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DEALING WITH NEGATIVE COMMENTS ON SOCIAL MEDIA

Special Interest Articles

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By: Phil Zisook

1031 EXCHANGES – BUILD WEALTH AND SAVE ON TAXES

By: Alena Jotkus

About Our Law Firm

We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

LEGAL PRACTICE AREAS:

- *Banking and Creditors' Rights*
- *Corporate and Other Business Transactions*
- *Defamation, Privacy and First Amendment*
- *Employee Benefits*
- *Employment Law*
- *Estate Planning, Probate and Trust Administration*
- *Health and Fitness Industry*
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Your business or profession uses social media as part of its marketing plan. You update content regularly on your website and have added a blog in which clients and the general public can participate. With this added content, you've been able to quantify an increase in visits to your website and search engine "hits".

However, another side to social media keeps you up at night. Recent posts on sites like "Yelp!" and "Google Reviews" have been critical of your business or services. And, they're 100% false! You're concerned that these negative comments could motivate clients and prospects to seek out your competitors and otherwise irreparably harm your reputation. Negative posts on social media are increasingly common today. Sometimes, the posts are written by disgruntled clients. Other times, the posts are simply false, written under pseudonyms, and disseminated maliciously, with the calculated intent to cause injury to a business.

What can you do to combat negative posts on social media? The correct approach is determined by analysis and consideration of multiple factors.

Developing an Effective and Efficient Strategy to Remedy Defamatory Posts on Social Media.

There are several things you must consider if you or your business are confronted with negative posts on social media. For example, even when speech is negative and malicious, not all such statements are actionable. Some disparaging speech is tolerated under the First Amendment. Negative opinions aren't actionable, even when they are hurtful. Speech is actionable as defamation when it is objectively verifiable as being true or false. Statements lacking factual context, such as that someone is a "crook", a "con-artist", "cocky", a "liar", or even "incompetent", are generally found to be immune from vindication through a lawsuit. In addition, a disparaging statement must be false to be actionable as defamation. Substantial truth is a complete defense regardless of the harm caused by its dissemination. Also, individuals and entities that are public figures must meet different burdens in proving defamation than private figures. A public figure must prove with convincing clarity that a defamatory statement was published with "actual malice", that is, with knowledge that the statement was false, or in reckless disregard of the truth. A private figure need only prove that the defamatory statement was published negligently.

The first step in determining what to do about negative social media posts is to consult with an experienced defamation attorney to obtain an opinion on

whether the disparaging posts are actionable. Then you can determine an appropriate strategy, based on the particulars of the statements, the speaker, and the extent of distribution. If you are aware of the poster's identity, you should consider the individual's ability to satisfy a judgment in the event you file a lawsuit.

Anonymous Posts on Social Media Can Be Effectively Remedied. Most jurisdictions afford litigants the right, in appropriate circumstances, to seek pre-lawsuit discovery to learn the identity of anonymous posters. Petitions can be filed to issue subpoenas to internet service providers and social media sites to obtain information to identify account holders, e-mail address owners, geographic locations where the offending posts emanated from, telephone numbers affiliated with internet service accounts, and other relevant information. Often, the identity of anonymous posters can be determined through this process.

Multiple Options Exist for Remediating Defamatory Posts. When you discover who created a defamatory post, there are options on how best to proceed. Litigation may not always be the optimum choice. There are less expensive and faster remedies that may provide relief and restore your good name and business reputation.

For example, an experienced defamation attorney can serve the poster with a persuasive "Cease and Desist Demand," which can lead to the negotiation of a take-down and removal agreement, a retraction, or other relief. In addition, with objective proof that a post is false and defamatory, social media sites may agree to remove the post, including removal from social media search engines results. Occasionally, a court order is required before a post will be voluntarily removed from a social media site. When these alternatives do not produce effective results, litigation remains an option. However, in most cases, a lawsuit is proper only against the poster, as host websites have statutory immunity for what others post on their sites.

Conclusion. An experienced defamation attorney can help you determine the most appropriate and effective way to confront negative posts which threaten harm to your hard-earned business reputation.

For more information, contact Phil Zisook at phil.zisook@sfnr.com.

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1031 EXCHANGES – BUILD WEALTH AND SAVE ON TAXES

“Nothing is certain but death and taxes.” Benjamin Franklin, 1879.

Welcome Aboard

Schoenberg Finkel Newman & Rosenberg LLC, in a move to expand its reach and add to the Firm's expertise, has added five veteran attorneys from Deutsch, Levy & Engel, Chartered, a renowned Chicago business law firm that ended its 50+ year run. A warm welcome is extended to **Terry L. Engel** (real estate tax, commercial real estate, banking, corporate), **Frank R. Cohen** (estate planning, probate, tax planning, real estate and corporate transactions), **Jerry I. Rudman** (business acquisitions/transactions, estate planning, commercial leasing and financing), **Joel A. Stein** (banking and creditors' rights, secured lending) and **Phil Zisook** (defamation, privacy, First Amendment, commercial litigation).

Speaking Engagements

This summer, **Leonard J. Gambino** presented to the Independent Medical Specialty Dealers Association and the Health Industry Representatives Association at their IMDA-HIRA Conference in Itasca. Len delivered succession planning guidelines crucial to rep agencies and specialty dealers when they decide to sell their business.

On July 11, **Alena Jotkus** and **Joan T. Berg** were guests of Byline Bank, where they were introduced to the incoming class of credit analysts. Joan provided a seminar to the analysts regarding the essentials of construction lending.

Notable Publications

On July 6, *Forbes* contributor Larry Light featured an interview with **Bruce E. Bell** entitled “[How To Get A Tax Break By Investing In Poor Areas.](#)” In this interview, Bruce discusses a new investment strategy where investors can invest money in opportunity zones in low-income areas and reap significant tax benefits.

Larry Light again featured an interview with Bruce on August 3rd – “[The Tax Bite From Selling Your Insurance Policy to Investors](#)” – highlighting the tax implications if owners decide to sell their life insurance policies.

“[Employers Must Approach ADA Obesity Issues Cautiously.](#)” an article originally written by **Norman T. Finkel** for our Spring 2019 newsletter, was featured in *Law 360* and the *Chicago Daily Law Bulletin*.

LinkedIn

If you have a LinkedIn account, please take a moment to follow our Firm page. We post new articles (not always included in our Firm newsletters), as well as Firm news and accolades.

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A 1031 Exchange (also called a Starker Exchange or Like-Kind Exchange) is a valuable tax planning procedure that, if properly and strictly followed, allows the owner of real estate investment property to sell the property with accumulated capital gains and then buy a “like-kind” property while deferring/postponing capital gains tax.

IRC Section 1031 (a)(1) states:

“no gain or loss shall be recognized on the exchange of real property held for productive use in a trade or business or for investment, if such real property is exchanged solely for real property of like-kind which is to be held either for productive use in a trade or business or for investment”

When you are considering selling your investment property, to the extent that the property has increased substantially in value from the time you acquired it, you should consider whether you want to defer or pay taxes following the sale. Any forward-thinking investor would consider investing more instead of paying as much as 40% in taxes. It is a powerful investment strategy and also an estate planning tool the investor can sequentially use to defer capital gains on the investment properties until death, potentially completely avoiding such capital gains taxes.

What tax can you defer? Capital Gains, Net Investment Income Tax, state tax, and Depreciation Recapture taxes can be deferred.

There are a number of types of 1031 exchanges:

1. The Simultaneous Exchange. Real Time Exchange. In a simultaneous exchange, the property you sell (“Relinquished Property”) and the new property you buy (“Replacement Property”) are transferred simultaneously between two parties. This type of exchange is not very common.

2. The Delayed Exchange. Sell today – exchange within 180 days. The most common exchange structure is when the Relinquished Property is sold, the proceeds are delivered to an independent third party, known as a Qualified Intermediary, and those proceeds are subsequently used to purchase the Replacement Property from a third party.

3. The Build-to-Suit Exchange. Sell – Improve – Buy. The build-to-suit exchange, known as construction or improvement exchange, provides the

opportunity to use the funds from the sale (“Exchange Funds”) for construction, renovations or new improvements to the Replacement Property. This type of exchange is more complex as well as costly.

4. The Reverse Exchange. Buy today – Sell within 180 days. A “reverse” exchange occurs when you purchase the Replacement Property before transferring the Relinquished Property. While a valuable tool, this type of exchange requires that the Seller has cash to buy the Replacement Property before selling the Relinquished Property.

General Rules to Follow. To receive the full benefit of a 1031 exchange, your replacement property should be a like-kind property of equal or greater value (or you risk recognizing “boot”). A like-kind property is a property of the same nature, character or class regardless of quality or grade. The IRS is very liberal in this interpretation and allows the exchange of an apartment building for raw land, or a ranch for a strip mall, for example. In other words, as long as you exchange investment real property for other investment real property, that satisfies the “like kind” test. You must also identify a Replacement Property within 45 days after the sale of the Relinquished Property and then conclude the purchase of the Replacement Property within 180 days after the initial sale. Of note, there are additional rules that allow the purchase of more than one property identified. The properties involved on both ends of the exchange must be “investment or business” property, not personal property or primary residences. In addition, the seller of the Relinquished Property must be the same taxpayer as the buyer of the Replacement Property. However, there is an exception with respect to single member limited liability companies as long as the sole member is the same.

Always plan ahead. If you plan to do an exchange, you should advise your attorney so that the “Exchange Cooperation Clause” is included in the purchase and sale agreement. Most importantly, you must use a Qualified Intermediary, which is essential to completing a successful exchange. Although the process is relatively simple, the rules are complicated and filled with potential pitfalls. Therefore, consulting with experienced legal counsel is a necessary part of the process.

For more information, contact Alena Jotkus at Alena.Jotkus@sfnr.com.