

# Phoenix Business **BLOG**

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## What Steve Nash's divorce can teach businesses, workers about social media



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Basketball star Steve Nash's divorce case from ex-wife Alejandra Amarilla Menrath has some social media lessons to teach both businesses and employees.

The Arizona case, which saw the Los Angeles Lakers star fighting his ex-wife's efforts to move to California, sets some further precedent for social media use and how it relates to various legal contracts including business deals, severance and employment agreements and civil settlements.

A Maricopa Superior Court this summer and more recently the Arizona Court of Appeals upheld a social media gag order that applies to both Nash and Menrath. The two agreed to the gag order not to disparage one another in their original divorce settlement.

The lower court and mediator admonished Menrath after she posted comments on Twitter critical of Nash and their divorce disputes. The Arizona Court of Appeals upheld the social media gag order on both parties despite Menrath's arguments related to the First Amendment and private messages not intended to become public.

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Gag orders on disparaging comments are increasingly common in business contracts related to severance packages, lawsuits settlements and business divorces, said Don Johnsen, an employment and labor attorney and partner with the Gallagher & Kennedy PA law firm in Phoenix.

"We see more of those kinds of things in severance agreements, in settlement agreements," he said.

Johnsen said some companies have started to put specific language about posts on social media websites such as Twitter and Facebook while others have more broad language in contracts barring negative comments and back biting.

John Egbert, another Phoenix attorney and employment law expert at Jennings Strouss & Salmon PLC, is starting to see more specific legal language in business and employment contracts specifically restricting social media communications.

"We are starting to see provisions in the employment context — employment contracts, severance/settlement agreements — which expressly attempt to address the parties' use of social media," Egbert said. He expects those to increase as employers and businesses try to avoid social media problems.

Johnsen said some companies are building specific damages for violating gag rules in contracts so they can go to courts and seek damages.

The Arizona courts cited a number of other civil cases with gag rules in their ruling in the Nash divorce.

Johnsen said what businesses need to figure out is whether it is worth their time and money to go after ex-employees, business partners or others who might disparage them on social media and other venues.

But while the ex-Mrs. Steve Nash and former employees and business partners can get gagged by contract language, businesses have a much tougher time doing the same to their existing workforce.

"The National Labor Relations Board has been all over employers that maintain overly broad social media policies," said Jeffrey Toppel, a labor and employment attorney and partner in the Phoenix office of the Jackson Lewis LLP law firm. The NLRB has been using New Deal-area laws protecting employees rights to organize unions to also back up their free speech online.

The courts are still carving out legal precedent on how federal union organizing laws mesh with the social media world.

But Toppel said employers cannot gag their workers' online communications about work.

"An employer simply cannot promulgate a policy, whether formal or informal, telling employees that they do not want them posting disparaging comments about the company on Facebook, Twitter or other social media sites," he said. "Not only is it unlawful to maintain such a policy, but any employer action against an employee who violates the policy would also be unlawful."

Egbert agrees it is hard for employers to muffle current workers' social media voices. "The NLRB takes the position that social media is the modern day version of employees talking 'around the water cooler' and therefore an important means of concerted action among co-workers," he said.

Nash and Amarilla Menrath reached a settlement earlier this month, but much of the case has been sealed by the courts. However, during proceedings in Phoenix over whether Amarilla Menrath would be allowed to move her children to Los Angeles, Nash argued he wanted his three children to grow up in Phoenix and he planned on living in the Valley after his NBA career ends.

Mike Sunnucks writes about politics, law, airlines, sports business and the economy.