



## Welcome to VMM Family Institute's Weekly Insights

By Joseph Trotti, Esq.

I have spent virtually my entire professional career assisting families, as they are forced to deal with the issues surrounding divorce, custody, support and domestic violence. Finding new ways to provide effective representation has been a constant challenge. The current legal system's reliance on adversarial proceedings often is not only inefficient, but harmful to the transition of families. At Vishnick McGovern Milizio LLP, we are proud to introduce the VMM Family Institute<sup>SM</sup>.

Matrimonial and Family Law can - and should - be so much more than fighting among opponents. When conceiving the VMM Family Institute<sup>SM</sup>, we borrowed from a concept known as "Collaborative Law," which recognizes that emotional issues exist, which cannot be addressed by the legal system. The collaborative divorce agenda formally incorporates an interdisciplinary approach with the goal of improving the divorce process for families and

reducing the accompanying emotional harm.

"VMM Family Institute Weekly Insights" are posted on our blog (conveniently located at [www.vmmlegal.com/blog](http://www.vmmlegal.com/blog)) to enhance the public's knowledge of various components of Collaborative Law and to highlight new cases and issues. Our initial post is just one of those topics:



Joseph Trotti, Esq.

### BEWARE OF SPYWARE

Some of our clients, families and friends feel as if they are being watched, followed or listened to. In a very interesting case recently determined and decided in Brooklyn, New York, the role of the court to protect the integrity of the parties and the law was examined and addressed.

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# Social Media: The Lurking Dangers for Employers

By Andrew A. Kimler, Esq.

The use of the internet by employers to either screen prospective job applicants or to investigate the activities of current employees has resulted in a steady increase in litigation based upon violations of either state or federal laws. Among other things, these violations may involve an employee's privacy rights or civil rights.

## Non-Work Conduct

In general, a New York employer may not discriminate against an employee or refuse to hire an applicant based upon that individual's lawful recreational activities conducted away from the worksite during non-working hours. However, an employee's off-duty conduct is not protected if it creates a "material conflict of interest" related to trade secrets, proprietary information, or another business interest. While it appears that no New York court has applied this law to social media sites, it remains possible that an employee's online activities can fall within the purview of this law. Nevertheless, there are other statutes that protect employees from an employer's access to a social media site.

## Privacy Claims

The courts routinely have found that employees have no reasonable expectation of privacy in their workplace computers, especially where the employer has a policy clearly informing employees that company computers cannot be used for personal email activity and that they will be monitored. An employee who uses an employer's computer or email system cannot claim a right to privacy with respect to emails contained on the employer's computer; he/she has no expectation of privacy in emails sent from or received and stored on an employer's computers.

On the other hand, an employer's access to third-party communication service provider's systems may expose the employer to invasion of privacy claims. The Stored Communications Act (SCA) imposes a variety of penalties if a person accesses an electronic communication service, or obtains an electronic communication without authorization while it is still in electronic storage. More specifically, a majority of courts that have addressed the issue have determined that email stored on an electronic communication service provider's system after it has been delivered, as opposed to an email stored on the personal

computer of an employer, is a "stored communication" subject to the SCA.

An interesting example of this involved a New York employer who obtained a former employee's username and password to his personal email account, which he left on the employer's computers. The employer then used that information to access the former employee's personal email account to read and print his emails.

Consequently, it was determined that the employer's entry to the employee's emails while they were in "storage" on the service provider's systems constituted a violation of the SCA.

## Attorney-Client Privilege

An offshoot to the privacy issue is attorney-client privilege, with respect to monitoring of emails. In that regard, the courts are split on whether emails sent using an employer's email account remain privileged. In one case, a federal court ruled that the privilege applied primarily because the employee was not aware that his employer had access to the emails. In

that case, the employer did not inform its employees that it would have regular access and save emails. Additionally, the employer did not ban the personal use of the company's email system. By contrast, another federal court ruled that the privilege was waived with respect to emails sent by the employee to his attorney from work since it was "unreasonable" for an employee to believe that his emails, sent directly from his company's email address over its computers, would not be stored by the employer and made available for retrieval. In yet another case, a federal court ruled that emails sent

to an attorney from a work computer were not privileged, since employees were on notice that the company's handbook precluded any expectation of privacy.

## Discrimination Concerns

It is no surprise that employers use search engines and explore social media sites to obtain information about prospective employees. Such activities, however, may expose an employer to possible discrimination claims based upon the personal information an employer can glean from such sources. For example, Facebook can provide various bits of information



Andrew A. Kimler, Esq.



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of an individual's personal life, which an employer would never inquire about in a face-to-face interview. More specifically, Facebook provides information such as gender, date of birth, religious views and sexual orientation. This information would be considered off limits during a conventional interview. Once an employer possesses such information, however, it may face discrimination claims from applicants who are rejected and who claim that the employer's decision was based upon information contained on a particular social media site. Likewise, some social media sites allow users to post photographs that would reveal to a prospective employer the gender, race and some indication of an applicant's age. Such information also can provide a basis for a discrimination claim by an applicant who is not hired.

The use of social media sites as a means for recruitment also may subject an employer to discrimination claims based upon the "disparate impact" this may have on a protected class of individuals. Disparate impact involves the application of an otherwise neutral employment practice that adversely affects members of a protected class. It may be argued that members of a certain race, gender or age group are more likely to utilize certain social media sites. Therefore, it might be asserted that members of a protected class are less likely to be present on such sites, and accordingly, the employer's recruitment process may have a disparate impact on a particular group of individuals.

### Recommended Employment Policies

To protect itself from potential liability, an employer should consider adopting a variety of measures, including:

- Employees should be informed that they have no reasonable expectation of privacy on the company's computers and email

systems and that they are subject to monitoring.

- Employers should emphasize that employees who engage in the use of social media must do so in a respectful and professional manner and avoid from engaging in any offensive postings.
- It should be pointed out that online activities in violation of the employer's harassment and discrimination policies will not be tolerated.
- Employers also should note that employees should refrain from revealing confidential information, trade secrets and related information.
- Social media policies should specifically point out that employees should refrain from disparaging the employer, its employees and clients.
- Moreover, an employer should not rely exclusively on social media sites to seek prospective applicants. Perhaps a company should utilize other recruitment methods, such as employment agencies and newspaper postings.

Any corporate policies developed by employers should be disseminated to all employees and the employees should acknowledge in writing their receipt of these policies. By drafting specific policies, an employer can help minimize, if not all together avoid, claims arising out of an employee's use of social media. **M**

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In that case, a husband asserted his Fifth Amendment right against self-incrimination when questioned as to whether he installed and used sophisticated spyware on his wife's phone to monitor all of her communications - including incredibly - access to her attorney-client privilege communications.

In addition, he used the spyware to activate a microphone to actually "lis-

ten" on her conversations, attorney-client meetings, sessions with her psychiatrist and conversations between her family and friends. He also then asserted his Fifth Amendment right against self-incrimination related to questions about his attempt to destroy the evidence of his actions from his computer devices.

**THE OUTCOME:** The court acted swiftly and dramatically by effectively

eliminating his right to obtain spousal support, equitable distribution or counsel fees. **M**

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# news & Events



## HELLO AND GOOD-BYE ...



After 22+ years with Vishnick McGovern Milizio LLP, the firm bid a fond farewell to **Marianne Pinto**, as she entered the world of retirement on May 16, 2018. A valued member of the Trusts and Estates Practice Group, Marianne's paralegal skills were equaled by her delightful personality, warm friendships and overall value to the firm. We miss you already, Marianne!



*Meredith Chesler*

The Trust and Estate Administration Practice Group has a new member: Associate **Meredith Chesler**, who is involved in the Surrogate's Court practice, including administration of decedents' estates; admitting wills to probate; administration and settlement of estates; distribution of assets; and administration of estates when there is no will.

VMM is pleased to welcome Paralegal **Liudmila (Mila) De La Rosa** and Legal Assistant **Rosemary Vella**, who recently joined the Trusts and Estates Practice Group. Working closely with the department's attorneys, Mila focuses on Estate Planning; Rosemary's work encompasses both Estate Planning and Administration.



## BOARD APPOINTMENTS ...

Partner **Joseph Trotti**, a longtime supporter of the Forest Hills Youth Athletic Association, is now co-chairman of the organization.



*Joseph Trotti*



*Joseph Milizio*

Managing Partner **Joseph Milizio**, a member of the steering committee that launched the Long Island Chapter of the international Exit Planning Institute in March 2018, has been named a vice president of the organization.



*Andrew A. Kimler*

Partner **Andrew A. Kimler**, a member of the board of trustees of the Reform Temple of Forest Hills, has since been elected vice president of the board.

## HERE, THERE AND EVERYWHERE ...



Partner **Joseph Trotti**, who heads the firm's VMM Family Institute, attended the Association of Family and Conciliation Courts Conference entitled, *Compassionate Family Court Systems: The Role of Trauma-Informed Jurisprudence*, from June 6-9, 2018 in Washington, DC.

In addition to a full schedule of seminars and discussions, the event featured Jaycee Dugard, Author, *A Stolen Life*; Bob Woodward, *Washington Post*; and the political satire of *The Capitol Steps*.

On April 11, 2018, Partner **Joseph Trotti**, a member of the Nassau County Bar Association's Matrimonial and Family Law committee, presented a toast to The Domus, home of Association, at a joint dinner meeting of the Matrimonial, LGBTQ and Adoption Law Committees. Managing Partner **Joseph Milizio**, co-chair of the LGBTQ committee, along with Associate **Meredith Chesler** and Counsel **Jordan Freundlich**, also were in attendance.



# news & Events



Partners **Andrew A. Kimler** and **Avrohom Gefen** presented a program entitled, How to Avoid a Lawsuit!, on April 15, 2018, to restaurant owners, managers and other Astoria business people at Zenon Taverna. The program

covered topics that included minimum wage and overtime rules; New York City Sick Pay law; New York State Family Paid Leave law; Workers' Compensation; and sexual harassment.

## THERE AREN'T ENOUGH HOURS IN THE DAY (OR NIGHT) ...



*Team Friendly, in their spirited t-shirts. Standing, from left: Kenneth Renov, Joseph Trotti, Lauren Freundlich, Jordan Freundlich, Lyn Dobrin, Meredith Chesler. Front, from left: Lynn Brown, Theresa Jacobellis, Dorit Gordon.*

Partner **James Burdi** attended the Kamp Kiwanis 50th Anniversary Gala, held on March 4, 2018 at the Crest Hollow Country Club ... VMM's "Team Friendly" once again sponsored and competed in Literacy Nassau's (un)Scrabble Challenge on March 15, 2018, led by Counsel Jordan Freundlich, winning the "Most Team Spirit" award ... Managing Partner **Joseph Milizio** and Counsel **John Gordon** attended the Alliance of Merger & Acquisition Advisors Long Island Chapter Fireside Chat on March 31, 2018 at the Carlyle at the Palace ... VMM was a sponsor of Gotham Open 2018, a United States Bowling Congress certified tournament, held in April at the Farmingdale Lanes ... Senior Partner **Bernard Vishnick** and Partner **Andrew A. Kimler** attended the Brandeis Association's Holocaust Remembrance Program on

April 11, 2018 ... **Joseph Milizio** attended the 2018 Deal Making Summit, held by the New York Association of Business Brokers, on April 18, 2018 ... Partner **Avrohom Gefen** and Associate **Kenneth Renov** attended a Legislative Breakfast held on April 29, 2018 at the Jewish Community Center of the Rockaway Peninsula ... In May, VMM sponsored the Planned Parenthood of Nassau County Pink Out Power Up! Gala ... Partner Joseph Trotti attended the Future Leaders Gala hosted by the Korean American Youth Foundation on May 31, 2018 ... Associate **Constantina Papageorgiou** attended the Judiciary Night of the Hellenic Lawyers Association on June 5, 2018.



## VMM ACADEMY ANNOUNCES THE VMM SPEAKERS' BUREAU

We are pleased to announce the launch of the VMM Speakers' Bureau, a spin-off of VMM Academy, the educational arm of Vishnick McGovern Milizio LLP.

VMM Academy, an informative legal seminar series, presented by those in the know, for those who need to know, has expanded beyond the walls of our office in Lake Success. Our knowledgeable attorneys are available AT NO CHARGE to present the legal aspects of relevant topics to members of your business or organization.

Consider the range of our experience in the areas of Trusts and Estates Law; Elder Law; Matrimonial and Family Law; Transactional and Business Law; Exit Planning for Business Owners; Employment Law; Commercial Litigation; Real Estate Law; legal issues affecting those in the LGBTQ community...each of which are multi-faceted and ever-changing.

For more information, or to book a speaker, please contact Chief Marketing Officer Mindy Wolfle at 516.390.3027 or [mwolfle@vmmlegal.com](mailto:mwolfle@vmmlegal.com).



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