



# the SideBar

## You've been sued! Now what?

By Avrohom Gefen, Esq.

If you are served with a lawsuit, the most important thing to do is to contact competent counsel immediately who will guide you through the litigation process and work to resolve the lawsuit with the best possible outcome. That said, prior knowledge of the basic roadmap of a lawsuit may help alleviate some of the anxiety that comes with litigation.

### HOW DOES THE LITIGATION PROCESS WORK?

#### Summons and Complaint

The litigation process begins when the plaintiff, usually through an attorney, files a complaint (lawsuit) with the court. Depending on the particular facts and allegations, a case may be brought in either state or federal court. The complaint generally asserts claims against the defendant, the injuries or damages suffered, and the amount of money damages or other relief sought. The plaintiff (through a process server) then serves the complaint on the defendant along with a summons. Depending on how papers are served, in New York the defendant usually has 20 or 30 days in which to file an answer to the complaint.



#### Answer and Counterclaims

An answer is the written response filed by the defendant and typically includes a denial of the claims in the complaint and an assertion of the defendant's legal defenses. A defendant's answer also may include a counterclaim, which is a claim against the plaintiff. Failure to timely answer could result in a default judgment whereby the party loses the right to a defense and also may be liable for the plaintiff's claimed damages.

#### Motion to Dismiss

Another way to respond to a complaint is filing a motion to dismiss the case, which may be based on several factors, including the court does not have jurisdiction to hear the case, the claim does not state a cause of action, or that there is clear documentary evidence refuting the claim. A motion to dismiss must be filed within the same time that an answer is due. If a motion to dismiss is granted, the case ends.

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Avrohom Gefen, Esq.

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# Employment retaliation claims: An avoidable headache

By Andrew A. Kimler, Esq.

According to a fact finding report issued by the United States Department of Labor, employment litigation has spiraled in the last two decades. The expansion of federal and state labor laws and the growth in common law and statutory protections against unlawful dismissals have provided employees with a broader array of tools with which to challenge employer behavior in court. In the federal courts alone, the number of suits filed concerning employment grievances has grown over 400 percent in the last two decades. Complaints filed with administrative agencies have risen at a similar rate. Leading the way are retaliation claims. To their detriment, employers often react to unfounded employment-related claims in a manner that provides a separate basis for employees to bring retaliation claims based upon the employer's adverse reaction to the initial complaint.

## The Basis for Retaliation Claims

Both federal and state laws prohibit employers from retaliating against employees who make complaints under a variety of labor laws. For example, retaliating against an employee for making complaints of discriminatory conduct, the improper payment of wages, or for seeking an accommodation for disability, is illegal. Prohibited retaliation can take many forms, including threats, poor evaluations, demotions, denials of promotions and other adverse employment practices. To successfully assert a claim for unlawful retaliation, an employee must generally demonstrate that:

1. He or she engaged in a protected activity, such as the filing of a discrimination complaint;
2. The employer was aware that the employee was engaged in the protected activity;
3. The employee was subjected to an "adverse action"; and
4. A causal connection exists between the protected activity and the "adverse action." It is important to emphasize that in order for the employee to succeed with a retaliation claim, the employee need not establish that he or she was

actually a victim of discrimination. Indeed, even if a court finds that the employee's original claim was unfounded, he or she may nevertheless have a legitimate retaliation claim because of the timing of the adverse employment action.



Andrew A. Kimler, Esq.

## Preventive Steps

In view of the significant increase in the filing of retaliation claims, there are a number of preventative steps that employers can take in order to avoid such claims:

1. An employer should take a proactive approach and establish a written anti-retaliatory policy in the workplace. It is incumbent on an employer to make his or her employees aware of the company's anti-discrimination and anti-retaliation policies in the company's employee handbooks.
2. Employees should be informed of the procedures to follow in the event they believe they are the victims of discrimination and/or unlawful retaliation.
3. Likewise, supervisors and managers should be trained in how to recognize and investigate such complaints. Retaliation claims also must be immediately investigated; if there is evidence of unlawful retaliation, then the employer must immediately take steps to correct the situation.
4. Consultation with legal counsel concerning how to address such problems will help avoid such claims and also will demonstrate that the employer gave the claim serious consideration.

## Document Disciplinary Actions

If it is necessary to discipline an employee, then the employer should be prepared to demonstrate that any adverse employment action that becomes the subject of a retaliation charge was motivated by lawful reasons, such as poor job

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# MEET Colleen Morici

## Paralegal



The members of Vishnick McGovern Milizio LLP's Trust and Estate Litigation practice group rely heavily on the support of Paralegal Colleen Morici, whose administrative skills, insights and compassion are critical when dealing with clients and attorneys engaged in disputes over the assets of deceased family members and others. She is the liaison between Bernard Vishnick and all adversarial attorneys on his cases. As Colleen states, "The crux of my work requires dealing with clients who are involved in extremely emotional situations. Beyond professional paralegal skills, the job requires handling people delicately, with compassion and understanding." We asked Colleen to weigh in on her work and family life.

**SideBar:** When did you join VMM and how has your career progressed over the years?

**Colleen Morici:** *I was hired as a receptionist in February 1993. I can't believe 24 plus years have passed since then. By 1994, I was working as the administrative assistant to the office manager, in addition to my receptionist duties. In July 1996, I transitioned to working on matrimonial and civil litigation cases before moving exclusively to the Estate Litigation Practice Group. As the expression goes, the rest is history.*

**SB:** Where was your career headed before joining VMM?

**CM:** *I attended Wilkes University in Pennsylvania and studied accounting. That's where I developed my business focus. I also worked for the Marriott Corporation, which opened my eyes up to the value of excellent customer service. Both experiences have served me well at VMM.*

**SB:** You're known as something of a computer expert at the firm. How did that skill emerge?

**CM:** *Back in the 1990s, computer applications like those we use today didn't exist. I literally was afraid to work on a computer until a colleague told me, 'The computer is not a monster*

*on your desk.' Bolstered by that encouragement, I proceeded to teach myself with floppy disks and a workbook, along with a support staff of women eager to answer any questions I would have. Remember floppy disks?*

**SB:** What work does your job entail?

**CM:** *As a paralegal, I primarily assist and provide a range of legal support and administrative services for Bernard Vishnick and Jordan Freundlich. These duties include drafting decrees, discovery and inspection responses, notices and other legal documents related to estate litigation. I am the front line with clients, often diffusing difficult situations. My work never slows down and neither do the piles on my desk. I say that with a smile on my face; I would be bored with anything less to do. I also work with just about everyone in the office on whatever needs my participation.*

**SB:** How do you spend your time when not wearing your paralegal hat?

**CM:** *I like to say that I am the CEO and CFO of my family. My husband, Ken, is the head of grounds and maintenance at the Levittown Public Library. We're all involved in our son 23 year old Andrew's racing interest, one he's had since the age of seven. We've been all over the northeast, as far as West Virginia and as close as Englishtown, New Jersey. Our 23 year old daughter, Zenia, is an artist – she won awards in high school – whose talents include photography, painting and decorating. I do enjoy a glass of wine now and then (said with a wink).*

**SB:** If you had one mantra to share with our readers, what would it be?

**CM:** *Try to look for the best in every person and every situation.*

*Colleen Morici is a paralegal working with the attorneys in the firm's Trust and Estate Litigation and Commercial Litigation Practice Groups. She can be reached at [cmorici@vmmlegal.com](mailto:cmorici@vmmlegal.com) or 516.437.4385 x126.*

# A will is the easiest way to exclude someone... and perhaps, the most problematic

By *Madison Porzio, Esq., LL.M.*

Making a will exercises the desire to leave a legacy or property in a way that a person is most comfortable. Attorneys strive to make a will a reflection of the client's wishes. Rarely are these wishes simple or straightforward, and very often include the desire to exclude family members for a variety of reasons. A will is not invalid merely because it appears to be unusual, unjust, unreasonable or inequitable. A will's validity cannot be challenged on the mere fact that the testator fails to provide for his or her children or a particular child. We should make the distinction, however, that under New York law, one cannot disinherit his or her spouse.

A will is the easiest way to exclude someone. As it is traditionally the most common, it also is the most problematic. One might simply not provide for a person within the will. For example, if a will distributes property to three of a testator's four children, but contains no clause disposing of the remainder of the estate, all four children would share in the residuary clause (a clause in a will that disposes of any estate property that remains after satisfaction of all other gifts) equally under the laws which pass property to one's closest living heirs as if there was no will.

One way around this is to add a negative provision in the will, specifically excluding the person as opposed to merely not providing for him or her. In the example above, the assets would be distributed as if the excluded individual died before the testator.

People may have heard of the use of a no-contest clause. Such a clause conditions that if a person challenges a will, and is unsuccessful in his or her challenge, nothing will be received under the will. To challenge the will is to risk losing one's inheritance. Closely akin to a no-contest clause is the idea of giving the person a gift at the time the will is executed. Again, the testator's desire not to give the person anything must be overcome for this strategy to take effect. For a disinherited person to accept a gift at the time the will is made puts the recipient at a disadvantage to later challenging the will while defending the gift made to him or her.

The use of a will may not need to be employed if one's assets have been properly placed in a revocable trust. Trusts are attractive because they take effect during the life of the testator and also can help avoid the probate process entirely. No-contest clauses also can be incorporated into trusts and there is little difference in the treatment between trusts and wills. The main distinction is that assets need to be retitled into the trust during the testator's life. **M**

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*Madison Porzio,  
Esq., LL.M.*



## VMM EXPANDS EMPLOYMENT LAW PRACTICE

Partners **Andrew A. Kimler** and **Avrohom Gefen**, employment law advisers and litigators, have expanded their assistance to employers regarding legal compliance with federal, state and local laws and regulations, as well as best human resource practices. Among the topics Messrs. Kimler and Gefen review are wage and hour practices compliance; employee handbooks; procedures for handling internal discrimination complaints, FMLA (Family and Medical Leave Act of 1993) and/or ADA (Americans with Disabilities Act) situations; and many other topics of significance to business owners. To discuss a review for your company, contact 516.437.4385 or [akimler@vmmlegal.com](mailto:akimler@vmmlegal.com) or [agefen@vmmlegal.com](mailto:agefen@vmmlegal.com).

## UPCOMING EVENT – REGISTER NOW

Partner **James F. Burdi** and VMM attorney **Constantina S. Papageorgiou** have been invited by Astoria Bank, 1150 Franklin Avenue in Garden City, NY, to speak on estate planning on Tuesday, June 6, 2017. The program will begin at 5:30 PM. All are welcome to attend this free program. Contact Mindy Wolffe at 516.390.3027 to make reservations.

Ms. Papageorgiou continued her participation in the New York State Bar Association's Mitchell Rabbino National Healthcare Decisions Day/Week, a public service project, as the volunteer attorney speaking on elder law and trust and estate planning issues at HANAC (Hellenic American Neighborhood Action Committee) Ravenswood Senior Center in Astoria, NY on April 26, 2017. She also presented "Elder Law: An Overview" on February 5, 2017 at St. Demetrios Greek Orthodox Church, discussing how to protect individuals, their families and their assets, along with information on Medicaid eligibility.



*Constantina S. Papageorgiou*



*James F. Burdi*

Mr. Burdi performed in the musical comedy, *First Edition*, as the crooked character Arthur Anderson in the Garden City Community Theatre's March 2017 production. A highlight of Mr. Burdi's performance was in "Fugue for Tinhorns" (commonly known as "I Got the Horse Right Here" from *Guys and Dolls*).

Managing Partner **Joseph G. Milizio** received an award from the Human Rights Campaign (HRC) for his volunteer role as Federal Club Co-Chair Team of the Year for 2017.



*Joseph G. Milizio*



Partner **Eun Chong (EJ) Thorsen** has been reelected vice president of KALAGNY (Korean American Lawyers Association of Greater New York) and is the newest member of the St. John's University School of Law Alumni Association, elected as treasurer on May 17, 2017. Also of note, Ms. Thorsen was a speaker on behalf of the Queens County Women's Bar Association at Councilwoman Karen Koslowitz's March 26, 2017 Rally for Women's Rights in Forest Hills.

**Honorable Edward W. McCarty, III**, of counsel to VMM, and **Madison Porzio**, attorney at VMM, were guest speakers on March 23, 2017 at the Maurice A. Deane School of Law at Hofstra University, discussing legal careers in trusts and estates.



*Edward W. McCarty, III*

Judge McCarty has been inducted into the 7th Legal Operations Detachment's Hall of Honor at the Fort Orange Club in Albany. Reserve as a Colonel, was the unit's first commander.

# news & Events

On April 9, 2017, Ms. Porzio participated in a charity workout at CrossFit Dynamix in Astoria, NY, raising money for WOD (Work-out of the Day) to Remember-Supporting Alzheimer's Caregivers & Research.



Led by Counsel **Jordan Freundlich**, "Team Friendly" won for the second consecutive year the final round of Literacy Nassau's "unScrabble," a unique fundraising/networking event.



*Seated left to right: Theresa Jacobellis, Jordan Freundlich, Laurie Freundlich and Mary Lucatorio. Standing, left to right: Tina Atlas Panos, Joseph Trotti, Lisa Sachs, Dorit Kane, Gail Polivy and Bernard F. McGovern.*

## You've been sued! Now what?... *(Cont'd from Page 1)*

### Discovery

After an answer is filed, the case moves to the discovery phase, during which each party has the opportunity to request information regarding the opposing party's case. Some of the discovery tools in a civil case include requests for documents and other information and depositions. Depositions usually require the parties to answer questions, under oath, before a court reporter in an attorney's office.

### Summary Judgment

A motion for summary judgment may

be filed at any time after the answer is filed, but usually is filed after discovery is completed. A motion for summary judgment asks the court to find that there is no need for a trial because there is no defense to the cause of action or that the claim or defense has no merit. If summary judgment is granted, the plaintiff will obtain a judgment against the defendant or the plaintiff's case will be dismissed.

### Trial and Settlement

If summary judgment is not granted, the case will proceed to trial. However, the overwhelming majority of cases settle before trial due to the costs and

risks of litigation. A settlement can occur at any time during the litigation, but often some discovery is needed before serious settlement discussions occur. A settlement usually will result in the parties releasing all claims they may have against each other. In order to help the parties, the courts often appoint neutral mediators who assist in the settlement process. **M**

*Partner Avrohom Gefen practices in the firm's Commercial Litigation and Employment Law Practice Groups. He can be reached at [agefen@vmmlegal.com](mailto:agefen@vmmlegal.com) or 516.437.4385 x119.*

## IMPORTANT NOTICE

Beginning in 2018, The SideBar will become a primarily digital publication. If you are receiving a print version of The SideBar, WE NEED TO HEAR FROM YOU!

A limited number of print SideBars will be mailed to those who indicate that is their preference. If you currently receive a print version and wish to receive the SideBar digitally in 2018, please make sure we have your email address by calling or emailing Mindy Wolfle at 516.390.3027/[mwolfle@vmmlegal.com](mailto:mwolfle@vmmlegal.com).

We want all our subscribers to receive The SideBar in the format they prefer. Please note that if we do not hear from our print subscribers and we do not have your email address on file, your subscription to The SideBar will lapse at the close of 2017. Thank you.

# UPCOMING VMM ACADEMY PROGRAMS ~ MARK YOUR CALENDAR NOW!

*Expand your understanding of the intricacies of laws that have an impact on your personal and work lives*

LAST WEDNESDAY OF THE MONTH	TOPIC	SPEAKERS
May 31, 2017	<b>Planning for children with special needs: What families should know</b>	<b>James F. Burdi, Esq. and Constantina S. Papageorgiou, Esq.</b>
<b>SUMMER BREAK</b>	<b>SUMMER BREAK</b>	<b>SUMMER BREAK</b>
September 27, 2017	<b>Exit planning for business owners</b>	<b>Joseph G. Milizio, Esq. and John P. Gordon, Esq.</b>
October 25, 2017	<b>Wage wars: Proper pay practices to avoid employee lawsuits and government audits</b>	<b>Andrew A. Kimler, Esq. and Avrohom Gefen, Esq.</b>
November 29, 2017	<b>Elder law and Medicaid planning: For seniors and their care providers</b>	<b>James F. Burdi, Esq. and Constantina S. Papageorgiou, Esq.</b>

**WHERE:**

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**AGENDA:**

**5:45 — 6:10PM: Check in, networking and refreshments  
6:15 — 7:15 PM: Program  
7:15 — 7:30 PM: Questions and Answers**

**THERE IS NO FEE TO ATTEND VMM ACADEMY, BUT ADVANCE REGISTRATION IS A MUST! CONTACT MINDY WOLFLE at [mwolfle@vmmlegal.com](mailto:mwolfle@vmmlegal.com) or 516.390.3027**

## Employment retaliation claims: An avoidable headache. *(Cont'd from Page 2)*

performance. Documentary evidence of the fact that the employee has a history of poor job performance for which the employee received written warnings, can help fend off retaliation claims. The more documentation that exists of the employee's prior performance issues (e.g., excessive lateness or absence), the more difficult it will be for the employee to establish unlawful retaliation.

### *Avoid Disparate Treatment*

Any disciplinary action that is meted out by an employer should be evenhanded and the employer should avoid the disparate treatment of two employees who have engaged in similar violations of employment policy. Any attempt by an employer to treat one employee in a more favorable fashion can provide a possible basis for a retaliation claim. It is clear that before undertaking

any adverse employment action against an employee, an employer must carefully consider the surrounding circumstances and make certain that the adverse action is well justified and supported by documentary evidence. **M**

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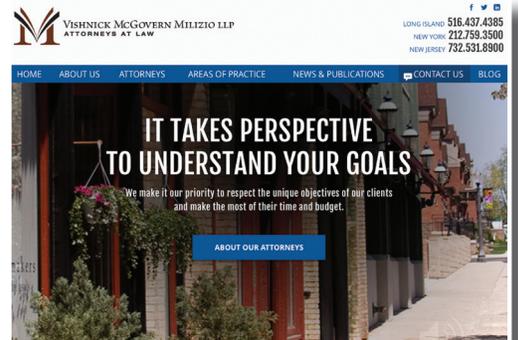
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