



PROMOTING JUSTICE SINCE 1877

## ACBA Business Section Newsletter

May 2010

Dear Members and Friends –

The Business Section wants to reach out to its members on a regular basis.

### Newsletter Blurbs – We Welcome Your Contributions

Please send in any comments, tips or interesting stories from your practice! We are looking for quick blurbs, from three to twelve sentences in length. We will credit the author by name and identify his or her firm or company. Please send any write-ups to Tom Maier at [tmaier@fddcm.com](mailto:tmaier@fddcm.com).

### Upcoming Lunch-Hour Seminar - The Accidental Partnership

The Business Section is sponsoring a lunch-hour seminar on Tuesday, May 25, 2010, titled “The Accidental Partnership: The Pitfalls of Informal Business Relationships.” The seminar will take place starting at noon in the ACBA offices in Jack London Square.

Our speaker will be David Herzog, a business attorney with the San Francisco based Pinnacle Law Group LLP. David has prepared materials for a roundtable discussion on clients who work together on an informal basis – and may end up, unintentionally, being considered “partners” for state law purposes. When do cooperating parties cross the line so as to owe fiduciary duties to one another as partners in a partnership? When does a client find herself exposed to joint and several liability for the obligations of a co-venturer, or at risk in a lawsuit involving the co-venturer, even in the absence of a formal partnership agreement?



These issues present recurring worries for business law practitioners. Please join us, and feel free to bring some good war stories that you’d like to share with our speaker and the audience. Pricing is \$35 for Section members, \$40 for ACBA members and \$50 for non-members, and lunch will be served. You’ll earn one hour of CLE credit and get a chance to compare notes with your colleagues about this troubling corner of the law.

# Ten Things a Company Should Consider When Drafting a Social Networking Policy

**Submitted by Randy Wilson, Member - Executive Committee of the Business Section**

If a company gets sued or audited, it may need to produce relevant social networking data as part of its electronically stored information repository, which means it better include record retention issues in its social networking policy.

According to a recent survey, 29 percent of companies claim to have developed a social networking policy for their organization. This number seems high but even if companies have such a policy, it may be inadequate. There are all kinds of ways that social networking issues crop up within an organization and developing a thorough and thoughtful social networking policy will take time, resources and constant monitoring and probably updating. Besides the records retention policy question above, here are ten questions to think about if you are asked to assist a company with their social networking policy:



1. Can there be a one size fits all policy that covers all employees (remember, marketing and sales people may need to use social networking to reach out to clients)?
2. Can a company handle every employee's violation of social networking policy in the same way, no matter what their position?
3. Are their employment discrimination issues to consider when using social networking to screen potential job applicants?
4. Are there any risks to finding job candidates using social networking?
5. How does social networking impact existing e-mail policies where communications through social networking is often tied to an e-mail account?
6. What can a company do to protect its goodwill and reputation if customers use social networking to complain about products and services?
7. Do your insurance policies include any requirements about what your social networking policies should include?
8. How does the company handle ex-employees and departures, considering how easy it is for vendors, competitors and clients to monitor LinkedIn when talent leaves an organization?
9. What measures are in place to protect the company's intellectual property displayed on social networking websites?
10. Does the company face any liability issues if its internet privacy policies conflict with that of the social networking websites that clients and potential clients are using to engage with the company?

## Losing Our Better Angels: Legislative Proposal to Change the Rules for Offerings to Accredited Investors

Tom Armstrong, the chair of the ACBA Business Section, has pointed out that proposed federal legislation, offered in the name of financial reform, may have a serious detrimental impact on the ability of a start-up company to raise so-called “angel” financing during the early stages of the company’s development.

Senator Chris Dodd has introduced a 1,400-page bill that would address many aspects of financial life in the US. One of the more troublesome (and least publicized) proposals would change the fundamental mechanics of raising equity capital from angel investors. Currently, most companies have a lot of latitude in raising capital in compliance with applicable securities laws so long as their investors are “accredited” investors. An accredited investor generally includes individuals who have either a net worth of \$1,000,000 or an annual income of at least \$200,000.



The Dodd proposal would change the definition of accredited investor, so that an individual would have to have either a net worth of \$2,300,000 or an annual income of \$450,000 to qualify as accredited. The proposal would also remove the existing federal pre-emption of state-level securities laws that has been in place for years, meaning that even an offering to accredited investors would have to run the dreaded “blue sky” gauntlet and qualify for a securities exemption under the laws of each state in which any investor resides. And, most disturbingly, a start-up company seeking angel financing would have to file with the SEC prior to the offering and wait out a 120-day review period before proceeding with the offering.

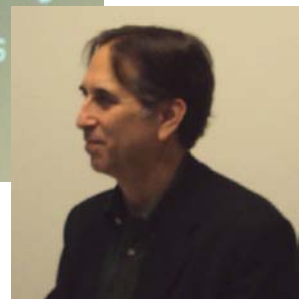
The Dodd proposal appears to be a response to perceived financial excesses that caused the economic disruptions of 2008 and 2009. But it also appears to be a harsh overreaction that will limit capital formation and restrict small businesses from raising funds required to operate and expand. It seems highly unlikely that the collapse of Lehman Brothers and the widespread weakness in mortgage debt can be laid at the feet of the current rules governing angel financing. If anything, current US laws that encourage small business formation are supporting a resilience in the national economy that is driving the nascent economic recovery.

Keep your eye on this legislation. The business lawyer’s job, and the small businessman’s access to capital, will become more difficult if the Dodd proposals are enacted.

### April Seminar - Licensing

Thanks to Dana Shultz for a fine presentation in the April seminar titled “What Every Business Lawyer Needs To Know About Licensing.” The hour moved quickly as Dana covered 60 insights in 60 minutes. The ACBA filmed the presentation, and we hope to be able to make the tape available at some point.

What Every Business Lawyer  
Needs to Know About Licensing  
Sixty Insights in Sixty Minutes  
Dana H. Shultz, Attorney at Law



## Licensing Territory – How Far Can You Go?

Dana touched on the topic of territorial clauses during his licensing seminar. In the old days, a fully inclusive license might recite that a territory without limit would cover rights “throughout the world.” Some licensing attorneys, worried about issues associated with satellite communications, have begun to up the ante, with an all-encompassing territory now routinely described as addressing all rights “throughout the universe.”

This, of course, raises interesting questions about venue and jurisdiction if a breach of the license occurs on the Planet Neptune or somewhere in the Andromeda Galaxy. And it’s also possible to ask whether the reservation of rights throughout the universe is sufficient. Many physicists, including Max Tegmark of MIT and Hugh Everett at Princeton, have suggested that all of reality may consist of our observable universe as well as various parallel universes, all composing a grand multiverse – with either no points of potential contact or quite limited tunnels of connection between universes. So, should the truly paranoid licensee start insisting on this phrase:



“Licensee’s territory shall include all areas in the universe and any areas beyond the universe, notwithstanding differing fundamental rules of matter, time and mechanics liens that may therein apply.”

The Business Section will offer an invitation to an executive committee meeting and a free sandwich to the first member who can make this work.

## Business Section Thanks Shannon Goecke

The Business Section would like to acknowledge the great work being done by the ACBA Communications Administrator Shannon Goecke. Shannon has been with the ACBA since 2003 and is responsible for production of email blasts, the e-Newsletter, other graphic designs and the ACBA’s quarterly magazine, *The Bulletin*, as well as maintenance of the ACBA website and IT troubleshooting. Shannon shapes and formats each Business Section newsletter that is sent to members. Thanks for all of your hard work, Shannon, for the Business Section and for the ACBA as a whole!



## Members of the Business Section Executive Committee

Tom Armstrong (Chair)  
Tom Maier (Vice Chair)  
Luis Montes (Secretary)  
Chuck Toombs  
Myra Mitzman  
Ralph Kokka  
Adrian Wolff  
Matt Dickstein  
Dana Shultz  
Randy Wilson

## We Need Your Input!



We are always looking for new seminar topics and presenters. Let us know if you or one of your colleagues would like to present.

Just send an email to Tom Maier at [tmaier@fdcm.com](mailto:tmaier@fdcm.com), Tom Armstrong at [tarmstrong@whiteandlee.com](mailto:tarmstrong@whiteandlee.com) or Kaysi Holman at [kaysi@acbanet.org](mailto:kaysi@acbanet.org) – it’ll just take a second – and we will start making arrangements.