PRO BONO

Pro Bono Attorney of the Month Tiffany N. Moseley

By Ellen Krakow

The Suffolk Pro Bono Project is pleased to honor Tiffany N. Moseley as its Pro Bono Attorney of the Month. Although a relatively new attorney, Ms. Moseley has already represented multiple pro bono clients, successfully completing their matrimonial matters. We are extremely pleased to recognize her for the generous and great work she has done in such a short amount of time.

Tiffany N. Moseley is a young attorney in a solo practice that specializes in family, matrimonial, and guardianship law. She also serves as 18b assigned counsel in the Suffolk County Family Court, appearing in court daily in her active practice. Ms. Moseley is one of several participants in Touro's Community Justice Center, the first law school incubator project to operate on Long Island, which opened its doors in November 2013 and provides reduced-fee legal representation to low and middle income clients.

After obtaining her undergraduate degree from Seton Hall in 2008, Ms. Moseley was a Pre-Kindergarten schoolteacher for one year. She then attended Touro Law Center. Ms. Moseley was honored in 2010 by Touro as a Public Interest Fellow in connection with her work at the law school's Family Law Clinic. While a law student, Ms. Moseley also interned with the Suffolk County Attorney's Office and New York City Legal Aid's Criminal Division. She continued her training in matrimonial matters at Mallilo & Grossman, a law firm in Flushing, NY. Ms. Moseley began there as a legal intern during her final year of law school and then became an associate upon graduating Touro in 2012. Ms. Moseley's varied experience during and immediately following law school proved invaluable to her as she moved on to her solo private practice.

Tiffany N. Moseley

Despite the challenges of launching her own legal practice at the Community Justice Center incubator project, Ms. Moseley was motivated to do more and give back. She contacted the Project in 2012 to offer her assistance and agreed not only to accept matrimonial referrals, but to also take on more than one case at a time. Her background in family and matrimonial law was a perfect fit for the Project, which receives hundreds of inquiries each month for divorce representation.

Since first contacting the Project, Ms. Moseley has completed several pro bono cases. She not only successfully advocated for her clients, but also extended herself above and beyond what would normally be expected. One example would be the repeated assistance she gave a pro bono client who was homeless at the time and living in an emergency shelter without any of his personal possessions. Ms. Moseley stored a suit for him in her office, which he would then change into just before their court appearances. When this same client did not have a way to return to his shelter following their meetings at Ms. Moseley's office, she arranged for transportation for him back to his shelter.

When asked why she has devoted so much of her time to pro bono work in the early stages of her legal career, Ms. Moseley stated, "I have real concern for those who need an attorney but can't afford one. I want to help people in need, and this allows me a way to do it." She also believes the work she's done through the Project has greatly benefited her professionally, by providing opportunities to appear before Suffolk County judges and opposing counsel previously unfamiliar with her, and to build relationships with them during the course of her pro bono matters.

Maria Dosso**,** Nassau Suffolk Law Services' Director of Communications and Volunteer Services, notes, "Tiffany has been an active and committed participant in the Pro Bono Project since the very start of her career. We are so impressed with her eagerness and her commitment, and we're grateful for the fine work she's done."

In addition to recently starting her own practice, Ms. Moseley recently started a family, giving birth to her first child, her son Cameron, earlier this year!

The Pro Bono Project's clients have greatly benefited from Ms. Moseley's efforts and legal expertise. We look forward to a long association with Ms. Moseley. It is with great pleasure that we honor her as Pro Bono Attorney of the Month.

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non-profit civil legal services agency providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq. (631) 232-2400 x 3323.

Note: Ellen Krakow Suffolk Pro Bono Project Coordinator Nassau Suffolk Law Services.

CIVIL RIGHTS

Facebook, Free Speech and a Reminder that *Mens Rea* Matters

By Cory Morris

When it comes to Facebook threats, intent matters. Mens Rea, the guilty mind element of a crime, still applies even in the digital age of Facebook posts, Twitter tweets and LinkedIn likes. The case here is *Elonis v. United States*, 575 U. S. ____ (Jun. 1, 2015). "The U.S. Supreme Court ruled 7-2…to limit convictions for threats made on Facebook, a decision that avoided First Amendment issues but provides some clarity about when online communication can be considered a federal crime."[1]

Petitioner, Anthony Douglas Elonis ("Elonis"), was convicted of violating 18 U.S.C. Section 875(c), "transmit[ing…] any communication containing any threat… to injure the person of another...." "A grand jury indicted Elonis for making threats to injure patrons and employees of the park, his estranged wife, police officers, a kindergarten class, and an FBI agent…"[2] Although these threats seemed egregious, the Supreme Court said that the focus of the lower court improperly narrowed upon the recipient of the threat rather than its creator.

Cory Morris

This Supreme Court decision rests upon the importance of Mens Rea. "From its inception, the criminal law expressed both a moral and a practical judgment about the societal consequences of certain activity."[3] Indeed, a "core principle of the American system of justice is that individuals should not be subjected to criminal prosecution and conviction unless they intentionally engage in inherently wrongful conduct or conduct that they know to be unlawful." When there is no Mens Rea requirement in a criminal statute, oftentimes a reviewing court can become confused and, as is the case here, differing courts will offer differing opinions about the mental state required for a conviction.

This lack-of-intent phenomenon is not unique at all. Indeed, recent studies show that of the "446 criminal proposals advanced in Congress during the 109th Congress, 25 percent…had no intent requirement… Of the 36 new criminal statutes passed by the 109th Congress, nine…had no intent requirement at all." The *Elonis* case dealt with this issue, albeit there was little to no mention in the news about what caused this confusion to begin with.

Rather than appreciate the bedrock of our legal system, news sources focused on the content of the speech and whether it should be protected. While some commentators saw this as a decision "likely to shield people who rant online or muse darkly about carrying out violent acts," others saw this as a "ruling fit for the Facebook era, the Supreme Court…[making] it a little harder to prosecute people for making threatening statements."[4]

Becoming "Tone Dougie," Elonis began to post graphically violent albeit fictitious postings. Akin to the most repugnant and abusive insult being prefaced by the "no offense" disclaimer, Elonis decided to post rap lyrics involving real-life subjects and then allude to his first amendment rights as if to hint that it was his expression of free speech and not a threat. At trial, Tone Dougie said he emulated the rap lyrics of Eminem, who also made rap lyrics about killing his ex-wife. Rejecting this argument, prosecutors stated that "it doesn't matter what [Elonis] thinks" and the jury agreed, convicting Tone Dougie and, arguably, providing credibility to his new violent-rap style persona.

In evaluating these Facebook posts, the Supreme Court stated that "[t]he question is whether the statute also requires that the defendant be aware of the threatening nature of the communica-

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WHO'S YOUR EXPERT

Growing Trends in the Courts

By Hillary Frommer

It seems that the courts are rendering more judicial decisions concerning expert witnesses than ever before. Does this mean simply that expert witnesses are more prevalent in litigation? Are litigants scrutinizing expert reports and opinions more closely during pretrial discovery than they have in the past? Or is there something unique about expert witnesses and their roles in litigation, both pretrial and during trial, that has caused this onslaught of attempts to preclude, exclude, and seek new trials?

Just this year alone, there have been quite a number of decisions addressing the timing of expert reports, the validity of expert opinions, and the qualifications of expert witnesses. As *The Suffolk Lawyer* heads into its summer hiatus, I leave you with a sampling of some of the issues the courts tackled in the past few months.

Hillary A. Frommer

In May, the Court of Appeals considered whether an expert witness could testify in via live video conference. In *New York State v. Robert F.*, No. 53, NYLJ 1202726477874, at *1 (Ct. of App. Decided May 14, 2015), the Attorney General commenced a proceeding under Article 10 of the Mental Hygiene Law to determine whether the respondent was a detained sex offender requiring civil management. During the dispositional hearing stage of the proceeding, the state's expert witness, Dr. Peterson, testified that the respondent was a dangerous sex offender who required confinement. After the respondent testified, the court permitted the state to recall Dr. Peterson to testify on rebuttal. However, due to Dr. Peterson's schedule, she was unable to return to court. At the state's request, and over the respondent's objection, the court permitted Dr. Peterson to testify via live, two-way video conference. After the hearing, the court found that the respondent was a dangerous sex offender and ordered his confinement. The respondent appealed on the grounds that the Supreme Court erred in permitting Dr. Peterson to testify via video conference. The Appellate Division affirmed the order, finding that "in the absence of an explicit prohibition, the trial court has the discretion to utilize live video testimony pursuant to its inherent power to employ innovative procedures where necessary to carry into effect the powers and jurisdiction possessed by it"[1] The respondent was granted leave to appeal to the Court of Appeals, which affirmed, yet found that "permitting Dr. Peterson to deliver her testimony via video conference over respondent's objection without requiring a proper showing of exceptional circumstances was error." However, given the "overwhelming evidence presented by the State," and which include Dr. Peterson's in-person testimony on direct, the court determined that the error was harmless and affirmed the decision.

In *Benjamin v Fosdick Machine Tool Co.*,[2] a products liability action, the District Court excluded the plaintiff's expert witness from testifying

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REAL ESTATE

Real Estate Attorneys as Real Estate Brokers

By Andrew Lieb

While presenting a talk on the topic of the Top Real Estate Laws of 2014 to the Nassau County Bar Association Real Property Committee I was asked about the restrictions on attorneys acting in real estate brokerage in this state, and responded that attorneys are exempt from the real estate license law. The audience was astonished to learn that licensed New York State attorneys can engage in real estate brokerage without a real estate brokerage license pursuant to Real Property Law §442-f. The statute expressly excludes "attorneys at law" from "[t]he provisions of this article" in reference to Article 12-A, which is the real estate license law. Moreover, the Department of State, which regulates real estate brokers in this state, has held in an administrative decision that attorneys are "not required to meet any of the educational, experiential, or character standards imposed by the governing statutes." *See In the Matter of Barry G. Bell*, 813 DOS 04. Still further, the Nassau County Supreme Court has echoed this decision in *Matter of Huber v. Shaffer* wherein it quoted the seminal Appellate Division case of *Matter of Cianelli v. Department of State* which held that "[i]t is true that as an attorney [a party] could act as a broker without a license." *See* 160 Misc.2d 923 (1993) *quoting* 16 AD2d 352 (1st Dept., 1962).

So why do attorneys ever get real estate brokerage licenses if they don't need them to function in the field?

Andrew Lieb

Matter of Cianelli explains the start of this answer wherein the court held that "[a]s a broker [an attorney] was privileged to do things that he could not do as an attorney-for example, he could hire real estate salesmen and he could advertise." It is noted that *Matter of Cianelli* predates *Bates v. State Bar of Arizona,* 433 US 350 (1977), where the court upheld the right of lawyers to advertise, and consequently a lawyer acting in brokerage could advertise to the extent permitted by the Rules of Professional Conduct; just not as a licensed real estate broker. Nonetheless, *Matter of Cianelli* remains accurate when it comes to hiring a real estate salesperson. Specifically, Real Property Law Article 12-A and19 NYCRR 175.21 both make numerous requirements that a salesperson must be supervised by a licensed real estate broker and neither the statue nor the regulation make an exception for an exempt attorney-at-law to provide supervision. As a result, should an attorney wish to have a staff of real estate salespersons, that attorney is required to be licensed as a real estate broker.

Beyond the benefits of having a staff at one's real estate brokerage office, the other advantage of an attorney obtaining licensing as a real estate broker involves real estate boards and cooperative brokerage agreements. To be a member of many real estate boards, the board may require a copy of your current real estate license in its application as a condition precedent to membership. The advantage of being a member of a local board is that many offer cooperative brokerage agreements for members. In real estate brokerage there are basically three types of transactions; to wit: (1) Direct Deals where one broker both represents the listing and procures the buyer or tenant; (2) In-House Deals where two or more brokers from the same brokerage cooperate wherein one or more represents the listing and one or more procures the buyer or tenant; and (3) Co-Broke Deals where different brokers cooperate to effectuate a deal where one has the listing and one or more procures the buyer or tenant. While an attorney can certainly earn a real estate brokerage commission in either a Direct Deal or an In-House Deal by way of Real Property Law §442-f (i.e., commission is paid directly from the client or customer to the attorney), earning a share of the commission from the listing agent (either the Seller's Agent or Landlord's Agent pursuant to RPL §443) by procuring a buyer or tenant on a Co-Broke Deal can be problematic when one is unlicensed in real estate brokerage. There is no statutory right that entitles a real estate broker to share a commission on a Co-Broke Deal and many real estate brokers will not share their commission with a broker or exempt-attorney who is a non-member of their local real estate board. Instead, such a broker will have to charge their buyer a fee and therefore the buyer must pay more money to bid on the same property that another like buyer represented by a board member would have to bid. While this practice raises both antitrust issues and breach of fiduciary duty issues in the listing broker (i.e., both a Seller's Agent and a Landlord's Agent owes its seller or landlord the duties of accountability and obedience and its questionable as to why an informed seller/landlord would not offer the same co-broke split to a non-board member procuring cause broker as it would to a board member procuring cause broker), being legally correct is both costly to prove and not beneficial in getting the brokerage job done.

Regardless, the Department of State has opinioned that an attorney who obtains a real estate brokerage license is not only exempt from "the educational and examination requirements for admission," but also from "the continuing education requirements." *See* 1979 N.Y. Op. Atty. Gen. 69. So, an attorney who wants a license must merely pay a fee. Isn't that the path of least resistance?

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb serves as a Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for several years.

LAND TITLE LAW

Do These Regs Have Legs?

By Lance R. Pomerantz

Predicting the future is always a risky business, particularly when it involves proposed regulations or legislation. Many proposals attract attention, only to fade in the face of potent opposition or the emptying of the legislative hourglass. On the other hand, knowing what is on Albany's mind can prevent being blindsided should new schemes come to fruition. Here's a look at some that are presently on the front burner.

Regulation 208

On May 6, 2015, the New York State Department of Financial Services ("DFS") published proposed Insurance Regulation 208[1] in the State Register. According to the official DFS summary, the regulation

- Delineates expenditures that title insurance corporations and their agents are prohibited from providing to current or prospective customers as an inducement for title insurance business;
- Mandates new reporting requirements intended to exclude all prohibited expenditures from future rate calculations;
- Sets parameters with respect to charges for ancillary services, such as Patriot Act, bankruptcy, and municipal searches, escrow services and recording of closing documents; and
- Prohibits the payment of gratuities and pick up fees to closers.


Lance R. Pomerantz

If implemented in their current form, the regulation will dramatically change customary marketing methods, rate-setting formulas and closing practices throughout New York State. The looming implementation of the combined TILA-RESPA Integrated Disclosure forms further complicates the situation.

The comment period for this regulation expired June 22, 2015**.** As of this writing, DFS has not issued a final decision on implementation. [*Full disclosure: the New York State Land Title Association has opposed the proposed regulation. The author serves on the Law Committee of the NYSLTA.*]

Proposed legislation

The New York Senate Committee on Local Government is considering Bill S. 5722-2015, which contains several new provisions affecting conveyancing documents.

Real estate crime & the land records

Section 7 of the Senate bill amends the definition of Offering a False Instrument for Filing In the First Degree[2] to include the "knowing procurement" and recording of a written instrument affecting real property that contains a false statement or false information.[3]

Section 3 adds a new section to the Criminal Procedure Law giving the District Attorney the ability to obtain a court order declaring a false real property instrument void *ab initio*.[4] This motion practice would take place in the criminal court in which the underlying prosecution is taking place.[5]

The DA is empowered to record a notice of motion in the land records, which would have the same effect as a notice of pendency filed pursuant to CPLR Article 65.[6] Following notice to "to all persons who have an interest in the property"[7] the court "must conduct a hearing" at which hearsay evidence, as well as pending civil proceedings regarding title claims may be considered.[8]

After conducting the hearing and making "findings of fact essential to the determination whether to declare the instrument … void," *and* upon the conviction of the defendant, the court *may* order that the instrument be declared void *ab initio*.[9] On the other hand, if the court, upon considering the motion, finds that the matter is more appropriately determined in a civil proceeding, the court may decline to make a determination.[10]

Enhanced notary requirements

The Senate bill also imposes numerous requirements on both notary qualifications and notary procedures.

Section 4 of the Senate bill adds a new subdivision (1a) to Executive Law §131. Each applicant for a notary public commission will be required to submit two sets of fingerprints to "assist in determining the identity of the applicant and whether such applicant has been convicted of a felony or any offenses." One set of fingerprint images will be forwarded to the FBI for a national criminal history record

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FAMILY/MATRIMONIAL

Same-Sex Marriage/Divorce

By Michael Pernesiglio

As the laws of each state evolve to allow for same- sex marriages, there are certain repercussions and limitations that should be considered by same-sex spouses. Some states, like New York, recognize same- sex marriage and do not have a residency requirement for same-sex couples to get married[1]. As a result, couples are coming from all over to get married in New York, only to relocate and reside elsewhere.

However, many of the prospective beneficiaries of these potential legislation changes fail to consider and prepare for obtaining a same-sex divorce. In the majority of states which allow for same-sex marriages, same-sex spouses can divorce in said state as long as one spouse satisfies the divorce residency requirement in that state.

But what if a same-sex couple relocates to a state which does not recognize same-sex marriage? How can a same-sex spouse obtain a divorce if the state where they now reside does not even recognize their marriage as valid? Are they forced to relocate to satisfy the residency requirement of a state which recognizes their marriage?

Other states like Vermont, allow for non-resident same-sex spouses to obtain a divorce.[2] According to Vermont law, a non-resident same-sex spouse can obtain a divorce if the following criteria are met: the marriage licenses for the same-sex spouses was issued in Vermont *and* the same-sex spouses reside in a state that does not recognize same-sex marriage. In addition, Vermont has other requirements such as the non-existence of minor children; required disclosure of financials and income statements; and neither same-sex spouse can be the subject of an abuse proceeding, among others[3]. The lack of these requirements aids in expediting the divorce proceedings and leaves little room for issues subject to litigation, which ultimately reduces same-sex spouses' attorneys' fees, costs and potential legal actions.


Michael Pernesiglio

However, what if the same-sex spouses' relationship breaks down irretrievably and they reside separate and apart from each other in different states or even different countries? Further, what if one of the same-sex spouses temporarily resides in a state which recognizes same-sex marriage, however they have not yet resided there long enough to satisfy the states' residency requirements? Still further, consider if the other same-sex spouse resides in a state or country which does not recognize same-sex marriages? What is the same-sex spouse to do? Are they required to re-establish residency in the state which issued their same-sex marriage license? Or can one of the spouses wait until they establish residency in a state, which recognizes same-sex marriage and then obtain a divorce once the residency requirements have been established?

One thought is to delay the divorce proceedings long enough until the divorcing same-sex spouse can satisfy the residency requirements in a state, which recognizes same-sex marriage. However, what if time is of the essence and the same-sex spouses cannot wait for residency to be established? (i.e. one of the same-sex spouses is leaving the country indefinitely with no intention to return) Where can a divorce be granted if neither of the same-sex spouses currently reside in a state, which recognizes same-sex marriage nor neither same-sex spouse currently resides in the state where the marriage license was issued?

Consider this hypothetical: X and Y enter into a same-sex marriage in the state of Vermont (which recognizes same-sex marriages). During the course of the marriage, their relationship breaks down irretrievably and the parties decide to reside separate and apart from one another; X moves to Nevada and Y moves to Canada. After residing in Nevada for 6 months and establishing residency, X decides to relocate to California (which recognizes same-sex marriages) and has currently resided there for three continuous months, with intent to remain indefinitely. Y continues to reside in Canada with intentions of leaving North America permanently with no intention of returning and X and Y need the divorce finalized immediately and most definitely prior to X's permanent departure from the country.

Now X and Y decide to get a divorce. Where can they properly file for one? Spouse X cannot file for divorce in California (which recognizes same-sex marriage) since spouse X has not resided in-state long enough to satisfy the residency requirement; X cannot file for divorce in Nevada (which recognizes same-sex marriages) since although X resided there long enough to establish

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TAX

Dissolved By the State? Rejected By the Tax Court

By Lou Vlahos

It's great to be in business when things are going well. When things start to go badly however, they can quickly cascade out of control, with reduced cash flow leading to the diversion of trust fund taxes, like sales and employment taxes, toward the payment of business expenses. Additionally, a struggling business owner in need of operating capital will often forego the remittance of business income taxes in favor of satisfying trade debts.

When the "deferred" income taxes are owed by a corporate taxpayer to the state under the laws of which the corporation was formed, there may arise at least one serious federal income tax consequence of which the corporation and its shareholders should be aware.

Dissolution by proclamation

"Federal income tax consequence for failing to pay state taxes?" you may ask.

Most NY tax advisers are aware that if a NY corporation does not file franchise tax returns, or pay franchise taxes, for two or more years, the NY Secretary of State may dissolve the corporation by proclamation, at which point the legal entity of the corporation ceases to exist, as do any legal rights to which it was entitled as a corporate entity under NY law. These lost rights include, of course, "the right to sue in all courts."

Many taxpayers and advisers believe that a dissolution by proclamation must result in the taxable liquidation of the corporation for Federal income tax purposes [IRC Sec. 331 and 336]. Fortunately, they are mistaken. Unfortunately, however, as two recent Tax Court decisions show, these corporations will encounter other difficulties with respect to Federal tax consequences.

Louis Vlahos

Just the facts

In each of the decisions, the respective taxpayers were California corporations whose corporate privileges were suspended by the state for failure to pay state franchise tax. In addition to these taxpayers' failure to pay state tax, had also failed to satisfy their federal tax obligations. As a result, the IRS had mailed to each respective taxpayer a notice of deficiency (a so-called "90-day letter") determining federal income tax deficiencies, penalties, and additions to tax. Each taxpayer timely filed a petition (i.e., within 90 days of the notice) in the Tax Court challenging the IRS's determinations. [*Leodis C. Matthews, APC v. Comr.,* T.C. Memo 2015-78; *Medical Weight Control Specialists v. Comr.,* T.C. Memo 2015-52] In most cases, the timely filing of its petition with the Tax Court would have enabled taxpayer to contest the asserted tax liabilities without having to first pay them; this is a major reason why most taxpayers opt to contest a tax liability in the Tax Court rather than in another forum in which payment would have to be remitted before a challenge could be made.

In each case, the IRS filed a motion to dismiss the taxpayer's petition for lack of jurisdiction, alleging that taxpayer lacked the capacity to sue at the time the petition was filed. Also in each case, the CA Franchise Tax Board issued to each of the taxpayers a certificate of reviver, retroactively reinstating the taxpayers' corporate existences (on account of the satisfaction of their respective past-due tax liabilities). However, these certificates were issued after the end of the 90-day period.

And the court says

The Tax Court held for the IRS in both cases, reasoning that it lacked jurisdiction over the cases—notwithstanding the otherwise properly filed petitions.

According to the court, whether a corporation has capacity to engage in litigation in the court is determined by the law under which the corporation was organized. The taxpayers' petitions, the court stated, was filed at a time when their corporate powers, rights, and privileges were suspended by the State of CA. A suspended corporation, it stated, cannot prosecute or defend an action while its legal status is suspended. Furthermore, the court stated, a revival will not restore a taxpayer's capacity to litigate a Tax Court case when the date of the revival is beyond the 90-day period in which a petition in the court was required to be filed.

The Tax Court noted that the CA courts have been clear that statutes of limitations create substantive defenses that may not be prejudiced by a corporate revival. As a result, the court found that the taxpayer lacked the capacity to file a valid petition that would confer jurisdiction over the matter on the Tax Court.

The court further explained that the timely filing of a petition in response to a notice of deficiency is a statutorily imposed jurisdictional requirement. The taxpayer's suspension under CA law deprived it of the capacity to sue, and thus prevented its corporate revival from prejudicing the IRS's defense of lack of subject matter jurisdiction. Pointing out that it lacked the authority to relieve the taxpayer from the jurisdictional requirement, the court granted the IRS's motion to dismiss for lack of jurisdiction.

What's next for taxpayer?

As a result of its loss in the Tax Court, and as a matter of federal tax law, the taxpayer will be assessed the additional tax, interest and penalties asserted by the IRS. The IRS will then begin collection action against the taxpayer by demanding payment. If the taxpayer fails to pay after this demand, a lien will arise (as of the time the assessment was made) in favor of the IRS upon all of the taxpayer's property. The levy process will follow and the tax will be collected.

If the taxpayer's objection to the additional taxes is defensible, it may file a refund claim with the IRS, and then bring an action in U.S. district court.

Takeaway

A troubled business is faced with many choices. Whom does it pay? Whom does it defer, or just ignore? There are trade creditors, there are institutional lenders, and there are federal and state taxing authorities.

Each decision will have consequences. We have seen cases where personal liability has been imposed upon the owner of a business in respect of the trust fund taxes owed by the business. We have seen cases where an owner has been charged with transferee liability for the income taxes of a corporate business that has been liquidated.

Almost invariably, the owners of the troubled business believe that, if they can just sustain the business a bit longer, it will turn the corner and become profitable again, at which point the business will either satisfy its creditors, including the taxing authorities, or work out a settlement (perhaps through a reduction of the amount owing and/or the implementation of a payment plan).

Most taxing authorities will suggest that such a business should cease operations altogether, rather than continue to neglect its tax obligations and allow them to grow exponentially (consider the power of daily compounded interest, plus penalties).

The ostrich is among my least favorite creatures. So is the unrealistic taxpayer. Early realization of the tax issue is the key, shortly followed by planning, and immediate implementation of the plan. The preservation of options has to be one element of that plan, and should include the preservation of a corporation's legal status. Without that, a corporate taxpayer cannot contest a liability in Tax Court, as we saw above. Nor can it pursue its own trade debtors – for example, customers who owe it money for services rendered or products delivered. This, in turn, will make it more difficult for the corporation to pay its own debts (including taxes) and turn that corner that its owners keep looking for.

Note: Lou Vlahos, a partner at Farrell Fritz, heads the law firm's Tax Practice Group. Lou can be reached at (516) 227-0639 or at lvlahos@farrellfritzcom.

NOTICE OF ELECTRONIC FILING REQUIREMENTS
NOTICE OF APPEAL

EFFECTIVE JULY 15, 2015, ALL NOTICES OF APPEAL AND REQUIRED SUPPORTING PAPERS FILED IN A MATTER SUBJECT TO ELECTRONIC FILING THROUGH THE NEW YORK STATE COURTS ELECTRONIC FILING SYSTEM (NYSCEF) BY A PARTICIPATING FILER SHALL BE UPLOADED AS ONE PDF-A FORMAT DOCUMENT IN THE FOLLOWING ORDER ALONG WITH PAYMENT OF THE APPROPRIATE FEE:

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CONSUMER BANKRUPTCY

Court Permits Chap 13 Debtor to Do the Unthinkable

By Craig D. Robins

Can a Chapter 13 debtor extend a plan well beyond 60 months?

Any attorney who regularly represents Chapter 13 debtors is extremely familiar with some statutory requirements that are etched in stone, and one of them is that the plan can never, ever be longer than 60 months, no way, no how.

It appears that the Bankruptcy Code provides for no flexibility whatsoever for extending the five-year period. Of course, the essence of Chapter 13 bankruptcy is that the debtor pays back some or all of his debts over a period of time, typically three to five years, but never more.

As recently as October, a written decision from our own district's Chief Judge, Carla E. Craig, sitting in the Brooklyn Bankruptcy Court, reiterated that basic legal premise contained in Bankruptcy Code section § 1322(d)(1), which states that plan payments may not extend longer than five years. *In re Merhi* (Case No. 1-14-42691-CEC, October 10, 2014).

I was therefore quite surprised and intrigued to come across a decision out of North Carolina that permitted a debtor to amend her plan to extend the period of payments from 60 months to 75 months, showing that sometimes the seemingly impossible is indeed possible. *In re Anessa Lynn Morris* (U.S.B.C. E.D.N.C., Case No. 12-03694-SWH, July 31, 2014). The debtor argued that the 60-month commitment period does not begin until the original proposed plan is confirmed, and the court agreed.

In *Morris*, the debtor brought a motion to modify her plan after confirmation in order to extend the period of payments from 60 months to 75 months. Despite the trustee's opposition, the debtor prevailed. During the period after she filed her petition, the debtor had been engaged in some extended litigation and as a result, the court did not confirm her plan until 15 months after filing.

Craig Robins

The court pointed out that § 1329(c) imposes a five-year commitment period but that § 1325(b)(1)(B) provides that this 60-month period begins on the date that the first payment is due under the plan. The distinction the court made is that the monthly clock starts ticking at the time of confirmation of the original plan, as opposed to the date the proposed plan is filed.

The court also noted that the debtor proposed the modified plan in good faith and that there was no evidence that the debtor was trying to take advantage of the bankruptcy system by back loading payments. Thus, the court concluded that since § 1329(c) only requires that payments be completed within 60 months of confirmation of the original plan, and since the only way the debtor could pay her debts and receive the fresh start that she was entitled to was to extend payments over a 75-month period, the court determined that this amount of time was warranted.

Ways to Get Debtors More Time

Chapter 13 trustees are usually loath to permit debtors more than 60 months to complete their obligations under the plan. However, that does not mean that a debtor cannot do so. I am not aware of any case in this jurisdiction in which a judge rendered a decision involving the issues presented in *Morris*. Thus, it is quite possible that a judge here could side with a debtor in extending the length of the plan under the appropriate circumstances.

It may also be possible to get a debtor more time informally. Even though a plan is limited to 60 months, and § 1322(d) states that a plan period may not be more than that, sometimes a trustee will keep a case open for a limited period of time to give the debtor the opportunity to cure any plan arrears.

In one California case, the trustee brought a motion to dismiss after the 60th month because the debtor had not completed his obligations. However, the debtor prevailed in preventing dismissal and obtained an additional period of time to cure the arrears. *In re Samuel D. Hill*, 374 B.R. 745 (Bankr. S.D. Cal 2007). The trustee estimated that this additional time would be an incredible 53 months after the 60th month. The debtor asserted without contradiction that his problem derived from having innocently underestimated certain creditor claims.

In *Hill*, the court examined whether failure to make payments was a basis for dismissal and held that § 1307 governs dismissals and that nowhere in that section is it specified that failure to complete a confirmed plan in 60 months is, in itself, a ground for dismissal. The court noted that other courts have permitted debtors to continue to perform for a "reasonable" amount of time after the 60 months.

Interestingly, the court in *Hill* found that the debtor's failure to conclude plan payments within the 60-month period was a "material breach" of the terms of the plan. However, the court went on to say that such a material breach does not compel conversion or dismissal under § 1307. In determining that the wording of that statute gave the court discretion, the court pointed out that Congress could have written the words "shall convert or dismiss" into the statute, but instead wrote, "may." Thus, the court permitted the debtor to continue to make payments well past the 60-month period and over the objections of the trustee, although in a somewhat informal manner as the plan was not formally extended.

The take-away from these cases is that bankruptcy practitioners may be able to help their clients who cannot finish payment obligations within 60 months, even though we previously thought that doing so is impossible. There seems to be little or no case law in this jurisdiction on such issues, but as indicated above, other jurisdictions have sided with honest and unfortunate debtors. If the issue were to be litigated, perhaps one of our judges would give the debtors additional time.

Also keep in mind that if a debtor just needs a few months, a trustee may, albeit begrudgingly, let the debtor complete the plan after the time to do so had run out. After all, if a debtor has demonstrated good faith by making most payments, and earnestly seeks a reasonable amount of additional time to complete his obligations, then it would also be in the best interest of the creditors to permit the debtor to continue making payments.

Note: Craig D. Robins, a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past twenty-nine years. He has offices in Melville, Coram, Patchogue and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.

Privilege Does Not Survive Dissolution (Continued from page 6)

whether the privilege will survive a state law claim. For state law claims brought in federal court under diversity jurisdiction, privilege shall be determined under state law. See, *Id.*, at *3. In *Randy International, Ltd. v. Automatic Compactor Corp.*, the New York City Civil Court held that the fact that corporations, which were judgment creditors, were "defunct and no longer functioning or operating" did not preclude them from invoking the attorney-client privilege. 412 N.Y.S.2d 995, 997 (N.Y.Civ.Ct. 1979). Thus, the attorney-client privilege survives the dissolution or extinction of a corporation for state law claims determined under New York law. Second, the court did differentiate a fully defunct corporation from one that was still in the process of dissolution: "A dissolved corporation should be permitted to assert its privilege during the windup process at least until all matters involving the company have been resolved and no further proceedings are contemplated." *Carrillo Huettel, LLP*, at *3.

Note: Leo K. Barnes is a member of Barnes & Barnes, P.C. in Melville, practices commercial litigation and can be reached at LKB@BARNESPC.COM

Meet the New President (Continued from page 3)

enhance your client base."

Donna also wants to provide information that will improve attorney's well being. "I'd like to provide programs that will focus on safety for lawyers and stress reducing programs, how to make a practice more efficient and more financially secure," she explained.

She plans to provide opportunities for older lawyers too. "We have an aging population," Donna said. "I want lawyers who retire to still be able to be active within the community and consider the SCBA their home."

There will be challenges.

The public have become savvy consumers, are more educated with the access they have to the Internet and the information they find on television.

"The client is not positive they even need a lawyer," Donna said. "A much larger group thinks they can advocate for themselves and what we do is so easy that anyone can do it. This mentality creates big challenges for us."

A team player, she is committed to reaching out to the membership to get them involved in the SCBA.

"I think in order to have people work together with you, you have to reach out to them in a personal way and let them know you value what they have to give," Donna said. "When you can do that people are very happy and honored to respond."

She's looking forward to the coming year.

"I'm a people person," Donna said. "One of the greatest things about being president is you are able to meet so many different people not only in your community but other legal communities. I'm interested in suggestions and open to hearing criticisms too. I like to hear what people have to say."

FREEZE FRAME

Hon. Andrea Harum Schiavoni Continues to Work with Vets

Andrea Schiavoni was elected to serve as Southampton Town Justice in 2008 and she was re-elected for a second term in 2012. Judge Schiavoni was appointed in 2010 to establish a Justice Court in the Village of Sag Harbor and serve as its first justice, and in 2013, she was appointed by Chief Administrative Judge A. Gail Prudenti to start a Veterans Treatment Court on the East End of Suffolk County. Most recently, Judge Schiavoni became Of Counsel to Campolo, Middleton and McCormick, LLP focusing on mediation, real estate closing and transactional matters for local businesses.

SCBA members James J. and District Court Judge Linda Kevins are the proud grandparents of not one but two new babies, twins James and Bridget born to James and Mary Kevins.

Josh and Erin Taylor, Steve Levy's daughter, welcomed Jonathan Lee Taylor, weighing 6 lbs., 15 oz., on June 17, 2015.

Is Portability a Myth? *(Continued from page 8)*

presence in that state. New York plans to establish its passing score as a scaled score of 260. This is the lowest score of all the UBE jurisdictions.

The importance of the score speaks directly to the myth of portability. A New York test taker that scores between 260 and 272 would allow him or her to possibly be licensed in only four UBE jurisdictions — Alabama, Minnesota, Missouri, and North Dakota. Alabama would also require attaining a score of 75 on the MPRE within 12 months of taking the UBE, while the other three states mentioned, do not have time restrictions on the MPRE. In addition, each state has a shelf life for a UBE score to be portable. In the above-mentioned jurisdictions, it would limit the shelf life on a UBE score as follows: Alabama, 25 months; Minnesota, 36 months; Missouri, 24 months; and North Dakota, 24 months. After this time, the scores expire.

In addition to the above hurdles, there is also a different state specific requirement that one would have to complete. In the previously mentioned states, if there were interest in going to Alabama or Missouri you would also be required to take a state specific component. New York will also have a state requirement portion. In New York, this portion will have two components outside of the standard UBE exam. It will require participation in an online class and taking a 50 question multiple-choice test online. Each state has its own requirements as to their state specific components and some states do not require state specific components. States that do have a state specific component have the option of doing it online, such as New York, or they have the option of live testing in the state.

New York is a state with the lowest score for passing the UBE. In the above scenario, a New York student would be limited to the possibility of four states in which to practice. The same score by a student in any of the other 14 jurisdictions means that they are eligible to practice in New York. It certainly seems that any possibility of portability is in the favor of students from the other 14 jurisdictions and not students from New York.

When looking at the possibility of a portable law degree, it seems New York Law Schools will certainly face lower enrollments. The average yearly tuition costs of law schools in the following UBE jurisdictions are Minnesota $34,995; Arizona $ 29,441; Alabama $ 28, 355; Colorado $34,773; Washington $30,242 and New York $46,722. It would seem certain that the New York judiciary, in establishing the UBE as the bar exam in New York, has not only hurt students, but also law schools and the prospects of employment, via increased competition as well. The myth of portability has taken New York from a leader in the legal field to the lowest standards possible.

New York continues to have reciprocity with 37 other states. In these states, you can request admission on motion. The requirements are usually to have practiced in the field of law five of the previous seven years (some jurisdictions are three out of the previous five years) and to go through that state's fitness and character evaluation. As far as can be seen, this will not change. Portability is the urban legend that may have just been debunked.

Note: George Pammer is entering his 3L year at Touro Law School. George is a part-time evening student and the President of the Student Bar Association. He has also held the position of Vice-President in the SBA as well as in the Suffolk County Bar Association – Student Committee.

Don't Lower the Standards *(Continued from page 8)*

practice in New York. The people who truly benefit from this are not New York law students. Chief Judge Jonathan Lippman boasts that the UBE will make it possible for those who pass to cast a wider net for jobs. That net is more beneficial to out-of-state students who would want to come to New York. This in turn, directly affects the job opportunities available for the recent in-state law graduates. For the in-state students who will walk out with six-figure debt upon graduation, the UBE does not create more job opportunities. The UBE merely gives a law graduate the opportunity to practice in other states, such as Alabama, Alaska, Arizona, Colorado, Idaho, Kansas, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming. Most students in New York want to work in the Tri-State area; the UBE does not offer that capability.

New York Bar Examiners are banking on an assumption that other states will follow suit but there is no guarantee that this will happen. What is guaranteed is that the job market in New York for recent New York law graduates will suffer.

There is talk that opponents of UBE adoption are merely seeking to arrogantly preserve the prestige of passing the New York exam. I would argue that arrogance is what compels proponents of UBE adoption to believe that other states will follow New York's lead. If there is one thing that I have learned in law school it is not to insert facts where they are not given. The facts are the job market is saturated and getting a job out of law school is already difficult. It is baffling that a system would be created that would further diminish job opportunities in one's home state.

To be told that UBE adoption is for the best seems ironic. I am just perplexed that it is described as for the best interests of in-state students, when the students truly benefitting will be from out of state.

Note: Denisse Mira is a rising second-year law student at Touro Law Center, and was born and raised on Long Island.

Community Stronger Together *(Continued from page 1)*

Association's new President. The Hon. Randall T. Eng, Presiding Justice, Appellate Division Supreme Court of the State of NY, Second Judicial Dept., installed the officers, which include: John R. Calcagni, President Elect; Patricia M. Meisenheimer, First Vice President; Justin M. Block, Second Vice President; Lynn Poster-Zimmerman, Treasurer; and Hon. Derrick J. Robinson, Secretary.

Before the actual installation, an awards ceremony was held on the lovely patio at the Larkfield. William T. Ferris III, the SCBA President, presented the Directors' Awards to members David H. Besso and Stephen Kunken.

"I am pleased to give the Director's Award to David Besso," said Mr. Ferris. "He has been committed to all lawyers in Suffolk County. He has worked to make sure there has been representation for the poor in court. I'd like to also honor his work in the 18B program. David leads by example."

Thanking Stephen Kunken for his service, Mr. Ferris said, "Long before there were mandatory CLE programs he was active at the Academy of Law."

The Lifetime Achievement Award was bestowed upon Thomas J. Spellman, Jr., who has been a member of the SCBA since 1970. "Tom was the founding member of the Lawyer's Assistance Program," Mr. Ferris said. "Even in retirement, Tom has helped attorneys who have given up their practices."

Hon. James P. Flanagan gave the Dean's Award posthumously to the family of Dorothy P. Ceparano, who died this past year. Dorothy was the executive director of the Academy of Law for many years.

"From now on this award will be called the Dorothy Ceparano Award," said Hon. Flanagan. "The award honors Dorothy's skill, devotion and commitment to provide education to attorneys."

Harry Tilis was installed a little while later by the Hon. Sandra L. Sgroi, Associate Justice, Appellate Division Supreme Court of the State of NY, Second Judicial Dept. as the new Dean of the Suffolk Academy of Law.

When Judge Prudenti spoke prior to installing Ms. England, she began by remarking that the SCBA is an organization that stands out statewide. "The rededication of the Bar Center reminded me of what a truly great organization the SCBA is," she said. "I am thrilled to see so many of my friends and distinguished colleagues here this evening."

Judge Prudenti went on to acknowledge the work of Mr. Ferris this past year saying that he had done a truly outstanding job "that is recognized statewide. He continues to make Suffolk County a very special place to practice."

Of Ms. England, Judge Prudenti said the following: "Donna England, our incoming president will continue to successfully lead this organization. Donna has carried on with a smile and added to her mother's great legacy. Donna has shared her expertise in matrimonial practice not just in Suffolk County but throughout the state of New York."

After taking the Oath of Office, Ms. England presented Immediate Past President William Ferris with a pair of cufflinks, which is customary. "Bill brought such integrity and fine programs to us and worked so hard this year, I want to thank him," Ms. England said.

Mr. Ferris thanked Ms. England and said he believed the Association was in great hands with her as the new president as well as the fine members of the board of directors and the directors that were installed that evening.

"In Suffolk County we really have a special and unique relationship between the bar and bench," Mr. Ferris said. "Our Board of Directors has increased the relationship with Touro, which is important. It is the future of our profession."

When President England went to the microphone everyone gave her a standing ovation. Her speech was interrupted by applause and well wishes were shared a great deal then and during the entire evening.

Note: Laura Lane is an award-winning journalist who has written for The New York Law Journal, Newsday and various magazine publications. She is the editor of the Oyster Bay Guardian and the Editor-in-Chief of The Suffolk Lawyer.

President's Message *(Continued from page 1)*

est of our clients and fellow lawyers is in fact one of the most challenging actions we make each and every day. The harder we work at this goal, the better we will be able to represent this great profession to the community at large. It is my hope to bring back the respect, dignity, and esteem to what we do everyday – uphold the rights of American citizens. And not a day too late, either— everyone believes they can be a lawyer today after all — they learned all they need to know from Judge Judy herself.

We must also celebrate our successes. On Law Day, 2016, I would like to publish a journal that features cases that have changed the course of the law in the past calendar year. It would highlight the case, attorney, and judge and speak to how the law was changed. It is my hope that this annual journal will be shared with the public and various media outlets — it is important that the public community understand that interpreting and changing the law is a vital part of what we do. I invite you all to submit cases that you believe are particularly worthy and join me in celebrating the achievements of our members.

Each member of our Executive Committee represents a different branch of our association. Bill Ferris will leave the presidency tonight to be a member of the Nominating Committee, John Calcagni will Chair the Bench Bar Committee, Pat Meisenheimer has established a Leadership Program, Justin Block will become the Chair of the Pro Bono Foundation and Lynn Poster-Zimmerman is the incoming treasurer and will work to give us a new budget.

I am also very honored to tell you that tonight, Derrick Robinson will be sworn in as secretary of the Suffolk County Bar Association. He will be our first African American Executive Committee Member and in five years, our first African American President. This is a major milestone for Suffolk County.

I dedicate tonight to all the Past Presidents who have come before me. I want to thank them for working hard to make our association diverse and welcoming to all Suffolk lawyers. I want to thank them for the hours that they have dedicated away from their families to ensure that we can be the guardians of the law. I want to thank them for raising money to build our home. And now, we have rededicated our building and look forward to the next 20 years of our Association.

I ask each of you as members, and in the spirit of "Community Stronger Together," to make a decision as to your level of commitment. I ask that you stay involved and help us grow.

In 1987 I started practicing law with my mother, Catherine T. England and my brother, Louis C. England. Pretty unusual in those times, but we had a family practice. I was taught that the Suffolk County Bar Association was part of being a lawyer and that we belonged to that family as well.

I am proud that I am the third member of my family to be the president of this great Association. In 1983, my mother became the first woman president of this Association, as well as the first sitting judge to hold that office. In 1998, my brother, Louis, became president. At that time, the Bar Association building was newly opened and Louis helped to raise money to furnish our building and develop the curriculum at the Academy of Law. I thank both of them for everything they taught me: to fight for my clients and fight for my fellow lawyers too. I especially thank my mother for paving the way, not only for me, but also for all women lawyer's in Suffolk County and beyond.

I wish to extend a special and heartfelt thank you to Justice A. Gail Prudenti for swearing me in and Presiding Justice Eng and Justice Sandra Sqori for swearing in the Officers, Directors and Dean of the Academy.

Congratulations to all the members of the Executive Committee and incoming Board of Directors. To all my fellow matrimonial and family law practitioners, I thank you for all of the love and support you've shown me tonight. Your actions exemplify just how much our community strengthens when we come together.

And to the one and only Jane LaCova, for all that you do, I thank you.

I ask that you all enjoy this night and celebrate.

As in my speech, I ask that you consider the level of commitment that you would like to give this year.

There are so many ways to be involved. While you've already selected what committees you would like to serve on, you can also volunteer to work on a program for the Academy of Law, write an article for *The Suffolk Lawyer* or be a Special Section Editor. You may want to work on the Annual Outing or 2016's Installation Dinner. We have several foundations, charities, Scholarship Funds, Lawyers Assistance or Pro Bono.

Over the summer, the Executive Committee and Committee Chairs will be working hard to ensure we are ready to go in September. Please know that I am here to work for you, our members. You can reach me at the bar or at my office. I am open to suggestions, ideas or problems.

Enjoy the summer!

Overcoming Objections in the Smartphone *(Continued from page 9)*

party, and therefore any statement made to her ex-husband is a) an admission and b) no foundation as to the time, place, or the specific language had to have been made.

The judge agrees. Opposing counsel objects again on "best evidence" grounds. This is likewise oft misused since you are not trying to prove the contents of the writing, but eliciting if, on a prior occasion, the witness made a different statement to someone else (your client) than she just made on the stand.

The judge sustains. You attempt to cure by marking the document for identification. You offer it to the witness for identification. The savvy witness gives you the worst-case scenario answer: "I don't recognize this document."

The text message failed to make impact. You ask the witness a different question:

"Do you deny ever having advised your husband that you would not be paying child support for August-October?" or "Do you deny sending your husband a text message wherein you advised him that you would not be paying child support for August-October, in sum and substance?"

This sets up the stage for you to call your client to a) testify that he did receive the text message; b) it also gives you one more shot at getting what you came for, in an inverse manner — if the witness does not deny sending the text message, it's an admission.

Introducing the text message into evidence can be tricky. Laying the foundation involves eliciting through your client that he or she received the text message on their phone and that their phone was their typical/primary mode of communication, and the name and number saved in their phone was and is the "digital identity" of the other party; that they transferred or printed out the text message by transferring it to their computer or some other similar process without altering it (how much foundational testimony is needed varies from judge to judge).

Opposing counsel may block this document via voir dire, arguing that a) the text message is an isolated communication/incomplete document; or b) the witness may have altered the text message between the time it appeared on their phone and the time it was printed out on the document; c) there are other persons with the same name saved in the witness' phone (i.e., there are two "Michelles"); or d) there is no time, date, or other method of identifying the date on the text message; or e) renewing the hearsay objection (improper but done anyway).

The easiest trial short-circuit to all of this is to have your witness take a "screen shot" of the text message or of the phone with the text message on it. The text message has just become a photograph, which can be easily authenticated:

Q: And when you received that text message, what did you do?

A: I took a picture of it.

Q: And how did you do that?

A: I took a picture of it with my phone (witness demonstrates).

Q: And is the document you are looking at now that photograph?

A: Yes.

Q: And is that a true, correct, and accurate representation of the way the text message first appeared on your phone?

A: Yes it is.

Counsel: I offer it."

Now, there can be no objection to the admissibility of the photograph (not even the oft-improperly used photographer-as-witness objection, as it is well-settled that the photographer need not be called; all that is required is a witness who is familiar with the original scene or item photographed and can testify that the subject matter in the photograph is a correct representation of the person, place, or thing portrayed.[2] In this case the witness is the photographer. The text message is in evidence and even if the trial judge forecloses further questions on it, such as asking your client to read from it, you can still read it into the record at summation.

What about emoticons or emojis (ideograms) — either amplifying their text messages: "I'm so mad (angry face)" or a text message that contains nothing but emojis: four angry faces and a lightning bolt? Speculation as to what the emojis were meant to mean, since the same emojis may mean different things to different people and the witness is being (tangentially) asked to speculate as to the intent of the sender, is the proper objection here. A variation on this theme is abbreviations like "lol" or "gfy" which can mean (according to whom you ask) either laugh out loud or lots of love; "gfy" can mean good for you, or the other much more crass invite to perform an anatomical impossibility, etc.

Both of these scenarios can be overcome if the offer of proof is to show what effect they had on the mind of the receiving party (i.e., not for their truth); or, as above, by the short-circuiting method of taking a picture and then moving the photograph of the emoji or text message into evidence.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

[1] *Blossom v. Barrett,* 37 NY 434, 438, see Prince, Richardson on Evidence
[2] *People v. Byrnes*, 33 NY2d 343, 347, 352 NYS 2d 913

Growing Trend in the Courts *(Continued from page 19)*

because his opinion, set forth in his report, did not satisfy the reliability standards set forth in Rule 702 of the Federal Rules of Civil Procedure.[3] Claiming that he was injured by a negligently manufactured drill press, the plaintiff sought to present expert testimony of Kevin Sevart who opined that the drill press was defective because it should have contained barrier guards. In the federal arena, the standard for reliability of an expert's opinion has been established by Rule 702 and *Daubert v Merrell Dow* Pharm., which together, enumerates several factors that bear on reliability. The defendant focused on two factors in particular: Sevart's failure to test his proposed safety guards, and Sevart's reliance on patents. With respect to the lack of testing, the court found that because Sevart admitted at his deposition that he (i) did not research the types of barrier guards available for the drill press, (ii) never spoke with anyone who used the drill press about using barrier guards, and (iii) had not reviewed any articles concerning the use of such barrier guards, his "design hierarchy methodology" did not sufficiently address the solution and left "simply too great an analytical gap." The court also agreed with the defendant that "pointing to the existence of simple patents … has been rejected as an unreliable method of assessing feasibility." It therefore found Sevart's opinion inadmissible to prove a design defect. Moreover, because the plaintiff relied solely on Sevart's opinion as evidence, the court granted summary judgment in the defendant's favor and dismissed the matter on the merits.

The District Court for the Western District of New York was also faced with a motion to preclude in *Byer v Bell Helicopter Textron, Inc.*,[4] another personal injury action (based on exposure to asbestos). There, the defendants sought to preclude the plaintiff's expert from relying on or referring to a supplemental report issued two days before the expert was deposed and eight months after the original report was served. The defendants argued that the plaintiff ignored the scheduling order, and produced a supplemental report containing more than 60 citations to articles, studies and other materials that were not contained in the original report, as well as an alteration of the expert's opinion, and different qualifications, which affected how the defendants consulted with their own experts and examined the plaintiff's experts. The court found that under Rule 26(e), a party may supplement a report if it learns that the disclosure is incomplete and incorrect. A party may not supplement where there is no information that was previously unknown or unavailable to the expert. It then found that the plaintiff did not meet the standard for supplementation because the supplemental report contained only "basic evidence regarding the nature and use of asbestos and its effect on human health." However, the court found that excluding the supplemental report would impose a substantial risk of prejudice to the plaintiff because without it, the plaintiff's ability to prove the elements of her claim would be compromised. On the other hand, the new information contained in the supplemental report did not substantially alter the defense. It therefore denied the motion and allowed the plaintiff to utilize the supplemental expert report. To prevent any prejudice to the defendants, the court permitted them to conduct – at the plaintiff's counsel's expense – additional depositions of the plaintiff's expert to address the newly disclosed information.

Note: Hillary A. Frommer is counsel in Farrell Fritz's Estate Litigation Department. She focuses her practice in litigation, primarily estate matters including contested probate proceedings and contested accounting proceedings. She has extensive trial and appellate experience in both federal and state courts. Ms. Frommer also represents large and small businesses, financial institutions and individuals in complex business disputes, including shareholder and partnership disputes, employment disputes and other commercial matters.

[1] 113 AD3d 691, 692 (2d Dept 2014).
[2] 11-CV-00571, NYLJ 1202724438307, at *1 (WDNY, Decided April 22, 2015)
[3] The plaintiff commenced the action in State Supreme Court, but it was removed to the Federal District Court on the grounds of diversity jurisdiction.
[4] 12-CV-676, NYLJ 1202727948557, at *1 (WDNY, Decided May 28, 2015).

Bard Still Bites *(Continued from page 16)*

Second, it keeps liability within manageable limits," third it encourages "domestic favorites," such as the dog and cat to "romp unguarded," which arguably comports with societal expectations. And fourth, disturbing Bard would run afoul of "the critical considerations of stare decisis."

Chief Judge Lippman dissented, insisting the majority decision "contradicts any sensible logic," as "[d]efendants are immunized under this rule from the consequences of their own negligent actions for no reason other than that a dog happened to be involved in the accident." He called for a second exception to the Bard rule where the owner not only set in motion a chain of events, but "directed the animal to engage in conduct that caused direct and immediate harm." Judge Abdus-Salaam rejected this proffered standard since it would require the fact-finder to speculate as to what really went on inside the mind of the dog.

Judge Fahey, joined by Judge Pigott in his dissent, attacked the flimsy legal foundation of the Bard prohibition and endorsed overruling that case altogether and joining the vast majority of other U.S. states in adhering to the Restatement doctrine, i.e. permitting a common law claim for negligence whenever the owner fails to prevent his or her animal from causing harm. Remarkably, New York is the only state in the union that expressly rejects the Restatement approach.

Judge Fahey downplayed the importance of "unguarded canine romping," reiterating the language from Justice Kaye's 1990 dissent in a similar case[5]: "[w]hatever may have been the expectation in an earlier, more agricultural age, it is no longer expected that dogs will roam the highways of this State at will." On the issue of stare decisis, Judge Fahey pointed out that the holding of Bard collides with a "prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience…the Restatement position."

Judge Abdus-Salaam concluded that the "obvious shortcomings" of the Bard rule did not necessitate the disturbance of precedent on the issue, stating "[w]e do not cast aside precedent unless it has become unworkable, increasingly irrational and/or increasingly unjust over time…none of those things has occurred."

So for now, a plaintiff injured by a domestic pet must prove, without exception, that defendant had notice of the dangerous proclivities of the animal. The court did leave open the possibility of liability for "supervision of an animal undertaken with the intent to cause harm to another or with conscious disregard of a known and unjustifiable risk of harm to another."

Judge Abdus-Salaam suggested that the viability of the Bard Rule should now be considered "settled." This may be wishful thinking.

Note: *Doerr v. Goldsmith* was decided concurrently with the case of *Dobinski v Lockhart*, which is not discussed herein due to editorial constraints.

Note: Jeffrey T. Baron is the owner of Baron Law Firm, an insurance defense firm located in Suffolk County handling cases throughout Long Island and New York City. He has lectured at the Suffolk County Bar Association and has defended personal injury actions since his admission to the Bar in 1996. He can be reached at Jeff@baronlawfirm.net.

[1] *Doerr v. Goldsmith, 2015 NY Slip Op 04752 (2015)*
[2] *Bard v. Jahnke, 6 N.Y.3d 592 (2006)*
[3] *Hastings v Sauve, 967 N.Y.S.2d 658 (2013)*
[4] *Doerr v. Goldsmith, 978 N.Y.S.2d 1 (App Div., 1st Dept 2013)*
[5] *Young v. Wyman, 76 N.Y.2d 1009 (1990)*

Do These Regs Have Legs? *(Continued from page 20)*

check, while the other will be used in conducting a state criminal records history search.

Section 5 of the Senate bill adds a new "notarial record requirement" when a notary or a commissioner of deeds "perform acts involving conveyances of residential real property in the City of New York."[11]

Although there are exceptions to the definition of "conveyance," the types of transactions to which this new requirement would apply are far-reaching.[12]

In addition to relatively routine information (date, type of instrument, property description, etc.) the proposed "Notarial Record" must also contain "the right thumbprint of each person whose signature is being notarized."[13]

While the notary is still expected to examine satisfactory evidence of the identity of the signatory, "satisfactory evidence" will now include:

> "the absence of any evidence or information that would lead a reasonable person to believe that the person whose signature is being notarized is not the individual he or she claims to be,"

"together with" a valid driver's license, passport, or similar document.[14]

Unless the Notarial Record "was created by a notary public in the scope of his or her employment with a title insurance corporation, financial institution, law firm, or attorney at law," it must be delivered to the City Register within fourteen days of its creation. In those cases where the record was created by an employee of a title company, lender of law firm, it must be delivered to the employer within the fourteen-day window. In either case, the Notarial Record "shall be retained for seven years."[15]

A Notarial Record cannot be disclosed except to (1) federal, state or City agencies as required for official business,[16] or to "a grantor or grantee of the residential property."[17]

Conclusion

Space limitations, as well as uncertainty surrounding the fate or final form of these proposals, prohibit extended analysis of the permutations and pitfalls lurking therein. But, beware—they are certainly present! For instance, the fingerprinting proposal applies to "applicants," which may lull existing notaries into thinking they are exempt from the requirement. But, existing notaries must submit an "application" for reappointment in order to continue exercising their office.

We encourage that these proposals be examined carefully and that one reflect on the impact each could have on the practice.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely read land title law newsletter "Constructive Notice." For more information, visit www.LandTitleLaw.com.

[1] 11 NYCRR §227 (proposed).
[2] Penal Law §175.35.
[3] Penal Law §175.35 (2) (proposed).
[4] CPL §255.25 (proposed).
[5] CPL §255.25 (1) (proposed).
[6] CPL §255.25 (2) (proposed).
[7] CPL §§255.25 (1), 255.25(9) (proposed).
[8] CPL §§255.25 (3), 255.25(6) (proposed).
[9] CPL §255.25 (4) (proposed).
[10] CPL §255.25 (5) (proposed).
[11] Executive Law §135-c (proposed).
[12] Executive Law §135-c (2)(A) (proposed).
[13] Executive Law §135-c (3)(H) (proposed).
[14] Executive Law §135-c (4) (proposed).
[15] *See* Executive Law §135-c (5) (proposed).
[16] Executive Law §135-c (6)(A) (proposed).
[17] Executive Law §135-c (6)(B) (proposed).

Commercial Division Judges *(Continued from page 3)*

was suggested that we arrange a seminar and invite the judges to speak. Laurel Kreitzing (also a member of the committee) suggested that we gather the Commercial Division Judges of both counties for a "meet the Long Island Judges evening." Laurel on behalf of the State Bar, Kevin Schlossler on behalf of the Nassau County Bar, and me on behalf of the Suffolk County Bar, began to organize the event. Through the joint efforts of the three Bar Associations, we were able to gather the six Long Island Commercial Divisions Judges, and give the lawyers the chance to talk to the judges during the hour long "cocktail" party and to listen to the insights that each judge discussed during the program that followed.

Robert Haig, chair of the Commercial Division Council, gave a short talk on the background of the task force and council. This was followed by a series of questions posed to the judges. The format was to have one from Suffolk and one from Nassau assigned to each question. The judges were active in the discussion and actually all participated in commenting on each of the questions.

The program was "sold out" and there were 180 Long Island lawyers who attended and hopefully became more knowledgeable as to the new rules, how each judge views them and would implement them in their own parts. Based on the popularity of the program, it is the intention of the Bar Associations to offer similar seminars in the future so that the bar can be appraised of the changes, the judges' outlook, and help make the Commercial Division more efficient and appealing to the litigants and attorneys.

We are extremely fortunate on Long Island to have six knowledgeable judges who are passionate and caring about improving the commercial division and making their parts attractive to the lawyers and the litigants.

Note: Harvey Besunder is a partner at Bracken, Margolin, Besunder LLP. He served as Law Secretary to Suffolk County District Court Judges from 1969 to1971 and was Assistant County Attorney in Suffolk County from 1971-1979. Mr. Besunder was President of the Suffolk County Bar Association from1993-1994. He has extensive experience in real estate, tax certiorari, condemnation, commercial litigation and contested estates.

Facebook, Free Speech and a Reminder that Mens Rea *Matters* *(Continued from page 18)*

tion, and — if not — whether the First Amendment requires such a showing."[5] The Court of Appeals reviewing this district court held that the *mens rea* required was the intent to "communicate words that the defendant understands, and that a reasonable person would view as a threat."[6] The Supreme Court disagreed. Either inadvertently, or what some scholars would attribute to "laziness," the lack of the intent requirement in the statute created a legal enigma that rose to the Supreme Court of the United States.

18 U.S.C. Section 875(c) "does not specify that the defendant must have any mental state...it does not indicate whether the defendant *must intend* that his communication contain a threat." The majority opined that this statute requires proof of a mental state and yet, as the dissent opined, refused to clarify what level of culpability is necessary for a conviction. Ultimately, "[t]he court said prosecutors needed to prove that more than negligence was needed for a conviction."[7]

This, however, is not the first time that the problem was confronted by the Supreme Court. The Supreme Court has repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it."[8] "The 'central thought' is that a defendant must be 'blameworthy in mind' before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like." Indeed, the Supreme Court reiterated "[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state."

Chief Justice John Roberts said it was "an error for the judge to permit the jury to convict Elonis based only on how his posts would be viewed by a reasonable person…The defendant has to be aware that his rants were true threats."[9] The majority did not address what both Justice Thomas and the news media focused upon: What are future Facebook users to do with this relative uncertainty?

"James Grimmelmann, a law professor at the University of Maryland, [stated] that the ruling makes clear that a person can't be convicted under these circumstances 'just because somebody you don't know and didn't expect came along and saw your writings as a threat.' " But what about here, when the viewers of the post included the investigating FBI Agent and Elonis' ex-wife? What we take from this decision is that *mens rea*, or the guilty mind element of criminal law, is still alive and well. Its absence from the statute allowed this uncertainty and the appeals that followed.

One legal scholar suggested **"**Congress should act one time only and pass a law that makes it clear that when it is silent, there is a default *mens rea* rule. In other words, all criminal laws should, by statute, be assumed to have a criminal intent requirement *unless* Congress explicitly says otherwise." This would certainly seem to resolve the issue going forward but still leaves us with a legal predicament — what criminal thought or guilty mind did Congress seek to eliminate with its legislation?

Although questions remain, one more thing becomes quite apparent from this decision — while some musical artists boast about drug-deals, killing police officers and being shot nine times, Tone Dougie may be alone in having his criminal conviction vacated by the Supreme Court. While he may not get a record deal out of this, the legal community sure has given him a great deal of attention.

Note: Cory Morris is a civil rights attorney and adjunct professor at Adelphi University. He can be reached at http://www.coryhmorris.com.

[1] Dana Liebelson, *Supreme Court Rules In Favor Of Man Convicted Of Threatening Wife On Facebook*, Huffington Post (June 1, 2015 11:37 AM), http://www.huffingtonpost.com/2015/06/01/supreme-court-facebook-threat_n_7470634.html.

[2] Elonis v. United States, 575 U. S. ____ (Jun. 1, 2015).

[3] Paul Rosenzweig, *Congress Doesn't Know Its Own Mind—And That Makes You a Criminal*, The Heritage Foundation (July 18, 2013), P. 3; available at http://www.heritage.org/research/reports/2013/07/congress-doesnt-know-its-own-mind-and-that-makes-you-a-criminal.

[4] Michael Doyle, *Supreme Court reverses conviction in Facebook threat case*, McClatchy Washington Bureau (June 1, 2015), http://www.mcclatchydc.com/2015/06/01/268388/supreme-court-reverses-conviction.html.

[5] Elonis v. United States, 575 U. S. ____ (Jun. 1, 2015).

[6] *Id.* (citing 730 F. 3d 321, 332 (CA3 2013)).

[7] Michael Doyle, *Supreme Court reverses conviction in Facebook threat case*, McClatchy Washington Bureau (June 1, 2015), http://www.mcclatchydc.com/2015/06/01/268388/supreme-court-reverses-conviction.html.

[8] *Morissette* v. *United States*, 342 U. S. 246, 250 (1952).

[9] David G. Savage, *Man who ranted on Facebook about estranged wife wins Supreme Court ruling*, LA Times (June 1, 2015), http://www.latimes.com/nation/la-na-court-facebook-20150601-story.html.

Same Sex Marriage/Divorce *(Continued from page 20)*

personal jurisdiction, X no longer resides in that state and intends to reside in California permanently. At this point, it is unclear whether or not the parties can obtain a divorce in Vermont. Technically spouse X does not reside in a state, which does not recognize same-sex marriages (one of Vermont's requirements for non-resident same-sex divorces) but at the same time, spouse X cannot afford to wait to establish residency in California as spouse X needs to file for divorce prior to spouse Y leaving the country indefinitely. Where is the proper venue for the divorce?

In a situation like this, I recommend fling for divorce in the state where the marriage license was issued in hopes that state can grant the non-resident divorce based on the fact that one of the spouses is no longer residing in the country and the other spouse has failed to establish residency in a state that recognizes same-sex marriage. This is indeed a more complex issue than most practitioners will encounter, however issues like these will arrive to practitioners in this field.

The issue of whether same-sex spouses have a constitutional right to marry is currently before the Supreme Court. Although oral arguments were heard on or about April 28, 2015, a decision is not expected until the end of June. Whichever way the Supreme Court rules on this issue will greatly affect the country's laws in regards to same-sex couples' rights.

When dealing with same-sex spouses, just be aware and be sure to properly advise your clients that the same-sex spouses future intentions will have a tremendous role in determining which venue is appropriate for a potential same-sex divorce. Until every state recognizes same-sex marriages, or in the alternative, if the Supreme Court holds that same-sex couples have a constitutional right to marry, this is an issue that needs to be addressed from the onset and continually throughout the marriage in the unfortunate event that the same-sex spouses separate and decide to obtain a divorce.

Note: *Michael Pernesiglio earned his Juris Doctorate from Touro Law Center. While at Touro, Michael was the President of the Arts, Entertainment and Sports Law Society. He is a solo practitioner of a general practice with a focus in foreclosure defense, criminal law, vehicle and traffic hearings, transactional law, and sports and entertainment representation. Michael is an active member of the Suffolk County Bar Association and is currently enrolled in the Suffolk County Pro Bono Foreclosure Settlement Conference Project, the Assigned Counsel Defender Plan of Suffolk County and occasionally makes pro bono appearances at Nassau County Supreme Courts and the Nassau County Bar Association.*

[1] "LegalEase - New York Marriage Equality Act Frequently Asked Questions." Ed. New York State Bar Association. New York Bar Association, n.d. Web. 16 June 2015. http://www.nysba.org/marriageequalityfaq/

[ii] "Nonresident Divorce or Civil Union Dissolution." *Nonresident Divorce or Civil Union Dissolution*. Ed. Vermont Judiciary. National Conference of State Legislators, n.d. Web. 16 June 2015.https://www.vermontjudiciary.org/eforms/InstructionsforFilingNonResidentCUDissolutionOrMarriage.pdf

[3] "Briefing: Supreme Court Will Rule This Month on Same Sex Marriage." *Briefing: Supreme Court Will Rule This Month on Same Sex Marriage*. Ed. The Atlantic Journal Constitution. The Atlantic Journal Constitution, 1 June 2015. Web. 16 June 2015. http://www.ajc.com/news/news/gay-marriage-ruling-due-month-supreme-court/nmSP2/#__federated=1

Court Notes *(Continued from page 13)*

in Connecticut.

Nancy P. Enoksen: Motion by the Grievance Committee to suspend the respondent from the practice of law granted based upon respondent's failure to cooperate with the lawful demands of the Grievance Committee, pending further order of the court.

Attorneys Disbarred

Dennis Steven Berkowsky: Upon a plea of guilty in the United States District Court for the Southern District of New York, the respondent was convicted of bank fraud and conspiracy to commit bank fraud, both class B felonies. Conviction of a felony under federal law that is essentially similar to a felony under New York law, triggers automatic disbarment. The federal felony of bank fraud has been found to be essentially similar to the New York felony of grand larceny and scheme to defraud. Accordingly, by virtue of his felony conviction, the respondent was disbarred from the practice of law in the State of New York.

Mitchell S. Ross: By decision and order of the court, the respondent was immediately suspended from the practice of law and the Grievance Committee was authorized to institute disciplinary proceedings against him based upon his failure to cooperate with the Grievance Committee. Proceedings were instituted by verified petition and the respondent was directed to serve and file an answer. The respondent failed to do so. By virtue of his default, the charges against the respondent were deemed established. Accordingly, the respondent was disbarred from the practice of law in the State of New York.

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is a past president of the Suffolk County Bar Association and past Chair of the New York State Bar Association Trusts and Estates Law Section.