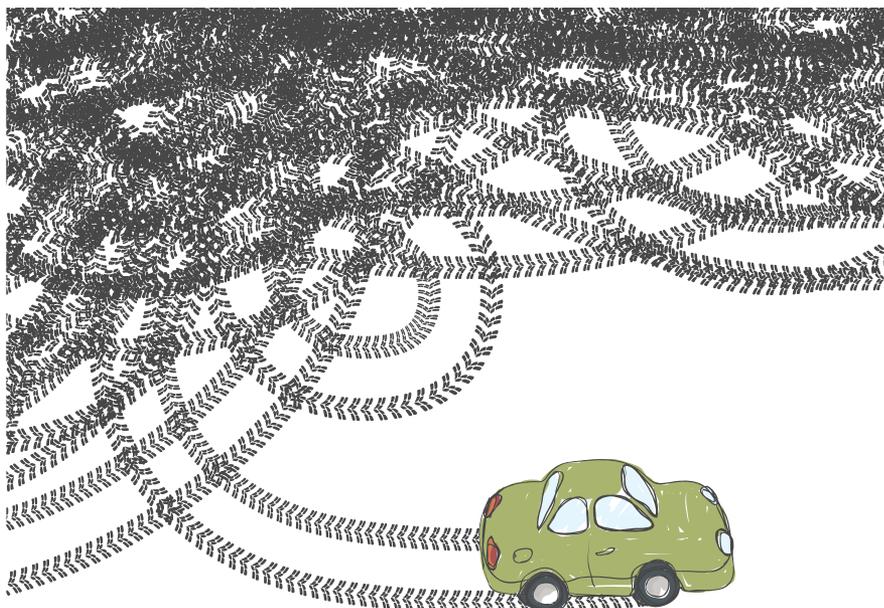
Are you considering selling your business? If not now, a bit further down the road? Whether you are expecting a leisurely drive with the top down or a rally-car cliff hanger, some special insights can help you avoid wrong turns and dead ends.

requires informed pre-planning — impromptu excursions can lead to unexpected results. If you start at the last minute, many of the resources and planning tools will no longer be available. Various types of trusts, gift giving, long-term purchase and sale agreements, deferred buy outs, and other mechanisms that can save you money and ease the burdens of the trip often cannot be capitalized on without advance planning.

a great time to inventory and review all of the governing documents for the business (e.g., Articles of Incorporation and other state public records, tax filings, Bylaws, Operating Agreements, and Buy-Sell Agreements), as well as any estate planning or other succession planning documents. If documents were drafted but never signed, add those to the stack for review and receive the benefit of any “hindsight” since the drafts were prepared.

Have you changed lawyers since important documents were drafted or signed? Make sure your current counsel has access to those files. It is a uniformly unpleasant and commonly expensive experience to be in the midst of a business sale (or owner divorce) and be faced with a claim from a former employee (or spouse) based on a signed document no one else remembers.

The focus of the succession contracts should be an orderly internal transition or sale to a third party. For example, what will trigger buyout rights? How much will be paid, when, and to whom? How will payment be secured? Would life or disability insurance help provide buyout liquidity and working capital during transition?



WHAT’S MOTIVATING YOUR MOVE?

It is always better to have as the reason for your sale, thoughtful planning for the good of your family and employees rather than finding yourself on the dreaded “D List” (Disenfranchisement, Default on Debt, Divorce, Disability, or Death). Whatever the motivation, careful analysis of your circumstances, clarifying your transition goals, and engaging skilled advisors will enhance your potential for a successful succession.

EARLY TRIP PLANNING CRITICAL.

When anticipating a trip, just as you need to know road conditions and have navigation aids, the succession highway

POP THE HOOD & CHECK YOUR TIRE PRESSURE.

How prepared is your vehicle for this journey? As you head on down the road, are you hearing strange noises that suggest difficulties ahead? Do you have significant liabilities such as tax or employee matters? Can you safely make the buyer’s requested representations and warranties? Are there any undesirable long-term contracts? Any third-party consents required? Have you taken care of personal items previously run through the business so that you can avoid add-backs required by the buyer?

ROAD WORK NEXT 10 MILES.

Having determined where you want to go and inspected your vehicle, now is

ARE WE THERE YET?

Gifts of ownership and related estate planning are best accomplished when transition is still hypothetical, and not immediately after signing the letter of intent to sell the business. Your best move is to start the discussion early and to involve your attorney, CPA, or other tax advisor, mergers & acquisitions intermediary, insurance advisor, banker, and wealth management planner.

HAPPYLAND: NEXT EXIT.

Although Confucius (551–479 BC) is widely credited with the following quote, our money is on Bill Murray (1950–AD): “And remember, no matter where you go, there you are.” So, why not get underway? Beep Beep.

LEGAL REVIEW

Tax Simplification Foiled Again

Portability of the unused estate and gift tax exemption of the predeceased spouse

BY DAVID L. CASE

The concept of “Portability,” first enacted by Congress in 2010, was made permanent by the American Taxpayer Relief Act of 2012, for 2013 forward. Essentially, under these rules the surviving spouse can transfer or “port” the unused exemption of the first spouse to die to the surviving spouse for later use for gifts during life or for estate tax at the second death.

The Treasury regulations and new tax forms refer to the exemption amount to be carried over for use by the surviving spouse as the “DSUE,” an acronym for “deceased spouse unused exemption.” The Form 706 Estate Tax Return now includes a schedule for computation of the DSUE amount for a decedent with a surviving spouse, as well as line items for its use at the death of the surviving spouse. DSUE can be claimed and preserved only by the timely filing of a properly prepared Estate Tax Return, even if one is not otherwise required to be filed. The Form 709 Gift Tax Return also now includes information for use of a DSUE amount by the surviving spouse for lifetime gifts. These rules include the requirement for use of DSUE for taxable gifts before use of the donor’s own gift tax exemption.

Though gift splitting for tax purposes by married couples was introduced in 1948 (see I.R.C. §2513), allowing spouses to share their gift tax annual exclusions and exemption amounts during life, until passage of this new Portability legislation, there has never been a mechanism in the law to take advantage of unused estate and gift tax exemption of the first to die by the surviving spouse. Because Portability has been widely thought to be fair and reasonable from inception, it seems

to be “politically” safe, and is not on the current administration’s wealth transfer tax planning list of items for elimination appearing in the annual budget proposals.

The often publicized goal of this legislation was to allow a surviving spouse to take advantage of the unused exemption of the first to die even if there was no estate planning, and it was thought Portability would thereby provide simplification and remove the need for complicated tax and trust planning. This author believes these goals have not been realized in most situations, and in fact Portability has made planning much more complicated for many clients. This elective tool has created the need for analysis of planning options that did not exist before, including that for larger estates, which were not the focus of Portability at all.

Because of many substantial benefits of trust planning including those relating to creditor and divorce protection (both for the surviving spouse and children), despite the availability of Portability for preserving perhaps many of the benefits of the estate tax exemption of the first to die without use of the traditional credit bypass trust and/or Q-TIP trust, most clients are still opting for use of trust planning.

In addition, Portability cannot preserve any unused generation-skipping transfer tax (“GSTT”) exemption of the first spouse to die, which can be very valuable for medium to large size estates. Also, no matter how large a formula clause credit bypass trust may grow between the first and second spouse’s death, it will be entirely protected from estate tax at the second

death, and if also covered by the GSTT exemption of the predeceased spouse, it can pass wealth transfer tax free for additional generations. The DSUE is frozen in amount, cannot grow with the assets over time, and can only be utilized against wealth transfers by the surviving spouse. And as explained below, the DSUE amount may be lost in certain situations.

Many planning techniques also are developing for use of the DSUE amount for various types of gift planning by the surviving spouse, including techniques related to advanced tax planning for larger estates. So again, simplicity has not resulted from the Portability legislation for many clients.

There are several complex rules in the legislation and Treasury regulations related to remarriage. Though remarriage does not, by itself, cause the loss of a predeceased spouse’s DSUE amount, only the properly-elected DSUE amount of the last predeceased spouse can be used by a surviving spouse.

For example, if a surviving wife (W) has a properly elected DSUE amount of \$5 million from her predeceased first husband (H1), then marries H2 who later dies during W’s lifetime after H2 used up all his exemption for lifetime gifts, W ends up with no useable DSUE amount. This rule, as well as several others under Portability, has resulted in the development of many planning techniques related to this new area.

Portability is a welcome and useful tool. For some clients, it may provide reason to simplify estate or trust planning, if the other benefits of such planning are not as important to them or practical. For many clients, however, it will require consideration of additional planning options, and may give rise to beneficial additional tax planning. But in almost all cases, it will require further analysis of options that did not previously exist. Thus, Portability cannot be characterized as simplification and cannot provide the benefits of proper tax and trust planning for many taxpayers.





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