

The perils of digital communications and social media in divorce proceedings

By Joseph Trotti, Esq. and Eun Chong (EJ) Thorsen, Esq.

In the summer 2014 issue of The SideBar, Dennis Lyons covered social media policies from the perspective of infringing on employees' rights. In this summer's issue, we look at social media as it applies to divorce proceedings.

"Like me on Facebook!" "I just added you as a 'friend' - will you accept?" "Send me a message." Today, many of us are active users of the Internet, email and social media sites such as Facebook, LinkedIn and Twitter.

These sites allow us to connect with new and old friends; post photos and videos; share personal and professional news and information; and communicate with other users on a regular, if not constant, basis. In fact, it is second nature for many to utilize social media and digital communications without thinking of the potential consequences. Harmless entertainment? Perhaps not so...in the context of a divorce proceeding.

Digital communications and activity on social media sites sometimes play a role in the reason for a divorce or separation. These activities also can have a serious impact on a divorce proceeding, with particular respect to parents' fitness for custody and finding hidden assets.

Ironically, a good deal of information on social media apprises users of vulnerabilities when it comes to matrimonial and family law matters. We've narrowed them down to several dos and don'ts.

- **DO NOT disclose** or discuss your relationship status at any time. Evidence of flirting on your Facebook page or disclosing details about your relationship with your ex or new friends could harm your case in a custody battle.
- **DO NOT post** pictures of yourself at social gatherings; even seemingly harmless photos can damage your case.
- **DO NOT make** negative comments about your spouse or vent personal complaints or grievances. Such activity could be used to support the adversary's argument that you are alienating the children from the other parent, which is a



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Employee or independent contractor?

By Andrew A. Kimler, Esq. and Avrohom Gefen, Esq.



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Misclassification of employees occurs when an employee is incorrectly labeled an independent contractor or is not reported by the employer in any capacity (i.e., is “off the books”). To deal with this issue, the New York State Joint Enforcement Task Force on Employee Misclassification was established with a mandate of, “Investigating the practice of worker misclassification; coordinating state agencies to ensure enforcement of the laws violated when employers misclassify workers; and developing legislative proposals and other tools to combat the problem.”

Despite the Task Force’s activities since 2007, misclassification of employees remains a major stumbling block for employers. In 2014, the Task Force completed over 12,000 investigations and found over 133,000 misclassified employees. The Task Force discovered nearly \$316 million in unreported wages and unpaid contributions of over \$40 million. The United States Department of Labor also routinely audits employers and assesses fines, penalties and restitution when it finds misclassified employees. Misclassification can also lead to “wage and hour” claims if workers who are improperly classified as independent contractors are not paid minimum wage or overtime, as is required for most employees.

For employers, the incentive to classify individuals as independent contractors or to keep them “off the books” is obvious: employers will avoid payroll tax, as well as Workers’ Compensation and Unemployment Insurance premiums for these individuals. Some workers also prefer to be classified as independent contractors, which may allow them to deduct certain expenses for tax purposes, or to be paid “off the books,” which may enable them to evade taxes altogether. However, for employers in New York, the risk involved with misclassifying employees exceeds the

perceived reward. If an employer is audited either randomly or based on a complaint and employee misclassification is found, the consequences can be devastating. Assessments for unpaid tax withholdings, unpaid insurance premiums, fines, penalties and interest may be more than a business can handle. Additionally, the business’ owner may be personally liable for these assessments.

It is essential, therefore, for employers to properly determine if their workers are employees or independent contractors. How is this done? Regulatory authorities such as the NYS Department of Labor generally begin with the proposition that most, if not all, workers are employees and it is the employer’s burden to prove otherwise. According to the DOL, among other criteria, true independent contractors are free from supervision, direction and control in the performance of their duties. Other regulatory bodies, including the IRS, use their own criteria to determine if there is an employer-employee relationship.

There is continuing and increased scrutiny of employers who classify workers as independent contractors. As can be seen from the criteria above, it is exceedingly difficult to create a true independent contractor relationship for most workers. Since keeping workers “off the books” creates its own perils, it is imperative for employers to continually evaluate, with the assistance of experienced employment counsel, the roles of their workers, to avoid devastating consequences. **M**

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Avoiding legal pitfalls when buying investment property

By James F. Burdi, Esq.

Recent improvements in the real estate market have prompted many individuals to contemplate purchasing investment real estate. While this can be profitable, providing both income and long term gain, there are many issues to be considered, especially by the uninitiated investor.

- **Realistically evaluate your financial position.** How does real estate fit into your overall investment plan and what is your level of risk tolerance? Assess the source of your working capital. Real estate can go down in value, as well as up; keep this in mind before investing your retirement savings in a building.

- **Determine the right kind of property for you.** Are you looking for a positive stream of income or a long-term investment? Are you interested in actively managing property as a landlord? Does your investment strategy suggest many small properties or one large property? Once again, there is no single response that fits every investor's needs.

- **Evaluate the best way to identify property.** An inexperienced investor will probably engage a real estate broker to help identify property and negotiate the deal. As an investor gains experience and working capital, he or she can look at foreclosure auctions and other more direct ways of identifying property. These methods, while potentially more profitable, require greater preliminary investigation and often the ability to move quickly, with no financing contingencies and no conditions. The inexperienced investor has significant risk in such cases.

- **Do your "due diligence."** With owner-occupied residential purchases, virtually all of the protections needed by a buyer will be in the contract of sale. This is not the case with most investment prop-

erty transactions. Due diligence may require examining rent rolls; reviewing leases; determining zoning if changes in use are contemplated; checking operating history; an engineer's inspection; an environmental survey; and other determinations, depending on the property.

- **Bring the attorney into the transaction early.** An attorney can provide guidance from the outset, both with pre-offer considerations and pre-contract due diligence, and will help you select the right form of business entity to hold title; negotiate the contract of sale; address title and survey issues; coordinate and negotiate with the lender; conduct the closing; and assist with post-closing matters.

Investing in real estate requires a careful, deliberative approach, but if you follow a few basic rules and consult with an attorney early in the process, you can avoid the pitfalls and make your purchase a solid investment.

This article was adapted from a presentation given on March 10, 2015 by Mr. Burdi and John P. Gordon, Esq. 

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James F. Burdi, Esq.





news & Events



“Neither snow nor rain nor dark of night . . .” When fighting MS, nothing could stop the Vishnick McGovern Milizio team from walking at Jones Beach on a very wet Saturday morning, May 16th. Holding the sign is managing partner and team captain, **Joe Milizio**, surrounded by friends, family and fellow VMM attorneys and staff. This year’s rain did nothing to stop the enthusiasm of the Vishnick McGovern Milizio team, which raised over \$11,000. VMM is a longtime supporter of the National MS Society-Long Island Chapter.



Bernard Vishnick, senior partner at VMM, was honored by the Nassau County Bar Association at a gala on May 9th for his 50 years as a practicing attorney. Lawyers marking both their Golden (50 year) and Diamond (60 year) anniversaries were presented at a VIP reception, awarded medallions and given certificates for their lifetime accomplishments. Mr. Vishnick’s milestone also was commemorated by the Queens County Bar Association at its April 13th Judiciary, Past Presidents and Golden Jubilarian Night.



Congratulations to our colleague, associate **Constantina Papageorgiou** and her husband Joseph Alexander on the arrival of Stella Alexander, born at 4:05pm on April 27, 2015 at 8 lbs., 5 oz., and 20 inches. Stella’s VMM family is thrilled to welcome our new “niece.”



Associate Eun Chong (EJ) Thorsen has been appointed to serve on the Commission on Statewide Discipline, chaired by Chief Administrative Judge A. Gail Prudenti. The Commission will conduct a comprehensive review of the attorney disciplinary system throughout the state and issue recommendations on how to reshape attorney discipline in New York to ensure fairness, efficiency and effectiveness.

Paralegal **Maia Carroll** and her ten year old daughter, Jade, each donated ten inches of their formerly long manes to Locks of Love, a public non-profit organization that provides hairpieces to financially disadvantaged children under age 21 suffering from long-term medical hair loss from any diagnosis. Maia formed an “X” and “O” for kisses and hugs before making the donation.





VMM Speaks



In April, partner **Joseph Trotti** received a Certificate of Appreciation for his contributions as an “Access to Justice Pro Bono Provider,” conferred by The Safe Center LI, the Nassau County Bar Association and Nassau Suffolk Law Service.

Partners **James Burdi** and **Joseph Milizio**, along with associates **John Gordon** and **Dennis Lyons**, attended the third annual PinkTie.org event held on May 4th, benefiting the Don Monti Memorial Research Foundation. VMM is pleased to be among the businesses and individuals who raised over \$300,000 for the cause.

PinkTie.org

Associate **Avrohom Gefen** presented a program entitled “The Impact of Plaintiff’s Bankruptcy on Employment Law Cases: Plaintiff’s and Defense Perspectives” to the Labor & Employment Committee of the Nassau County Bar Association on May 12th.

Partner **Andrew Kimler** was a seminar presenter of “Wage and Hour Laws Affecting Your Client’s Business” on May 12th. The program, in collaboration with the US Department of Labor, Long Island District, was held at LIU-Post College of Management, School of Professional Accountancy, Tax and Accounting Institute.

Managing Partner **Joseph G. Milizio** spoke as a member of the Nassau County Bar Association Speakers Bureau at the Port Washington Library on April 17th on the topic of buying or selling a home. On August 20th, he will make a presentation at the North Merrick Library on the legal considerations associated with starting a business.

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critical factor in a custody determination.

- **DO NOT “check in”** to locations and be aware of the option that allows friends to check you in. That option raises the potential for false alibis; for example, when dealing with questions such as where a parent was when s/he should have been with the children, or where a spouse was on the night of an alleged domestic violence incident.

- **DO NOT send** “private messages” to anyone, even trusted individuals, believing they will be kept “private.” You may learn about your ex’s bonus or raise in a “private message” sent to a friend that did not remain private, either voluntarily or involuntarily.

- **DO disable** the “tag” function for photos, so that others will not be able to associate you with a photo without your permission. It

may be your spouse’s relative or friend who posts a photo of his/her new vehicle or a photo taken with him/her on an expensive trip, when said spouse has just claimed poverty in court.

- **DO verify** your privacy settings. You and your ex may have mutual friends or acquaintances who are not really your “friend.” We have discovered damaging information about a party through a “connection” or Facebook “friend,” who in reality is not an ally after all.

Whenever in doubt, refrain from using digital communications or posting on social media sites. #Bettersafethansorry! **M**

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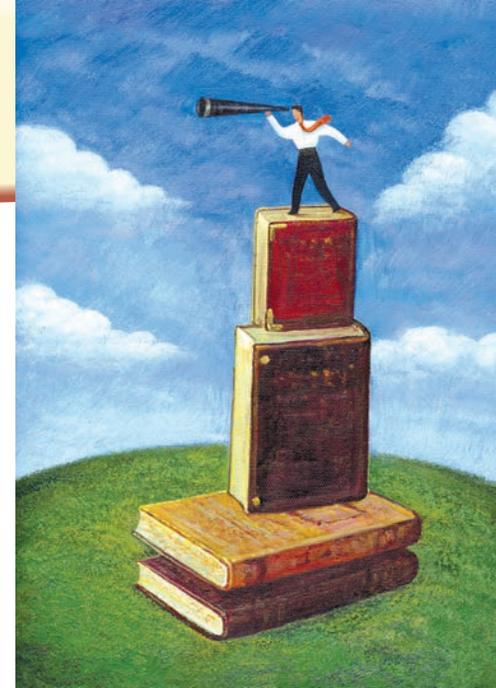
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