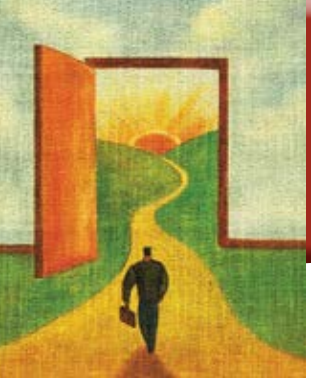

Summer 2014

the SideBar

Is Your Power Of Attorney Due For An Update?

By James F. Burdi, Esq.

James F. Burdi, Esq.

At our law firm, we have come across a troubling trend. Some of our clients, acting as agents under Powers of Attorney, have been turned away by banks and other financial institutions simply because the Power of Attorney document was executed prior to 2010, when the New York State Legislature updated its recommended Power of Attorney form.

A useful tool in estate planning, a Power of Attorney (POA) is a legal document, by which one person, known as the "Principal," authorizes another person or persons, known as the "Agent" or "Agents," to act on the Principal's behalf, with respect to legal, business or financial matters. Effective use of a Power of Attorney can eliminate the need for expensive and time-consuming Guardianship proceedings. It can make it more convenient to assist an aging or infirm family member or friend, and assures that there will be someone with clear legal authority in the event of an emergency.

New York State has a recommended form, known as the Statutory Short Form. Use of the Statutory Short Form has a great many advantages:

- its terms are clearly defined by the statute
- it includes protections which make it easier for third parties to honor it
- it is generally recognized and respected by lawyers, title companies, Courts and financial institutions.

The state legislature has made changes to the Statutory Short Form over the past several years. The latest version of the form went into effect on September 12, 2010. The greatest change was the introduction of the Statutory Gifts Rider, which must accompany the POA. An agent no longer has a presumed or implied power to make gifts on behalf of the Principal. Without the Rider, the gifting power is now severely limited.

Although the state legislature has always provided that Powers of Attorney executed prior to a change in the law remain valid, and although financial institutions and other third parties doing business in New York State cannot refuse to recognize the Statutory Short Form, some financial institutions are rejecting POAs that do not adhere to the current (2010) form,

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Social Media Policies May Infringe on Employees' Rights

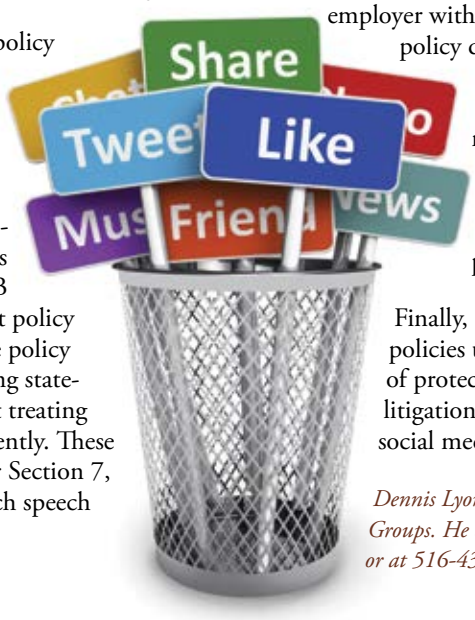
By Dennis Lyons, Esq.

The explosive growth in the use of social media over the past several years has enabled individuals and companies to communicate with enormous audiences including employees, supervisors, customers and clients at any time of day, on any day of the week.

With such a wide-open avenue of communication available to employees, many employers have found it necessary to implement social media policies in an attempt to protect trade secrets, to prevent employees from tarnishing an employer's brand or reputation with clients or customers, and to prevent unlawful harassment between co-workers. Recently, however, the National Labor Relations Board (NLRB) has began attacking such policies as infringing on employees' statutory rights.

Under Section 7 of the National Labor Relations Act (NLRA), employees have a statutory right to discuss wages, terms of employment and working conditions. Additionally, employees may take "concerted activity" for mutual aid and protection and to improve their working conditions. A company's social media policy would violate these rights if the policy "would reasonably tend to chill the employees in the exercise of their Section 7 rights," according to the Act. Quite often, an employer's social media policy is so broad that it prohibits an employee's exercise of his or her Section 7 rights.

For example, one employer implemented a policy prohibiting employees from "making disparaging comments about the company through any media, including online blogs." When an employee made derogatory comments on her Facebook wall regarding an internal job transfer that she perceived as unfair, she was fired for violating the employer's policy on disparaging comments. The NLRB ruled that the employer's non-disparagement policy violated the employee's Section 7 rights. The policy could be reasonably interpreted as prohibiting statements that the employer is, for example, not treating employees fairly or paying employees sufficiently. These statements would be protected speech under Section 7, and therefore any policy which prohibits such speech violates the NLRA.



The NLRB also found that an employer's policy prohibiting employees from using social media to engage in "unprofessional communication that could negatively impact the employer's reputation" was also in violation of Section 7, since this policy could reasonably be read to prohibit protected speech that, for example, criticized the company's employment practices.

Dennis Lyons, Esq.

In both cases, the NLRB pointed out that the employers' policies did not contain any limiting language excluding Section 7 protected activity from the policy's prohibitions. More specifically, Section 7 does not protect all employee speech, and a well-crafted social media policy can still prohibit unprotected speech that may damage an employer. For example, an employee's social media post expressing his or her own frustration or anger (and not voiced on behalf of co-workers) is not protected by Section 7 and may be prohibited by company policy.

The key to fashioning a social media policy that protects the employer without violating Section 7 is to make clear that the policy does not prohibit protected speech. The NLRB has already held that a simple "savings clause," such as a statement that says "this policy does not prohibit Section 7 protected communication and activity," is insufficient. Instead, the policy must focus narrowly on prohibiting unprotected speech, and must expressly exempt protected speech.

Finally, it would be wise for employers to keep their policies up to date with the NLRB's evolving definition of protected speech, so that the employer can avoid costly litigation, which may result from enforcing an invalid social media policy.

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Power of attorney... *(Cont'd from Page 1)*

especially if the Agent is attempting to exercise gifting authority. Many financial advisers or customer service representatives simply do not know the law and they turn away the client without making further inquiry. The gifting issue has become particularly problematic, since older Powers do not include the Statutory Gifts Rider.

For this reason, we recommend that if you executed a Power of Attorney prior to September 12, 2010, you contact us to update it. We can revise your documents to meet all the latest requirements and eliminate the potential for problems when the time comes for the Power to be used. While we are at it, we can review other aspects of your estate plan, to be certain your existing plan still meets your needs.

It pays to anticipate estate planning and asset management issues, and to address them before they cause you or your family any unnecessary expense or inconvenience. Please call us if you would like assistance with your estate plan, or have any questions regarding your existing documents.

James F. Burdi, Esq., a Partner in the Business & Transactional Law Practice Group, also works with the Trusts & Estates Practice Group in estate planning and administration. He can be reached at JBurdi@vmmlegal.com or at 516-437-4385, ext. 130.

news & Events

Out and about

Team VMM hit its stride again this year at the annual MS Walk Long Island on May 17. The beautiful weather was matched by the camaraderie. Thanks to all who helped us reach our $10,000 fundraising goal.

Jim Burdi, "The Bunny-master," escorted the Easter bunnies at the Garden City Chamber of Commerce's annual Antique Car Parade. This is a recurring role for Jim, who also performs in his church choir.

On June 10, **EJ (Eun Chong) Thorsen** and **Joseph Trotti** attended the gala for the Korean American Lawyers Association of Greater New York. EJ was a co-chair of this year's event (see below).

Min Sun Kim, Chairperson of the Korean American Lawyers Association of Greater New York; Gary Park, Esq., Joseph Trotti, Esq., Eun Chong (EJ) Thorsen, Esq., Surrogate Peter J. Kelly, NYS Assemblyman Ron Kim

In the news

Andy Kimler was quoted in a Long Island Business News article describing the factors employers must consider when evaluating a job applicant's criminal background.

In another Long Island Business News article, John Gordon described the method of leaving individual retirement accounts in a trust in order to avoid tax consequences for beneficiaries.

Professional accomplishments

On June 8, Senior Partner **Bernard Vishnick** (on left in photo) presented a seminar entitled "Planned Giving and Endowments as Legacy" at the Holocaust Memorial and Tolerance Center's Generations event, which honored holocaust survivors, liberators and their descendants.

Partner **Andrew A. Kimler** was elected a member of the Brandeis Association Board of Directors.

As a sign of her commitment and dedication, **EJ (Eun Chong) Thorsen** has been named to three posts. She was elected a member of the Board of Directors of the St. John's University School of Law Alumni Association, was named to the Board of Advisors of the Kupferberg Holocaust Resource Center and Archives and became Vice President of the Korean American Lawyers Association of Greater New York (KALAGNY). She was also co-chairperson of the KALAGNY Gala, which took place June 10 at the Harvard Club in New York City.

Constantina Papageorgiou gives frequent workshops on estate planning. On June 3, she presented a workshop at Zenon Taverna in Astoria.

Author, author

Dennis Lyons was published in the NYSBA Trusts and Estates Law Section Newsletter. His article was entitled: *"The Prudent Investor Rule: The evolution of Prudence in Trustee Investing and the Influence of Modern Portfolio Theory."*

Brian Lovell's article, *"New Mortgage Rules Create Barriers for Lenders and Borrowers,"* was published in the National Mortgage Professional Magazine.

Please contact our office for a copy of these articles.

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