# THE SUFFOLK LAWYER

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## INSIDE...
JUNE 2015





# President Donna England and Board Commit to Theme 'Community Stronger Together'

**By Laura Lane**

The Suffolk County Bar Association celebrated the installation of the Association's president, officers and directors, also honoring several members with awards at the 107th Annual Installation Dinner Dance on June 5 at the Larkfield. Several judges, as well as members of the bar and their family and friends attended the evening, during an event that is perhaps one of the most important and beloved events of the year.

Chief Administrative Judge of the State of NY, Hon. A. Gail Prudenti, presented the oath of office to Donna England, the Suffolk County Bar

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Photo by Ron Pucchiana

**The Hon. Randall T. Eng presented the oath of office to Hon. Derrick J. Robinson, left, Justin M. Block, Lynn Poster-Zimmerman, Patricia M. Meisenheimer and John R. Calcagni. See more photos on pages 14-15.**

## *Farewell, Dean Flanagan*

Photo by Barry Smolowitz

**Suffolk Academy of Law Dean James Flanagan, accompanied by his wife, was honored for his two years of service at the bar association. See more photos on page 11.**

## PRESIDENT'S MESSAGE

**By Donna England**

I am honored and feel a great deal of pride to be given the opportunity to serve as your President. During our Installation Dinner, held on June 5 at the Larkfield, I spoke about my plan for the year ahead. For those who were unable to attend, I have reprinted my message below.

Good Evening Dignitaries, Justices, Judges, Family, Friends and Colleagues.

Welcome to the Suffolk County Bar Association's 107th Installation of its Directors and Executive Committee members. Not only am I a proud member, but grateful that you are here on this special night to celebrate our profession.

After practicing law for over 28 years, I am well aware that there are some days when this career presents complex challenges and adversity.

In this coming year, I have made it my mission to represent the interest of you, our members, by protecting the independence of both lawyers and judges.

**Donna England**

I will work closely with our administrative judges so that our members have unrestricted access to the court.

I will work to promote legislative proposals that benefit our profession and strongly oppose those that effectively burden our practice of law.

I will work to ensure that lawyers are able to protect their clients' interests and last but not least, I will work to ensure that our lawyers are fairly and justly compensated.

The theme I have chosen for my presidency is: Community Stronger Together.

It is my deep belief that when we make a concerted effort to work collectively, we can achieve our goals as a law community. At a glance, it may seem like a simple request, but as we are all aware, upholding the best inter-

*(Continued on page 24)*

## BAR EVENTS

### Council of Committee Chairs
**Thursday, Aug 13, at 5:30 p.m.**
**Bar Center**
The meeting provides an opportunity for committee chairs to discuss their plans for the upcoming year. Chaired by Pat Meisenheimer.

### Annual Outing
**Monday, Aug. 10**
Fishing for SCBA members and guests aboard the Ospry V, a private charter boat. Sailing out of Port Jefferson Harbor at 7:30 a.m. sharp, Breakfast dockside at 7 a.m. Music by the Road King Band. Golfing at the Willow Creek Golf and Country Club, Mount Sinai, NY. BBQ lunch 11:30, driving range and putting green, shotgun starts at 1:30 p.m. Cocktails and grand buffet 6:30 to 10 p.m. For further info contact Jane LaCova at the Bar.

### Hon. Ira Block Memorial Golf Outing Fundraiser
**Monday, Sept. 21, at 11:30 a.m.**
**West Hampton Beach Country Club**
Funds will be used to help lawyers and their families in need. For further info contact Jane LaCova at the Bar.

# Suffolk County Bar Association

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## Board of Directors 2014-2015

Donna England .....President
John R. Calcagni .....President Elect
Patricia M. Meisenheimer .....First Vice President
Justin M. Block.....Second Vice President
Lynn Poster-Zimmerman.....Treasurer
Hon. Derrick J. Robinson .....Secretary
Leonard Badia .....Director (2016)
Cornell V. Bouse.....Director (2016)
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Laura C. Golightly.....Director (2018)
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Arthur E. Shulman .....Past President Director (2016)
Dennis R. Chase.....Past President Director (2017)
William T. Ferris .....Past President Director ( 2018)
Sarah Jane LaCova .....Executive Director

## SCBA Calendar

All meetings are held at the Suffolk County Bar Association Bar Center, unless otherwise specified. Please be aware that dates, times and locations may be changed because of conditions beyond our control. Please check the SCBA website (scba.org) for any changes/additions or deletions which may occur. For any questions call: 631-234-5511.

### OF ASSOCIATION MEETINGS AND EVENTS

**JULY 2015**
**13 Monday** Executive Committee, 5:30 p.m., Board Room.

**AUGUST 2015**
**3 Monday** Executive Committee, 5:30 p.m., Board Room.
**10 Monday** SCBA's Annual Golf & Fishing Outing, Willow Creek, Mt. Sinai. Fishing $150 –Fishing Boat (The Osprey V) sails from Pt. Jefferson Town Dock at 7:30 a.m. for a day of fishing for blues, porgies or fluke – Music on Board by the Road King Band. Golf $235 – includes green fees, electric cart, BBQ lunch. Both Fishing & Golf prices include Cocktail and Grand Buffet at 6:30 p.m. Register on line at scba.org or call Bar Center for reservations.

**SEPTEMBER 2015**
**8 Tuesday** Executive Committee, 5:30 p.m., Board Room.
**9 Wednesday** Young Lawyers, BBQ, 6:00 p.m.
**16 Wednesday** Lawyers Helping Lawyers, 5:00 to 6:00 p.m., Board Room.
**21 Monday** The Annual Ira P. Block Memorial Golf Classic, sponsored by the Lawyer Assistance Foundation of the SCBA, Westhampton Country Club, Westhampton Beach. (Further details forthcoming).
**28 Monday** Board of Directors, 5:30 p.m., Board Room.

**OCTOBER 2015**
**5 Monday** Executive Committee, 5:30 p.m., Board Room.
**19 Monday** Board of Directors, 5:30 p.m., Board Room.
**29 Thursday** ProBono Recognition Night, Captain Bill's Restaurant. Further Details forthcoming

# *Our Mission*

**"The purposes and objects for which the Association is established shall be cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of the members."**

NOTICE TO ATTORNEYS IN FORECLOSURE ACTIONS
IN SUFFOLK COUNTY
SUFFOLK COUNTY FORECLOSURE ACTION
SURPLUS MONIES FORM

Suffolk County Administrative Order 41-13 modified the generic statewide Foreclosure Action Surplus Monies Form that is required to be filed upon a foreclosure sale.

Referees and parties to the foreclosure sale are required to only use the Suffolk County Foreclosure Action Surplus Monies Form. This form is to be filed by the referee with the Supreme Court Calendar Clerk and the Suffolk County Clerk within thirty (30) days of the sale.

If the referee's fees are anticipated to exceed $750, the referee must also file a copy with the Supreme Court Fiduciary Clerk, One Court Street, Riverhead, NY 11901-0390.

A copy of the form may be found on the Suffolk County Supreme Court web page at: http://www.nycourts.gov/courts/10jd/suffolk/Forms/Surplus-Money.pdf

**Commencing July 1, 2015, all non-Suffolk Surplus Money Forms will be rejected.**

THE SUFFOLK LAWYER

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# SCBA President Donna England Ready to Lead

**By Laura Lane**

Donna England, the new president of the Suffolk County Bar Association, has been a familiar face in the legal community, even before she became an attorney. She is personable, respectful, intelligent and open to considering ideas, even if they conflict with her own.

"Being president is not about you," she said. "It's about the Association, bringing it to a better place a year from now."

Ms. England, who has lived in Cold Spring Harbor her entire life, is the third member from her family to lead the SCBA. Her mother, Catherine, who was an SCBA president from 1983 to 1984, introduced the profession to her daughter when she was very young, allowing Donna to accompany her to court.

"I was in court with Mom while her client was being arraigned and during real estate closings," Donna recalled. "I was even a witness on a will for a woman when I was 10. When she died Mom as worried I'd have to testify about the woman's competency but that didn't end up happening. I was exposed to law very early in my life."

Her brother Louis, who was a past SCBA president from 1998 to 1999, worked with Catherine in the practice. After college Donna worked at their office for five years before going to law school.

"While I was working in the office I was deciding if I wanted to go into law," she explained. "I wanted to be sure that's what I really wanted — that it was my choice — not my mothers."

She decided to move forward with a legal career when her mother went to the bench. And by then, she'd been to many SCBA functions and knew many people in the courts. Donna really knew just about everyone in the legal community.

When Donna graduated from law school her mother was no longer a judge. She, Louis and Catherine worked together in a general practice until 1996, when her mother retired. Donna still works with Louis at England & England in Centereach.

"Working together with family, you know each other so well and it worked, as long as you knew what the pecking order was," Donna said. "Mom was always the boss and I learned a tremendous amount from her and my brother."

Donna learned that attorneys needed to be civil to each other, respectful in court and that hard work was essential. "The bar was raised very high with my Mom," she added.

Catherine was a hard worker, driven by her love of the law, Donna said, and she shared her passion for the profession with her children.

The only reason why Catherine stopped working when she was 80, was due to health issues. When she began to recover she considered going back to work but decided not to. "Even after brain surgery, she was still sharp as a tack," Donna said.

Donna's general practice emphasizes matrimony and family law. And for 28 years she's been an attorney for the child, appointed as a law guardian.

Photos by Ron Pucchiana

SCBA new President Donna England was sworn in by Chief Administrative Judge for the State of New York, Hon. A. Gail Prudenti at the 107th Installation on June 5.

Becoming the president of the SCBA is something Donna has thought about her entire life. "I'd gone to installation dinners since I was a young kid. And I always imagined myself being up there," Donna said.

Now with her dream a reality, she has many plans.

A top priority will be to reach out to the community during Law Day. The journal she has planned to create will share with the public the ways in which the profession has helped to interpret and change laws over the past year.

She is also committed to enhancing lawyer benefits, particularly through the lawyer referral service. "I want to publicize it with the media and make more of our members become a part of it," Donna said. "I am going to reach out to our members to let them know that this is one of the most significant benefits that the SCBA offers, to

*(Continued on page 22)*

# Meet the Commercial Division Judges

**By Harvey B. Besunder**

Harvey Besunder

Several years ago a task force related to the Commercial Divisions of the State on New York was created and chaired by Hon. Judith Kaye. That group made recommendations regarding the best methods of attracting commercial cases to the New York courts and providing a comprehensive plan to make our commercial parts efficient and competitive with those in other states. The committee rendered a report which contained a series of recommendations, and which was presented to the New York State Bar Association.

As a result of the report, Chief Judge Jonathan Lippman appointed a Commercial Division Council which was charged with the task of implementing the recommendations of the Kaye Committee. Robert Haig was chosen as the chair and judges and commercial litigators from across the state were appointed as members. That commission has met regularly and made a series of recommendations many of which have already been adopted and others which were held, pending public comment.

In view of the fact that Suffolk and Nassau counties have a total of six commercial division judges, each with large inventories of cases, in 2014 the Executive Committee of the Suffolk County Bar Association decided to form a new committee specifically for the purpose of working with the Commercial Division Judges and litigators.

Since Nassau and Suffolk Counties have been aligned over the years in the practice of law, it was decided that the committee should be comprised of lawyers from both counties. The impetus for this initiative of course was the fact that the Chief Judge had created a Commercial Division Council charged with the task of implementing the recommendations made by the task force chaired by former Chief Judge Judith Kaye. That Council's recommendations have been geared to enhancing the efficiency of the Commercial Division and to make it appealing for businesses to bring their litigation in the State Courts of New York. The Suffolk Bar group was to monitor the changes, discuss the workability with the judges, and inform the practicing lawyers of new rules, and to insure that the judges and the attorney litigators were on the same page. Since Judge Elizabeth Emerson was on the original task force and I am a member of the council, we were appointed as co-chairs of the committee. The committee members were selected from commercial litigators from both Long Island counties.

In furtherance of our charge, Jim Wicks a member of the committee now Chair of the New York State Bar Association Federal and Commercial Litigation Section arranged for a joint meeting with our respective committees.

As an outgrowth of that meeting, it

*(Continued on page 25)*

## BENCH BRIEFS

**By Elaine Colavito**

### SUFFOLK COUNTY SUPREME COURT

**Honorable W. Gerard Asher**

*Motion for an order pursuant to CPLR §2104 enforcing the stipulation of settlement of plaintiff's action against the defendant denied; unknown injuries at the time of the mediation; plaintiff did not fully understand the mediation settlement agreement which his attorney entered into on his behalf; plaintiff did not sign the agreement.*

In *Santos Soto Aragon v. Juana A. Flores,* Index No.: 12942/2013, decided on February 3, 2015, the court denied the defendant's motion for an order pursuant to CPLR §2104 enforcing the stipulation of settlement of plaintiff's action against the defendant. The court noted that the action was commenced on February 13, 2013 by plaintiff to recover damages for personal injuries. On or about October 17, 2013 counsel for plaintiff and the claims representatives for defendant's insurance carrier, Nationwide Insurance Company, entered into an agreement to mediate the matter. Thereafter, On October 18, 2013 counsel for plaintiff and the representative for nationwide entered into an agreement at the mediation to settle the matter in the amount of $20,000.00. Over eight months passed from when the parties reached the agreement without closing documents being signed by plaintiff. The plaintiff in opposition to the defendant's application claimed that there existed unknown injuries at the time of the mediation and that he did not fully understand the mediation settlement agreement, which his attorney entered into on his behalf. Furthermore and most importantly, plaintiff did not sign the agreement. The court found that no one would be prejudiced by not entering the stipulation and accordingly, the court denied defendant's motion.

*Motion to dismiss complaint for lack of personal jurisdiction granted; service not perfected pursuant to the Hague Convention.*

In *Donna Truhan v. Osram AG, Osram Sylvania, Inc., Osram Sylvania Products, Inc., Family Dollar Stores, Inc., Family Family Dollar Services, Inc., Family Dollar Stores of New York, Inc., and Family Dollar Store No. 4192,* Index No.: 36181/2012, decided on January 14, 2014, the court granted the defendant Osram AG's motion for an order pursuant to CPLR §3211(a)(8) dismissing the cause of action for lack of personal jurisdiction as the Summons and Verified Complaint were not properly served upon the defendant.

The court stated the pertinent facts as follows: defendant Osram AG was a German Corporation, reorganized as Osram GmbH, a corporation organized under the laws of Germany, with its principal place of business at Hellbrunner Strasse 1, 81543 Munich Germany. As such, the defendant was a corporation existing under the laws of Germany and accordingly, service of process was governed by the Hague Convention. In the matter at hand, the plaintiff did not comply with the service requirements of the Hague Convention but rather attempted to serve the defendant Osram AG pursuant to Section 307 of Business Corporation Law of New York by delivering two copies thereof to the Secretary of State and by mailing one copy by certified mail to the defendant's headquarters in Munich, Germany. The court noted that the Hague convention requires each member (of which Germany is a member) to establish a Central Authority, which would facilitate the service of legal documents in each country. Additionally, the convention provides provisions, specifically, Article 10, which allows service by mail, provided the state/country of designation does not object. However, Germany specifically objected to service by mail, in essence stating service pursuant to Article 10 of the Hague Convention shall not be effected. Accordingly, service via the Central Authority was the only means by which an American plaintiff may serve a German defendant. Since the service was not done in accordance with Hague Convention, service was not perfected and the motion was granted.

Elaine Colavito

**Honorable Paul J. Baisley, Jr.**

*Motion to dismiss complaint against estate granted; an estate is not a legal entity and any action for or against the estate must be by or against the executor or administrator in his or her representative capacity.*

In *Glenn Kennedy v. The Estate of Helen Ansbro, deceased and Island Advantage Realty,* Index No.: 63349/2014, decided on February 13, 2015, the court granted the motion by defendant, the Estate of Helen Ansbro, to dismiss the complaint asserted against it. The court noted that their electronic file contained an affidavit of service of process, which indicated that service on the estate was effectuated upon Miller & Milone, P.C. Miller & Milone, P.C. asserted that although they represented Ms. Ansbro prior to her death on July 20, 2012, there had been no appointment of an executor or administrator of her estate.

In rendering its decision, the court stated that an estate is not a legal entity and any action for or against the estate must be by or against the executor or administrator in his or her representative capacity. Further, the court pointed out that a plaintiff may not commence a legal action or proceeding against a dead person during the period after death and before the appointment of a personal representative. Here, the court found that the papers submitted established that although the estate was named in the action, Ms. Ansbro was deceased on July 20, 2012, prior to the commencement of the action.

*Motion for summary judgment on issue of liability denied; field report submitted was hearsay.*

In *Niza Lopez and Carlos Lopez v. David Gonzalez and ML Perez Gonzalez,* Index No.: 67849/2014, decided on March 13, 2015, the court denied plaintiffs' motion for judgment on the issue of liability. In deciding a motion for summary judgment, the court noted that all of the competent evidence must be viewed in the light most favorable to the defendants, as the opponents of the motion and all reasonable inferences must be resolved in their favor. Moreover, the court pointed out that it is well established that the burden on the movant is such that summary judgment must be denied even if the existence of a triable issue of fact is only arguable. In reviewing the submissions in support of the motion, court found that the Field Report was hearsay, not competent evidence and had not been considered as it was not certified or authenticated as required by CPLR §4518 (c).

While hearsay evidence may be admissible in opposing a motion for summary judgment, the court stated that there must be an acceptable excuse for failure to tender proof in admissible form. Here, the defendants failed to proffer an excuse. Nonetheless, the court denied the motion as in viewing all evidence in the light most favorable to the defendants and resolving all reasonable inferences, summary judgment as to liability was not warranted as the conflicting affidavits raised a factual issue to be resolved through disclosure or trial.

**Honorable Joseph C. Pastoressa**

*Motion to dismiss complaint for failure to produce discovery denied; movant had not outlined what discovery currently remained outstanding*

In *Robert Nalewajk and Susan Nalewajk v. Kolbe & Kolbe Millwork, Co., Inc., Dimensional Millwork, Inc., Millwork Solutions, Florence Corporation d/b/a Florence Building Materials, Kolbe and Kolbe Millwork, Co., Inc. v. Ample Contracting Inc., Jim Makarius, Jim Makarius d/b/a Ample Contracting, J.Z. Woodworks, John Zotos, John Zotos d/b/a J.Z. Woodworks, Synergy Concrete Corp., Vince Caponga and Vince Capogna d/b/a Synergy Concrete,* Index No.: 37842/2011, decided on April 17, 2015, the court denied defendant, Kolbe & Kolbe's motion for dismissal of the complaint for failure to provide discovery. In denying the motion, the court reasoned that counsel's good faith affirmation asserted that on May 4, 2012, defendant requested plaintiffs respond to a discovery demand dated March 9, 2012, which was long overdue. No other good faith effort to communicate and resolve the discovery dispute had been set forth, and movant had not outlined what discovery currently remained outstanding. Without the CD rom, it was impossible for the court to determine from the parties' submissions what discovery had been provided and what remained outstanding. Pursuant to 22 NYCRR 202.7 and *Chervin v. Macura,* 28 A.D.3d 600, the motion was denied.

**Honorable Arthur G. Pitts**

*Motion to quash and for a protective order granted; plaintiff proffered no reason why a non-party deposition should be conducted prior to the completion of party depositions*

In *Michael Toohey v. Nausheen Muntiqua, M. D., Michael J. Peterson, M. D., Vascular Associates of Long Island, P.C. and John T. Mather Memorial Hospital of Long Island,* Index No.: 37917/2012, decided on April 1, 2015, granted the motion by defendants quashing the subpoena served by plaintiff on non-party, Lynne Marie Nitti to take her deposition as well as for a protective order. In rendering its decision, the court noted that the parties entered into a preliminary conference and stipulation order, which provided for the scheduling of depositions in caption order. The order did not address scheduling of non-party depositions. In granting the motion, the court directed that party discovery proceed first, then non-party discovery afterward. The court stated that the plaintiff proffered no reason why a non-party deposition should be conducted prior to the completion of party depositions.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

*Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6% of her class. She is an Associate at Sahn Ward Coschignano & Baker, PLLC in Uniondale, a full service law firm concentrating in the areas of zoning and land use planning; real estate law and transactions; civil litigation; municipal law and legislative practice; environmental law; corporate/business law and commercial transactions; telecommunications law; labor and employment law; real estate tax certiorari and condemnation; and estate planning and administration. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.*

EDUCATION

# Transgender Students' Name Change Requests

**By Candace J. Gomez**

Recently, some school districts have experienced an increase in the number of name change requests that they have received from transgender students. Transgender students often choose to change the name assigned to them at birth to a name that is associated with their gender identity.[1] Many school officials want to accommodate these requests in order to create an environment in which these students feels safe and supported, but school officials also have legitimate questions regarding how name changes may affect the district's record keeping practices and whether these name changes are in compliance with applicable laws.

New York's Dignity for All Students Act ("DASA") protects transgender students from discrimination, and Title IX of the Education Amendments of 1972 ("Title IX") may offer additional protections, but the New York State Education Department ("SED") has not yet issued clear guidance regarding the rights of transgender students with regard to several issues including name change requests.[2]

However, it certainly appears that SED is working towards releasing such guidance in the near future. During its April 6, 2015 meeting, the Board of Regents P-12 Education Committee reviewed a draft guidance document and has been editing this document with the goal of ultimately directing SED to release a "Transgender and Gender Nonconforming Students State-wide Guidance Document."[3]

Candace Gomez

In the interim, in the absence of official guidance from SED, it is probably prudent for schools to implement the following procedures which many school attorneys have recommended to school district clients for years and is now reinforced by the language set forth in SED's draft guidance.

"With respect to a transgender student's birth name versus a chosen name, if the student has been previously known at school or in school records by his or her birth name, the school district may consider directing school personnel to use the student's chosen name. While it is recommended that schools are respectful of a student's expressed choice in name and pronoun usage on a day to day basis, local school district policies govern the creation and maintenance of official school records."[4]

If a transgender student wishes to formalize a name change on official documents, the school district should process this request in the same manner as all other requests for a name change on official documents. Therefore, the change must be made by petitioning the court.[5] While a name change for an adult is generally granted, absent fraudulent intent, in the case of a minor seeking to change his/her name, the court will only consent upon a determination by the court that the change is in the best interest of the child.[6]

*NOTE: Candace J. Gomez is an attorney with the law firm of Lamb & Barnosky, LLP in Melville. She practices in the areas of education law and civil litigation. Ms. Gomez is the Chair of the Nassau County Bar Association Education Law Committee, a member of the Suffolk County Bar Association, and she also serves as a member of the New York State Bar Association President's Committee on Access to Justice. Ms. Gomez is also the Nassau County President of the Long Island Hispanic Bar Association. Follow her at* nyedulaw.com *and* twitter.com/@nyedulaw.

[1] www.regents.nysed.gov/common/regents/files/meetings/Apr%202015/415p12d3.pdf

[2] Title IX of the Education Amendments of 1972 ("Title IX") prohibits discrimination on the basis of sex in educational programs and activities operated by recipients of federal financial assistance. While Title IX does not specifically prohibit discrimination on the basis of gender identity or gender expression, it has been invoked to address gender based issues in schools based on gender stereotypes. *See* DOJ case no. DJ169-l2C-70, OCR case no. 09-12-l020, in which the United States Department of Justice and the United States Department of Education stated: "All students, including transgendered students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX and Title IV."

[3] www.regents.nysed.gov/common/regents/files/meetings/Apr%202015/415p12d3.pdf -

[4] *Id*. at pg. 9

[5] N.Y. Civil Rights Law § 60 et. seq.

[6] *In re Conde,* 186 Misc.2d 785 (2000) ("Although an adult has the right to liberally change his or her name, where a minor is involved, courts stand *in loco parentis* to the minor. The court is obligated to protect the minor's best interest.")

# Miranda Installed as President at New York State Bar Association Summer Meeting in Cooperstown

**By Scott M. Karson**

The annual summer meeting of the New York State Bar Association was held from June 18 – June 20, 2015 at the Otesaga Hotel in Cooperstown, New York.

The main event, the meeting of the Association's policy-making body, the House of Delegates, featured the formal installation of David P. Miranda of Albany as the Association's 118th President. Former New York State Chief Judge Judith S. Kaye administered the oath of office to President Miranda.

The meeting also marked the debut of NYSBA President Elect Claire P. Gutekunst as Chair of the House.

The meeting featured memorials to two giants of New York's legal community who passed away in recent months. First, former NYSBA President Maxwell Pfeifer delivered a memorial to the late Robert P. Patterson, who served on the federal bench in the Southern District of New York and as President of the Association. Second, former NYSBA President Stephen P. Younger delivered a memorial to the late Richard J. Bartlett, who served as the State's first Chief Administrative Judge, Dean of Albany Law School and President of the New York Bar Foundation.

Scott Karson

The prestigious Root-Stimson Award, which is named after distinguished lawyers Elihu Root and Henry Stimson, and is given annually by the Association to recognize exemplary community service that is unrelated to the practice of law, was awarded to Jeffrey A. Moerdler in recognition of his long-time service as a volunteer emergency medical technician.

The Association's Committee on Women in the Law has identified 10 women attorney "trailblazers" in New York State. They are: Kate Stoneman, the first woman admitted to practice law in the state (in 1885); Mary M. Lilly, the first woman attorney elected to the State Legislature (in 1918); Jane Matilda Bolin, the first black woman judge in the United States (appointed by New York City Mayor Fiorello LaGuardia to the Domestic Relations Court in 1918); Florence Perlow Shientag, the first woman federal prosecutor in New York (in 1843); Charlotte Smallwood-Cook, the first woman District Attorney in New York (elected as District Attorney of Wyoming County in 1949); Shirley Adelson Siegel, appointed Chief of the New York State Attorney General's Civil Rights Bureau in 1959 and, in 1979, as New York State Solicitor General; Constance Baker Motley, who, in 1966, became the first black woman appointed to serve on the federal bench; Maryann Saccomando Freedman, the first woman President of the New York State Bar Association (1987-88); Geraldine Anne Ferraro, United States Congresswoman and first woman nominated by a major political party to run for the office of Vice President of the United States (in 1984); and Judith S. Kaye, the first woman appointed to serve on the New York Court of Appeals (1983) and as the State's Chief Judge (1993). Three of these distinguished trailblazers, Shirley Adelson Siegel, Maryann Saccomando Freedman and Judth S. Kaye, are still living, and two of them, Ms. Siegel and Judge Kaye, were present at the House meeting and were recognized by the Association.

Interim reports by the Special Committee on Re-Entry, the Commercial and Federal Litigation Section on Social Media, the Committee on Women in the Law on the Family and Medical Insurance Leave Act and the Chief Judge's Commission on Statewide Attorney Discipline were presented to the House for informational purposes only.

The meeting ended on a somber note, with a moment of silence for the nine victims of the Charleston, South Carolina church murders.

The next meeting of the House will be held on Saturday, November 7, 2015, at the State Bar Center in Albany, New York.

*Note: Scott M. Karson is the Vice President of the NYSBA for the Tenth Judicial District and serves on the NYSBA Executive Committee and in the NYSBA House of Delegates. He is also Chair of the NYSBA Audit Committee and former Chair of the NYSBA Committee on Courts of Appellate Jurisdiction. He is a former President of the SCBA, a member of the ABA House of Delegates, a member of the ABA Judicial Division Council of Appellate Lawyers and Vice Chair of the Board of Directors of Nassau-Suffolk Law Services Committee, Inc. He is a partner at Lamb & Barnosky, LLP in Melville.*

**COMMERCIAL LITIGATION**

# Pursuant to Federal Law, the Attorney/Client Privilege Does Not Survive Corporate Dissolution

**By Leo K. Barnes Jr.**

For individuals, the attorney-client privilege protects communications even after a death (see *Swidler & Berlin v. United States*, 524 U.S. 399 (1998)), thereby encouraging individuals to speak candidly with counsel without the fear of the information becoming public after death, and thus possibly opening up litigation or shame against the deceased and/or his or her family. *Id*., at 407. To the contrary, when a corporation is dissolved, it no longer has assets to protect, shareholders to appease, or goodwill to maintain. Therefore, the necessity for the continued protection of the attorney-client privilege is greatly diminished. See, *City of Rialto v. United States Department of Defense*, 492 F.SUpp.2d 1193, 1200 (C.D.Cal.2007) ("As there are usually no assets left and no directors, the protections of the attorney-client privilege are less meaningful to the dissolved corporation.").

In the recent decision of *S.E.C. v. Carrillo Huettel, LLP*, 2015 WL 1610282, 13 Civ. 1735 (S.D.N.Y. 2015), Southern District Magistrate Judge James Francis IV specifically ruled upon this issue, and held that when *applying federal common law*, the attorney-client privilege does not survive a corporation's dissolution or extinction.

Leo K. Barnes

The privilege issue arose when the Securities and Exchange Commission (SEC) commenced an action alleging a law firm helped facilitate stock fraud by aiding several companies in their violations of federal securities laws. As part of the ongoing investigation, the SEC requested that the court compel the production of documents and testimony withheld by the law firm on the grounds of attorney-client privilege. The SEC's primary argument, *inter alia*, for compelling the production was that any privilege asserted on behalf of the law firm's corporate clients was ineffective because those corporations had ceased to exist.

In evaluating whether to grant the SEC's motion to compel, the court held that "the weight of authority … holds that a dissolved or defunct corporation retains no [attorney-client] privilege." *Id*., at *2. The court noted that the concerns set forth by the Supreme Court in *Swidler* regarding an individual's future liability, harm to reputation, or possible harm were inapplicable to corporations because "[t]he possibility that a corporation's management will hesitate to confide in legal counsel out of concern that such communication may become unprivileged after the corporation's demise is too remote and hypothetical to outweigh the countervailing policy considerations supporting discoverability." *Id*., at *2 (internal quotations omitted).

The court noted that after dissolution a corporation will not have any goodwill to maintain, shareholders to appease, or tangible assets to protect, and as such, the protections offered by the extension of the attorney-client privilege were unnecessary. *Id*. The court continued by stating that "once a corporation is truly extinct, it has lost practical ability to assert the [attorney-client] privilege," because "there is no one who can speak for a defunct corporation in order to assert the privilege." *Id*., at *3.

The court added that this limitation of the privilege "is consistent with the principle that the privilege is to be construed narrowly because it withholds relevant information from the judicial process." *Id.* The court elaborated that keeping relevant information from a fact-finder to protect an entity that no longer needed protection is beyond the narrow construction of the rights offered by the privilege.

It is important to note that the court did acknowledge two exceptions to the rule that the attorney-client privilege is lost when the corporation is defunct or dissolved. First, and most importantly, the court's decision is based upon on a federal claim where the court applied federal common law, and has *no* bearing on

*(Continued on page 22)*

## SIDNEY SIBEN'S AMONG US

### *On the move…*


Jacqueline Siben

**Theresa A. Mari** has formed her law firm, Theresa A. Mari, P.C., 200 Vanderbilt Motor Parkway, Suite C-17, Hauppauge, (631) 617-6100, email tmari@tmarilaw.com.

Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana LLP have added Partners **Daniel S. Dornfeld** and Elbert F. Nasis & Associate **Tara Sorensen**.

**Frederick Eisenbud** has joined Campolo, Middleton & McCormick as of Counsel and is bringing his Commack-based environmental law firm practice.

### *Congratulations…*

**Fred Johs,** of Lewis Johs Avallone Aviles, LLP, was honored recently at Outreach's Annual Long Island Luncheon at Outreach House in Brentwood. Outreach is an organization committed to making a difference in the lives of children and families who are struggling with the devastating consequences of drug and alcohol addiction.

To SCBA members **James J.** and District Court Judge **Linda Kevins** on the recent birth of twin grandchildren James and Bridget born to James and Mary Kevins.

**Karen Tenenbaum**, of Tenenbaum Law, P.C., was honored at the Strong, Smart and Savory Awards of 2015 held by Girls Incorporated of Long Island. Ms. Tenenbaum was recognized for her commitment to educating youth on financial literacy.

*The Suffolk Lawyer* Editor-in-Chief, **Laura Lane,** was honored twice at the 2015 Press Club of Long Island Media Awards competition. PCLI is a chapter of the Society of Professional Journalists. Lane won for a feature story submission and for in-depth reporting on a second submission.

### *Announcements, Achievements, & Accolades…*

**Hon. Glenn A. Murphy** and **Hon. Richard I. Horowitz** were appointed Court of Claims judges by Governor Andrew Cuomo.

To **Alan E. Weiner** who was elected as a board member to the Estate Planning Council of Nassau County in Mineola. Alan is a partner emeritus with Baker Tilly Virchow Krause in Melville.

**Karen Tenenbaum,** of Tenenbaum Law, P.C., was quoted in the Bloomberg Business news article "How New York Hunts Down Tax Refugees." The NYS residency article was included in an edition of the American Institute of Certified Public Accountant's 'CPA Letter Daily' newsletter.

**Yvonne Cort**, of Tenenbaum Law, P.C., recently spoke in Florida on "New York State & New York City Residency Issues: The Hidden Tax Cost of a Second Home in NYS or a NYC Apartment" for the South Palm Beach County Bar Association. Ms. Cort also discussed New York State and New York City residency issues for the Florida Institute of Certified Public Accountants, Broward Chapter.

Elder law attorney **Melissa Negrin-Wiener** and partner at Genser Dubow Genser & Cona, based in Melville, appeared in June as a guest on WHPC's radio (90.3 FM) "Law You Should Know" hosted by Ken Landau, Esq. She discussed the growing use of mediation to resolve elder law issues and to keep families together.

**James M. Wicks,** of Farrell Fritz, will begin his one-year term as Chair of the NYSBA's Commercial & Federal Litigation Section.

### *Condolences…*

To **John L. Juliano,** whose brother-in-law, Frank Martuscello recently died.

To the family of **Patrick Kevin Brosnahan,** who died suddenly on June 15, 2015.

To Acting Supreme Court Justice **John H. Rouse,** on the death of his brother, James Rouse.

To **Amy Koreen** and her family on the passing of her father, Joseph Koreen.

### *New Members…*

The Suffolk County Bar Association extends a warm welcome to its newest members: **Talia N. Beard, Amanda L. Becker, David M. Bradford, Jacqueline M. Caputo, Ian E. Hannon, Mary C. Hartill, Michael D. Humphrey, Dayna Johnson, Alison Katrivanos, Abraham B. Krieger, Ava S. Lucks, Joseph G. Milizio, Michele T. Pilo, Hon. Frank N. Schellace, Donna E. Vallone-Heilmann and Erica Vladimer.** The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **Amrita Ashok-Khan, Nayana Herath, Heather McGee and Amanda Spinner.**

The short article set forth below provides an overview of the Uniform Bar Exam that recently was adopted by the New York Court of Appeals as the bar exam that will be used in New York, as of the July, 1916 bar exam. The article discusses reasons for opposition by some to a Uniform Bar Exam in New York, and reasons for support by some to a shift to a Uniform Bar Exam. Following the short article are student essays expressing the views, perspectives, and concerns of two law students relating to adoption of the Uniform Bar Exam for admission to practice law in the State of New York.

# New York Adoption of the Uniform Bar Examination

**By Douglas D. Scherer**

Chief Justice Jonathan Lippman recently announced that the New York State Court of Appeals adopted the Uniform Bar Examination (UBE), in a closed session, during the last week of April 2015. This makes New York the sixteenth state to adopt the UBE as a replacement for the state specific bar exams used in these states in the past.

The other UBE states are Alabama, Alaska, Arizona, Colorado, Idaho, Kansas, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming. Chief Judge Lippman expressed a belief that adoption by New York will prompt other large states to embrace the UBE.

The UBE will be given for the first time in New York on the last Tuesday and Wednesday of July, in 1916. The exam will have three components: the Multistate Essay Exam (MEE), the Multistate Performance Test (MPT) and the Multistate Bar Exam (MBE).

The MEE will contain six essay questions, the MPT will contain two multistate performance questions, and the MBE will contain 200 multiple choice questions. The MEE component will count for 30 percent of the grade, the MPT component will count for 20 percent of the grade, and the MBE component (which previously counted for 40 percent of the New York State Bar Exam) will count for 50 percent.

Douglas Scherer

The content of the three components of the Uniform Bar Exam, the MEE, MPT, and MBE, will all require an understanding of legal principles that are of general significance for the practice of law in New York and in other states.

UBE test takers who want to be licensed in New York will be required to take an online course with videotaped lectures dealing with New York law, and they must take and pass a 50 question multiple choice exam dealing with principles of law specific to New York.

The MBE component of the UBE will include testing in the following areas of law: Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, Torts, and Federal Civil Procedure.

The adoption of the UBE will not affect the ability of New York to regulate admission to practice through evaluation of the character and fitness of applicants, and through other eligibility requirements that might be applicable to persons seeking admission to practice law in New York.

Proponents of the UBE focus on the extent to which it will provide recent law school graduates with an opportunity to practice law in other states, soon after graduation from law school. Proponents also focus on the value of increased mobility for experienced lawyers who seek opportunities for law practice in states other than the state where they began to practice law, or who have personal obligations that require them to move to another jurisdiction.

Proponents of the UBE also point to the nature of law practice in 2015, with law practice by a high percentage of lawyers being interstate in nature, or international in nature. The UBE is viewed positively by these proponents as a replacement for state bar exams that are out of touch with the current nature of law practice in many areas of law practice.

Opponents of the UBE have raised a number of concerns including, most notably: the importance of developing a better model of licensing that assesses the competencies necessary for the practice of law; the need for a study to determine whether adoption of the UBE will produce a disparate impact on historically disadvantaged groups; and whether a test whose content reflects general principles of law adequately measures competence to practice in New York.

UBE opponents also express concern over a flooding of the market for law practice jobs in New York because recent law graduates from other states, and experienced lawyers from other states, will be able to move to New York and begin to practice law having successfully passed the UBE in another state.

Concerns have also been raised about the implementation of the UBE in New York in July 2016. Students who have completed roughly two thirds of their legal education must now prepare for a different type of bar exam, and law schools that have developed courses designed to assist students in passing the New York Bar Exam must reconfigure course content. And the details of the 50 questions multiple choice New York law exam, which all UBE test takers must take and pass independently of the UBE, have not yet been revealed.

The probable impact of adoption of the UBE for testing the competence of recent law school graduates and experienced lawyers is not clear. However, it may be significant that the three components of the UBE, the MEE, MPT, and MBE, focused on essay writing, a performance exercise, and multiple choice questions, are similar to the three components of the New York Bar Exam used in the past.

*Note: Douglas D. Scherer is a professor at Touro Law Center.*

# Uniform Bar Exam: Is Portability a Myth?

**By George Pammer**

The Chief Justice of New York State, the Honorable Jonathan Lippman, who established the Advisory Committee on the Uniform Bar Examination, released a report of their findings in April 2015. The report stated in part that, "A significant advantage of adopting the UBE is that passage of the test would produce a portable score that could be used by the bar applicant to gain admission in other UBE states, assuming the applicant satisfies any other jurisdiction-specific requirements. This portability is crucial in a legal marketplace that is increasingly mobile and requires more and more attorneys to engage in multi-jurisdictional practice."

George Pammer

Portability. This is what the New York Judiciary would like you to believe. Changing the bar exam from the current, state specific, New York Bar Exam to the multi-jurisdictional (UBE) Bar Exam will allow students to be admitted to multiple jurisdictions, or does it?

Currently 14 jurisdictions utilize the UBE, with the closest one to New York being New Hampshire and the next closest, Minnesota. Each jurisdiction is allowed to establish what is a passing UBE score as well as a host of other requirements such as the Multi-state Professional Responsibility Exam (MPRE), how long the score will last before becoming stale, if there will be a state component and if so, will it require

*(Continued on page 23)*

# Help us Meet the Challenges — Don't Lower the Standards

**By Denisse Mira**

As a first year law student, I came to learn that the initial goal is to graduate from law school, but the real prize is to pass the bar exam. Unlike in other careers, where a student begins her career upon obtaining a diploma, law students face an additional hurdle of having to pass a bar exam to practice law. The bar exam is a grueling rite of passage that all law students simultaneously dread and embrace. It astounds me that NYS bar examiners and the Court of Appeals are so drastically changing such a pivotal exam, in my opinion for the worse.

Denisse Mira

New York has one of the most difficult bar exams in the United States. As a law student, the prospect of the Uniform Bar Examination ("UBE"), a less difficult bar exam, should be something to rejoice. However, "rejoice" does not convey my true feelings. I consider myself an open-minded individual who is open to change, but the UBE is not the type of change that is needed. Perhaps the UBE was adopted in reaction to the low bar passage rates over the past year, but as a wise professor once said to me, the solution should never be to lower the standards, but instead to help the student meet the challenge.

Adopting the UBE, and so quickly, means radical change for current students. Students now need to learn additional material to pass, and those materials are not necessarily needed to

*(Continued on page 23)*

# Refusing to retire, Miller practiced law until his death

Smithtown Attorney Edwin Miller, 82, died on January 1, 2015 from complications related to cancer. He was born in Brooklyn on February 2, 1932, the second child of Celia and Barney Miller. His family moved to Nassau County when he was a young child.

After graduating Cum Laude from Hofstra University he went into the Army for two years serving in Research and Development. On the G.I. bill he went to New York University Law School. In his last year he met Margaret Braude and after graduation in 1958 they were married. They built a home on a beautiful spot on the Nissequogue River in Smithtown.

Edwin wished to practice on Long Island and started in Commack, then went into partnership and established the law firm Campbell & Miller in Smithtown. In the early years they often had cases representing the town. He practiced for 56 years and never retired. At the end of his career he began writing stories for *The Suffolk Lawyer* drawing from some of his most memorable cases. His writing was witty and humanistic.

Photo courtesy of the Miller family

**Edwin Miller**

He was always an athlete. In high school he played football and baseball and was chosen to try out for the position of catcher for the Brooklyn Dodgers. In college and the army it was mostly baseball until he broke a finger. When he married his energies turned to the individual sports, tennis, swimming and skiing.

He was an active member in the Rotary Club for many years, known there for his fantastic memory and sense of humor. His friends of the club were extremely supportive when he was hospitalized at St. Catherine's of Siena where he died from Chronic Lymphocytic Leukemia (CLL).

Edwin had a very happy and full life. He leaves behind his wife Margaret, his brother Stan, his sisters Renee Devine, Bernice Pollack and Carol Barrocas. Rev. Laurence DeLian conducted the private non-sectarian memorial service.

**MATRIMONIAL/FAMILY LAW**

# Entering Emojis Into Evidence — Overcoming Objections in the Smartphone

**By Vesselin Mitev**

**Vesselin Mitev**

Hearsay is a statement made out of court, offered for its truth inside the four walls of the courtroom. This rule arose out of spoken statements, since for eons humanity primarily spoke. Now, as a practical matter, we don't really speak anymore; we text, e-mail, instant-message and Facebook chat.

Many times clients will have text messages on their phone which they wish to introduce in evidence at trial, i.e., in a custody case, one parent has texted the other parent statements that implicate their mental health status: "I am going to kill myself!" or a key admission as to equitable distribution: "I spent our savings account money in Atlantic City! Sorry!"

Armed with these black-and-white statements, we stride into court where we will no doubt be able to use them in our case in chief, or on cross. But evidence rules become elastic from courtroom to courtroom, because of judicial discretion or misapplication of the rules of evidence.

Ex-wife A testifies she always paid child support timely. Your client, ex-husband B, reminds you that you have a copy of a text from his ex-wife, stating "I won't be paying any child support for August – October." You rise up to cross:

"You just told us that you always paid your child support on time, correct?

A: Yes.

Q: And that was a true statement, am I correct?

A: Yes.

Decision time: Ex-wife A is a party to the action, so no foundation needs to be laid as to the time, date, and place she made the statement. Statements can be both oral and written and if they are statements by a party they are treated as admissions and received as primary evidence against the party.[1] You go right for the jugular:

"Isn't it true, madam that you told your husband in a text message that 'I won't be paying any child support for August–October' — isn't that true?

Opposing Counsel: "Objection, hearsay."

This is incorrect; you argue that this is cross-examination, the witness is a

*(Continued on page 25)*

## TRUSTS & ESTATES UPDATE

By Ilene Sherwyn Cooper

Ilene S. Cooper

### Right of Election Waived

In *In re Estate of Mason,* the Surrogate's Court, Kings County, was confronted with a proceeding instituted by the decedent's surviving spouse to determine the validity of her exercise of her right of election against his estate. The executor of the estate moved for summary judgment dismissing the petition on the grounds that the spouse had waived her right of election pursuant to a post-nuptial agreement with the decedent, and for an award of sanctions, costs and fees pursuant to 22 NYCRR §130-1(c).

The decedent died on March 7, 2011, survived by his spouse, the petitioner, and two adult daughters. His will was admitted to probate in January 2012, and two years later, the subject proceeding was instituted. The record revealed that the decedent and the petitioner were married on July 21, 2005, and in June 2006, they entered into a post-nuptial agreement. Each of the parties signed the document before a notary public, and both signatures were accompanied by a written acknowledgment by each notary. Separate counsel represented both parties.

The court concluded, upon the record presented, that the executor had met her burden of proving that, as a matter of law, the agreement was in writing, subscribed by the parties, and properly acknowledged in compliance with the statutory requirements of EPTL 5-1.1-A(e)(2). Nevertheless, the petitioner maintained that the agreement was defective because the language referring to the waiver of the elective share was ambiguous, the agreement was not "certified," the decedent did not initial the exhibit page containing the list of the petitioner's assets, and the list of the parties' assets appeared after the signature page, instead of before the signature page.

The court found, despite petitioner's characterization, that the agreement clearly manifested the unambiguous purpose and intent of the parties to mutually waive their right to marital property and their spousal right of election. Further, the court opined that the agreement was not legally defective because the word "certification" did not appear in the acknowledgment by the notaries. Indeed, the court noted that the subject acknowledgment contained the required elements endorsed by the Court of Appeals, to wit, (1) that the signor made an oral declaration to the notary public that he or she in fact signed the document; and (2) that the notary or other official either actually knew the identity of the signor or secured satisfactory evidence of identity ensuring that the signor was the person described in the document. Accordingly, the court granted summary judgment in the executor's favor, and dismissed the petition.

With respect to the executor's request for sanctions, the court observed that it had the discretion to award costs or sanctions against a party or an attorney who engages in frivolous conduct. Pursuant to the provisions of 22 NYCRR 130-1(c)(1), conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." Considered in this regard is whether the conduct at issue was continued when its lack of legal or factual basis was apparent,

*(Continued on 31)*

# Farewell Dean Flanagan!

By Allison Shields

Photos by Barry Smolowitz

**Suffolk Academy of Law Dean James Flanagan, accompanied by his wife, was honored for his two years of service at the bar association. See more photos on page 11.**

The Suffolk Academy of Law held a celebration at the SCBA Great Hall (known for the evening as "Rangers Hall"), in honor of Hon. James Flanagan and his two years of service as Dean of the Academy on May 21. Although Dean Flanagan would not permit the customary skit and songs by the Academy Players, the Academy still managed to create a fun and festive atmosphere by hosting an event based on the Dean's all-time favorite sports team — the New York Rangers.

With NY Rangers-themed decorations and red, white and blue balloons, as well as video clips from recent Rangers playoffs, victories, and photos of famous Rangers who looked suspiciously like Dean Flanagan, the stage was set for a fabulous evening.

The Just Cause Band provided outstanding music for the event, allowing the Dean's friends and family, along with the Academy, to wish the Dean a fond farewell and thank him for his two years of hard work and dedication at the helm of the Academy in grand style. Food was provided by Uncle Giuseppe's catering in Port Jefferson, with the help of Dean Flanagan's beautiful new wife, Donna Flanagan. It was clear from the empty food trays at the end of the evening that the Italian fare was appreciated by all in attendance!

The Dean's last year in office was especially challenging, due to the passing of our beloved Executive Director, Dorothy Ceparano. But despite this and other challenges faced by the Academy during Judge Flanagan's two years in office, under his leadership the Academy still managed to put on over 100 programs each year to provide lawyers in Suffolk County with quality continuing legal education. The Dean also spearheaded some new initiatives for the Academy to help reduce costs and bring service to our members into the 21st Century.

Towards the end of the evening, the Dean was presented with awards recognizing him for his years of service to the Academy and to the Board of Directors of the Suffolk County Bar Association. The Dean gave an emotional farewell speech in which Dorothy figured prominently. Judge Flanagan also thanked the new Academy Executive Director, Allison Shields, and congratulated the incoming Dean, Harry Tilis. Judge Flanagan concluded by assuring all present that he would continue to work with the Academy as a member of the Advisory Committee and return to his position on the "Greek Chorus" at the back of the room at monthly Academy meetings.

## Be prepared at Academy programs

Materials for all Academy programs are provided online in digital format, available for download in PDF format. Printed materials are available for an additional charge.

# SCBA Thanks Suffolk Academy of Law Dean Flanagan for his Years of Service

Photos by Barry Smolowitz



**CONSTRUCTION**

# Both Owner and Lessee of Real Property Must be Served with a Mechanic's Lien

**By Parshhueram T. Misir**

The lessee of real property who hires a contractor to perform construction work in its leased space has an obligation to pay the contractor for that work. When the lessee does not pay the contractor, the contractor may file a mechanic's lien against the real property to secure payment for its work.

The contractor may then serve the fee simple owner with the mechanic's lien, but it may fail to serve the lessee with a copy of the lien. The contractor's failure to serve both the fee simple owner and the lessee with the lien, however, renders the lien defective and subject to cancellation by the court.


Parshhueram Misir

In order to avoid cancellation of a lien, under the facts stated above, a mechanic's lien must be served on both the fee simple owner and the lessee of real property. Pursuant to Lien Law §4(1), a lien extends "to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien…"

Lien Law §2(3) defines an owner to include both the owner in fee simple of real property and the lessees of that real property. As such, a leaseholder is considered an owner within the definition of Lien Law §2(3). Moreover, a leasehold is a lienable interest, and the tenant is an "owner" of its leasehold under Lien Law §2(3).

Under Lien Law §11, the owner of real property must be served with a notice of mechanic's lien, otherwise the lien must be cancelled and discharged of record. Not only does Lien Law §11 require a party to serve a notice of lien upon the owner, but proof that the lien was served on the owner must be filed with the county clerk where the real property is located.

A court has no discretion if a party fails to comply with Lien Law §11, and must discharge the lien, when a party fails to either serve the notice of lien on the owner or fails to timely file proof of service for the lien with the county clerk. Thus, it is imperative that a contractor who is contracted directly by a tenant to perform work, in filing its mechanic's lien, serve both the fee simple owner and the tenant with the lien to avoid cancellation.

*Note: Parshhueram T. Misir is an attorney in the Construction Law Department at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP.*

**REAL ESTATE**

# Real Estate Tax Breaks for Green Buildings

**By John V. Terrana and Alexander Zugaro**

Doing the right thing environmentally doesn't always make economic sense. However, when it comes to *green* buildings, it certainly may. A recent amendment to the New York State Real Property Tax Law (RPTL) provides certain tax benefits to those who construct a building with the health of its occupants and the environment in mind.

RPTL Section 470 allows exemptions for improvements to real property meeting certification standards for green buildings. The U.S. Green Building Council, or USGBC, is the overseeing body that developed the Leadership in Energy and Environmental Design (LEED) program, the most well known certification program. LEED provides building owners and operators with a framework for identifying and implementing practical and measurable green building design, construction, operations and maintenance solutions.

Initial requirements under RPTL Section 470 are (a) such construction of improvements was commenced on or after January 1, 2013, or such later date as may be specified by local law; (b) the value of such construction exceeds the sum of $10,000; and (c) such construction is documented by a building permit, if required, for the improvements, or other appropriate documentation as required by the assessor.

Properties that meet the above requirements and apply for an RPTL Section 470 tax exemption are subject to a rating system that will classify the building in one of four categories: Certified, Silver, Gold or Platinum. A building that qualifies for a Certified, Silver, Gold, or Platinum exemption shall be exempt from taxation by any municipal corporation in which such property is located to the extent provided in RPTL Section 470, provided the governing board of such municipal corporation, adopts a local law, ordinance or resolution providing RPTL Section 470 exemptions effective in that municipality. The following chart shows the maximum exemption percentages allowed given the certified rating achieved:


John V. Terrana


Alexander Zugaro

| YEAR | CERTIFIED/ SILVER | GOLD | PLATINUM |
|---|---|---|---|
| 1 | 100% | 100% | 100% |
| 2 | 100% | 100% | 100% |
| 3 | 100% | 100% | 100% |
| 4 | 80% | 100% | 100% |
| 5 | 60% | 80% | 100% |
| 6 | 40% | 60% | 100% |
| 7 | 20% | 40% | 80% |
| 8 | 0% | 20% | 60% |
| 9 | 0% | 0% | 40% |
| 10 | 0% | 0% | 20% |

The certification system used by LEED is a point based system where LEED assigns a certain amount of points to each environmentally friendly improvement made to the property. LEED lays out major areas of improvement where a taxpayer can earn points such as sustainability, water efficiency, energy and atmosphere, materials and resources as well as indoor environmental quality. The number of points the project earns determines its level of LEED certification.

RPTL Section 470 provides an exemption for *improvements* to the property and does *not* provide an exemption for the existing land or building(s) already on it. As set forth in the chart above, the exemption declines over a 10 year period, and only in year 11 would the taxpayer pay taxes based on the full assessment of the improvements. However, if the taxpayer has separately commenced tax certiorari proceedings and has been successful, he may never have to pay taxes based on the proposed assessment of the improvements. For these reasons, it is advisable that one files a separate tax certiorari proceeding on the property in addition to filing for the exemption.

Despite checking with the New York State Office of Real Property Tax Services and the USGBC, there does not appear to be a database that lists the municipalities that have adopted RPTL Section 470. However, there are some municipalities on Long Island that have adopted RPTL. To date, the Suffolk County Towns of Huntington, Babylon, Brookhaven and Southampton have adopted RPTL Section 470. The maximum allowable exemption in Babylon is $250,000 and in Southampton it is $1,000,000.

This article is meant to provide some general information regarding the availability of a particular tax exemption for new construction. A more detailed review of the proposed project and the statute must be done before it can be determined if a project qualifies for it. In addition, other exemptions or avenues for obtaining tax relief may be available. Accordingly, before proceeding with a project, an attorney should be consulted with expertise in tax certiorari.

*Note: John V. Terrana is head of the Tax Certiorari Department at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP.*

*Note: Alexander Zugaro is a third year law student at Pace University School of Law and a former law intern at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP.*

LAND USE/APPELLATE

# 7-Eleven Comes Up a Winner

**By Robert J. Flynn, Jr.**


Robert J. Flynn, Jr.

Over the last fifty years, municipal boards across the state have often confused the standards and proof required to establish a special use permit with those of a use variance. The confusion has resulted in myriad appellate cases across the state attempting to explain the differences in the nature of the two land use applications and the proof required to establish each.

In the recent decision in the *Matter of 7-Eleven, Inc. v. Incorporated Village of Mineola, et al*, the Appellate Division, Second Department clearly set forth the standards for a special exception permit, and reiterated the difference between the special exception and the use variance.[1] The decision makes clear the importance of providing expert testimony at a hearing, either in support of an application for a special use permit or against it. It also demonstrates that when a special use permit is under consideration by a board, there will be no tolerance by the courts for specious, unsupported reasons to defeat the application for a special use permit.

In *Matter of 7-Eleven*, the applicant, 7-Eleven, Inc., sought relief before the Board of Trustees of the Incorporated Village of Mineola for a special use permit in order to build one of its convenience stores at premises located on East Jericho Turnpike in the Village of Mineola. The applicant's plan called for no variances, only the special use permit. At the hearing held before the Board of Trustees, 7-Eleven presented its case, which included real estate and traffic expert testimony in support of the application. The expert proof showed that the convenience store on these premises would not adversely affect the surrounding neighborhood property values, nor would it exacerbate the existing traffic conditions.

A contingent of neighbors who opposed the application complained about the nature of the clientele that they feared a 7-Eleven convenience store would draw into the village. The neighbors also protested that the proposed 7-Eleven store would worsen the existing traffic conditions in the village. However, the opposition forces failed to offer any expert proof to support the contention.

The Village Board of Trustees denied 7-Eleven's application for a special use permit on the basis of concerns about increased traffic hazards and parking problems. 7-Eleven thereafter commenced an Article 78 proceeding to review the Board of Trustee's denial of its application. The Supreme Court, Nassau County dismissed the Article 78 petition, so 7-Eleven appealed to the Appellate Division.

The Appellate Division reversed the lower court and directed the case be remitted to the Board of Trustees for approval of the special use permit subject to the imposition of reasonable conditions permitted by law.

The Appellate Division distinguished the nature of the special use permit from that of a use variance. The court said: "A special use permit gives a property owner permission to use property in a way that is consistent with the zoning ordinance, although not necessarily as of right. By contrast, a use variance gives a property owner permission to use property in a manner inconsistent with the zoning ordinance. The significance of this distinction is that the inclusion of the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood".[2]

The fact that the Village of Mineola ordinance provided that a convenience store such as a 7-Eleven was conditionally permissible in the zoning district was tantamount to a legislative finding that the use was in harmony with the general zoning plan and would not adversely affect the neighborhood.

The court recognized that because the 7-Eleven application was for a special exception permit only, and not a use variance, the burden of proof upon 7-Eleven was lighter. Unlike a use variance, an applicant for a special use permit is not required to show it has been denied any reasonable use of the property. The applicant for the special use permit must only show that the use is contemplated by the ordinance subject only to conditions attached to its use to minimize the impact on the surrounding area.[3]

In the 7-Eleven case, the Village Board completely discounted 7-Eleven's expressed willingness to abide by certain restrictions on the size of the delivery trucks and the timing of deliveries in order to minimize traffic problems.

While a reviewing board retains discretion to evaluate each application for a special use permit to determine whether applicable criteria have been met, and to make a common sense judgment in deciding whether the application for the special use permit is warranted, any determination must be supported by substantial evidence on the record.[4] The standard of review of a special use permit application is whether the decision of the board making the determination is arbitrary and capricious. A reviewing board is given deference in making its decision; even in a case where there is ample support in the record for the granting of the special permit, the board may still deny it if there is evidence in the record, coupled with commonsense knowledge of board members as to the conditions in the community known to them.[5] However, a denial of a special use permit can never rest solely on generalized community objections.[6]

The 7-Eleven case also demonstrates the importance of presenting expert testimony and proof at the hearing either in support of or in opposition to the special use permit application, and, shows the perils of failing to do so. 7-Eleven attended the hearing equipped with expert proof and testimony while the neighborhood opposition presented no expert proof or expert testimony.

In the end, it was clear that the neighbors' claim that the granting of the special exception permit would exacerbate existing traffic conditions and decrease the value of surrounding properties by attracting an unsavory clientele to the area was mere speculation, unsupported by empirical data and contradicted by 7-Eleven's expert proof in the record. In other words, the board's decision was based on generalized community objections. As such, the court determined that the reasons underlying the Board of Trustees' decision concerning traffic and parking were not supported by substantial evidence in the record.

Because there was no proof to demonstrate that the proposed 7-Eleven store would have a greater traffic impact on existing conditions than any other as-of-right use, the court annulled the decision, finding that the board's conclusions in support of the denial of the special use permit were arbitrary and capricious.

*Note: Robert J. Flynn, Jr. is a practicing lawyer in Huntington, NY specializing in municipal and real estate law and land use appeals. He is the co-author of the book "Zoning Board of Appeals Practice in New York" published by the New York State Bar Association.*

[1] Matter of 7-11, Inc. v. Incorporated Village of Mineola, 2015 NYSlip 03544 [Second Dept. April 29, 2015].
[2] Matter of 7-Eleven, supra (quoting from Matter of Retail Property Trust v. Board of Zoning Appeals, 98 NY2d 190; Matter of Twin County Recycling Corp. v. Yevoli, 90 NY2d 1000).
[3] Matter of North Shore Steak House v. Thomaston, 30 NY2d 238; Matter of Capriola, 73 AD3d 1043 [Second Dept. 2010].
[4] Matter of North Shore, supra.
[5] Matter of Retail Property Trust, supra.; Matter of Smyles v. Board of Trustees of the Incorporated Village of Mineola, 120 AD3d 822 [Second Dept. 2014].
[6] Matter of Retail Property Trust, supra.

## COURT NOTES

**By Ilene Sherwyn Cooper**


Ilene S. Cooper

**APPELLATE DIVISION-SECOND DEPARTMENT**

**Attorney Resignations**

The following attorneys, who are in good standing, with no complaints or charges pending against them, have voluntarily resigned from the practice of law in the State of New York:

Paul F. Altruda
Robert Stephen Barlow
Kenneth J. Barnes
Neil H. Cogan
Lisa Ann Fortin
Carly Henek
Don Lewis Horwitz
Jennifer Wu Keen
Robert E. Kellogg
Paul Ira Klein
Abbey Marie Marzick
John R. McDermott
Jean Philips
Wilfred J. Romero
Rebecca Sawhney
Donald Reilly Shields
Taegin Stevenson
Louis F. Vaccarella
Robert Gabriel Vidoni
Lynda M. Zukaitis

**Attorney Reinstatements Granted**

The following attorneys have been reinstated to the roll of attorneys and counselors- at- law:

David A. Feinerman
Michael Weinreb

**Attorney Resignations Granted/ Disciplinary Proceeding Pending:**

**Louis John Uvino:** By affidavit, respondent tendered his resignation as an attorney on the grounds that he was the subject of an investigation into his professional misconduct alleging, *inter alia,* that neglected legal matters, failed to adequately communicate with his clients, and failed to maintain funds entrusted to his charge. He stated that he could not successfully defend himself on the merits against the charges. Further, respondent stated his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

**Suspension Vacated**

**Dean Gary Weber:** Motion by Dean Gary Weber to stay order of suspension granted to the extent that said order was recalled and vacated, and the respondent directed to serve and file a response to the Grievance Committee's motion to confirm the report of the special referee.

**Attorneys Suspended**

**Francis Anthony Miniter:** Application by the Grievance Committee to impose discipline upon the respondent based upon his suspension in Connecticut from the practice of law for a period of seven years. The respondent opposed the application and the matter was referred to a special referee. After a hearing, the referee found that the respondent had failed to sustain any of his defenses, and the Grievance Committee moved to confirm. The court granted the Grievance Committee's motion, under the totality of circumstances, and suspended the respondent from the practice of law in New York for a period of five years. Further, any reinstatement of the respondent in New York was conditioned upon his reinstatement

*(Continued on page 27)*



# SCBA Installation 2015 — an Evening to Remember





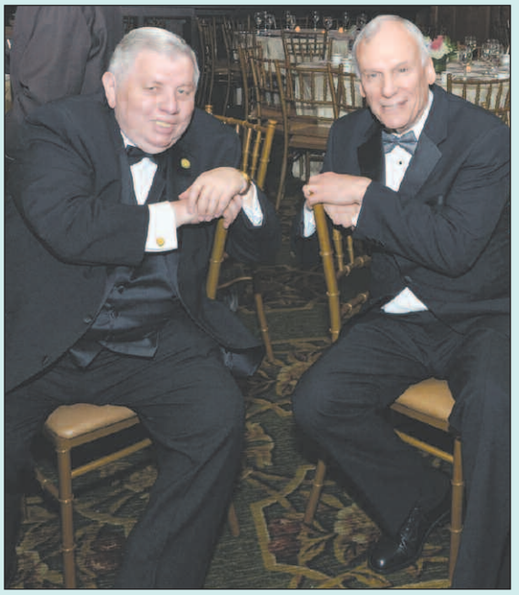


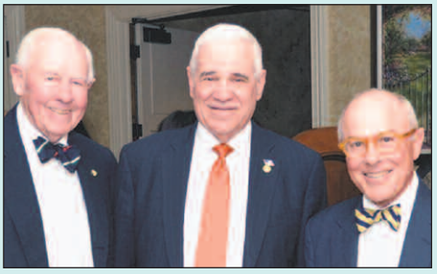






Photos by Ron Pucchiana





**PERSONAL INJURY**

# Bard Still Bites

## *Rule prohibiting negligence claims for harm caused by domestic pets upheld*

**By Jeffrey T. Baron**

If you've noticed a lot of tail wagging lately, it might be because the New York Court of Appeals in *Doerr v. Goldsmith*[1] just published one of the most dog-friendly decisions ever. The main issue before the *Doerr* Court was whether to overrule the high courts' heavily criticized 2006 Bard rule[2], which prohibited negligence claims in cases where the harm was caused by a canine or other animal.

The Bard Court held that cases against the owner or harborer of an animal could proceed only under a theory of strict liability, triggered once plaintiff proves that defendant had prior notice of the animal's harmful proclivities. Under the Bard rule, the negligent acts or omissions of the animal's owner in causing or contributing to the plaintiff's harm are completely irrelevant, including violations of local leash laws. Justice Smith's dissent in Bard criticized the majority's decision as archaic, rigid, "contrary to fairness and common sense," and likely "to be eroded by ad hoc exceptions."

The first such exception arrived in the 2013 case of *Hastings v Sauve*[3], where a cow was negligently permitted to stray from a farm and onto a highway, accidentally causing injuries to a passing motorist. The Court of Appeals recognized a "fundamental distinction" between cases where domestic pets engage in atypical vicious or aggressive behavior and cases where farm animals engage in emblematic errant or dangerous behavior, wandering away and causing harm. The Hastings Court saw fit to carve a narrow exception to Bard's negligence prohibition where farm animals (i.e. "domestic animals" as defined by Agriculture & Markets Law §108(7)), stray from the property where they are kept. The court refrained from deciding whether domestic pet owners might also be subject to liability under ordinary tort law principles where their pets cause harm without engaging in vicious or aggressive behavior. The court insisted that question would have to await a different case, which brings us to Doerr.

Jeffrey T. Baron

Plaintiff Wolfgang Doerr was riding his bicycle on a road in Central Park toward a location where defendant Julie Smith and her boyfriend Daniel Goldsmith were standing on opposite sides of the road from each other. Goldsmith was kneeling down and holding Smith's dog. Smith chose this inopportune moment to beckon her dog, which faithfully ran toward her and directly into plaintiff's path. Unable to stop his bicycle in time, plaintiff struck the dog and flew from his bike into the annals of legal history.

In keeping with the Bard rule, the Supreme Court on a defense motion for summary judgment dismissed the *Doerr* case because the dog had no prior harmful proclivity when its owner beckoned it into the path of the plaintiff's bicycle. The Appellate Division reversed[4] based upon the "fundamental distinction" referenced by the *Hastings* Court. They sidestepped the Bard Rule, shifting focus from the dutiful behavior of the dog to the derelict actions of the defendant. They likened the case to one where someone tosses a ball into another person's path, thereby launching an instrument of harm. Defendant appealed to the Court of Appeals.

On June 11, 2015, in a 4-3 decision, the New York Court of Appeals reversed the Appellate decision and granted summary judgment to defendant Julie Smith, dismissing Doerr's case. The high court examined the history of animal liability in New York, weighed considerations of logic and fairness against societal expectations, insurance ramifications, and judicial consistency, and chose to double-down on the Bard prohibition against negligence claims for injuries caused by domestic pets.

In a controversial concurring opinion, Judge Sheila Abdus-Salaam rejected the Appellate Division's ball analogy, pointing out that a ball, once tossed, is constrained by the laws of physics, while a dog has an actual choice. It was, the judge maintained, the volitional behavior of the dog that caused the harm, and not the act or omission of the owner. After all, a dog won't always follow its owner's command, and we can't possibly know what a dog is actually thinking when it acts or fails to act. On the other hand, the judge allowed, if the defendant had "tossed" the dog across the road, a negligence claim would have likely been viable. Thus, under the majority rule, a defendant who gracelessly tosses a ball to her dog in a crowded park can be held liable for negligence if the ball hits someone, but not if her dog lunges to catch the errant ball and crashes into someone.

Judge Abdus-Salaam acknowledged that the Bard rule will seem "unsatisfactory" in "a few cases," but she cited various policy reasons in support of her decision to uphold Bard. For one thing, it is an "easy to apply bright-line rule."

*(Continued on page 26)*

**SOCIAL MEDIA**

# Avvo.com Ratings: in Defense of a Colleague and Perhaps His Nemesis

**By Mona Conway**

By way of an interesting coincidence, I came upon an article in *The Suffolk Lawyer* about Avvo.com. Not having an opportunity to read the February 2015 edition, I was using the newspaper for packing materials and happened to spot a photograph of my good colleague Glenn Warmuth. Having recently requested that Glenn provide me with a peer review on my Avvo profile, I came to realize that my request was adding salt to a wound. For this I must openly apologize to him and my other colleagues, who may have been irritated by such a request.

Having maintained a profile on Avvo for many years now (Internet years, that is), I was rather stunned by the revelation of Avvo's dark side. Indeed, Mr. Warmuth's investigation uncovers another "perfect scam" insulated from legal liability. However, as a veteran of Avvo, and at the risk of seeming to promote the company, I feel obligated to share the lighter side of this quasi-social-networking site.

I "claimed" my Avvo profile in about 2009. At that time, it seemed to me to be the closest online forum to accomplish a vision for our profession that I had hoped for a decade ago. (I had suggested a similar network to the Suffolk County Bar Association on a few occasions to enhance legal networking on the local level). Avvo offered the potential for genuine local networking as well as a bridge between lawyers and those in need of legal help. Avvo was barely a blip on the web at that time, so my motivation was primarily altruistic. Those in need of legal help or wanting a quick answer to a simple legal question post their issues on Avvo and let the lawyers give their input. The site is free to the layperson and a nice thing to do by lawyers, who are not well known for their non-billable generosity of time. The added presence on the Internet doesn't hurt either. In addition, connections can be made, attorney-to-attorney on a local level as well as across the country.

Mona Conway

Like most of my colleagues, I have been a member of LinkedIn and have a professional Facebook page. For all the time and attention that I have given these social networks, I have found them to be largely useless. Perhaps I'm missing something, but most of what I have seen on LinkedIn and Facebook appears to be nothing more than a contest of collection. Members collect "contacts" or "friends," and interactions are devoid of meaningful social networking. Even for the legal profession, having some social networking profile has become a necessity, lest we all be deemed shrewd-less luddites. Apparently, Avvo is giving new meaning to the phrase "peer pressure." While Mr. Warmuth's Avvo rating is a mediocre 6.6-out-of-10 by default, those who could give him his true "industry recognition" would rank him at 11 (playing on Glenn's '80's movie reference). Likewise, the same or inverse of which may be said for many members of the bar.

My two-cents is that social networking is a necessary evil or at least a nemesis against reality, the force of which cannot be overcome at the present time. Like so many Internet industries, Avvo's methods do not seem to be above-board. I must state — with all due respect to my colleagues who despise its underhandedness — that Avvo has genuine usefulness. The non-legal community seems to be benefiting from the one-stop, online legal advice shop and attorneys can demonstrate their specialty knowledge in the same arena. It is a strange win/win situation with an ironically unjust result for the non-players of this game.

*Note: Mona Conway is a member of Conway Business Law Group, P.C., practicing business law and commercial litigation in Huntington, New York. She is a former Chair of the SCBA's Commercial Law Committee. mail:mconway@conwaybusinesslaw.com.*

ADR

# Mach Mining LLC v. Equal Employment Opportunity Commission (U.S. S.Ct. 2016)

**By Lisa Renee Pomerantz**

Increasingly, many statutory and regulatory schemes, as well as court procedures, include some form of conflict resolution mechanism. Since these rules typically require only that the process take place, and not that the conflict gets settled, the question arises of if and how to enforce them.

This was the question addressed by the Supreme Court in *Mach Mining LLC v. Equal Employment Opportunity Commission* (slip op. April 29, 2015).

The governing statute requires the EEOC to attempt "conciliation" of a claim filed with the agency before filing suit. In *Mach Mining*, the EEOC investigated a complaint and determined there was reasonable cause to believe that Mach Mining's alleged refusal to hire women as miners was discriminatory.

Lisa Pomerantz

After making this finding, the EEOC wrote to the parties to inform them that an agency representative would contact them to initiate the "conciliation" process. No such contact occurred, and the agency then sent a letter to the parties stating that all legally mandated conciliation efforts had taken place and were unsuccessful. The EEOC then filed suit.

*Mach Mining* contended that the EEOC had failed to satisfy the statutorily mandated "conciliation" prerequisite to filing suit. The EEOC, on the other hand, argued that the decision as to whether and to what extent the agency must pursue informal dispute resolution was committed to its unfettered discretion.

The Supreme Court disagreed. It observed that there was a presumption of Congressional intent to provide for judicial review of administrative action, and that there was no basis for finding that such presumption did not apply in this case. The court, in a unanimous decision, held that, at a minimum, the "conciliation" requirement obligated the EEOC to inform the employer of the nature of the claim and provide an opportunity for the employer to address the claim with the EEOC and "achieve voluntary compliance."

*Note: Lisa Renee Pomerantz is an attorney in Suffolk County. She is a mediator and arbitrator on the AAA Commercial Panel and serves on the Board of Directors of the Association for Conflict Resolution.*

ENVIRONMENTAL LAW

# Pharmaceutical Disposal – a Patchwork Solution

**By Lilia Factor**

The disposal of pharmaceuticals is a growing area of concern in our over-medicated society. According to Citizens Campaign for the Environment, nearly 4 billion prescriptions are filled in the U.S. each year, of which about one third or 200,000 pounds are unused. Trace amounts of these drugs enter our surface and ground waters from various sources, including landfill leachate, animal feedlots, aquaculture, land application of organic materials, pharmaceutical manufacturing facilities, and deliberate flushing.

Most ubiquitous of all, the pharmaceuticals pass through our bodies and are secreted, ending up in cesspools and sewage treatment plants, neither of which are equipped to filter or treat them. Studies relating to the impacts of these substances and of personal care products are still few and far between. However, according to Douglas Feldman, Chief of the Office of Water Resources of the Suffolk County Health Department, some of these compounds are known to mimic naturally occurring hormones and affect normal hormone activity. A limited number of studies have reported disruptions of the endocrine system in animals and the "feminization" of fish.

At this time, there are no mandatory regulations requiring any particular method of pharmaceutical disposal by members of the public. The New York State Department of Environmental Conservation (DEC) has focused efforts on a public awareness program advising people not to flush their unused or expired medications. Instead, the public is urged to return them to collection events where available, or mix them with something such as coffee grounds, cat litter or dirt, seal them in containers, and put them in the garbage. Pursuant to New York's Drug Management and Disposal Act of 2009, pharmacies, retail businesses that sell drugs, and veterinary offices are required to conspicuously display a poster to this effect. In addition, people can bring unused medications and deposit them in drop boxes installed in police stations statewide or to municipal collection events.

Lilia Factor

The current process for getting approval for a household pharmaceutical collection event is somewhat cumbersome. The DEC requires an applicant to fill out three forms identifying the location, date and time of the event, the law enforcement presence, a chain of custody from collection through destruction and pre-approval for destruction via a witnessed burn at a permitted medical solid waste combustion facility in New York State. The program requires the further approval of the New York State Department of Health, Bureau of Narcotic Enforcement (BNE) and notice to the U.S. Department of Justice Drug Enforcement Administration (DEA). After the event, the organizer must submit to DEC a chain of custody report and another form, which reports the weight of pharmaceuticals collected. See 6 NYCRR 373-4 et seq.; www.dec.ny. gov/chemical/68554.html. The DEC is considering new regulations to streamline this process.

A new option for Long Island residents is to bring the drugs to 11 local King Kullen pharmacies, which accept everything, except for narcotics. (Use this link to find participating police and supermarket locations: http://www.citizenscampaign.org/campaigns/pharmaceutical-disposal/nassau-suffolk-locations.asp)

About half a million pills were collected in the first five months of the King Kullen program and sent to a hazardous waste incinerator in Texas. A recent grant will enable the store to continue the program for the next three years.

Pharmacies and hospitals usually send back their unused or expired medications to reverse distributors. However, if the drugs have the characteristics of hazardous substances (e.g. warfarin, nicotine, alcohol, mercury, acids) and are classified as waste, then the state hazardous waste regulations apply to their disposal (6 NYCRR Parts 364, 370-373). Last year, the DEC created an audit program for pharmacies, allowing them 12 to 18 months to come into compliance and deferring inspections and enforcement. See http://www.dec.ny.gov/docs/ remediation_hudson_pdf/rcraaudits12182014.pdf. In addition, new hazardous waste regulations from the U.S. Environmental Protection Agency are expected to be issued this month.

A separate effort is being made for the collection of unused medications from long-term care facilities, such as nursing homes. For a long time, the preferred method of disposal was flushing. In fact, it is still approved for controlled substances by BNE. This is because BNE imposes restrictions on the movement of narcotics, and nursing homes may not return them to the pharmacies that issued them or dispose of them as solid waste, but rather, are required to render them totally "unrecoverable and beyond reclamation" (10 NYCRR Part 80).

In recent years, there has been an effort to curtail the practice of flushing. The DEA used to conduct national collection events for controlled substances, i.e. narcotics. Unfortunately, these have recently been discontinued. The DEC has picked up where the DEA left off, organizing special collection events. The first such event on Long Island took place in February 2015, yielding 52 boxes of waste medications collected for proper disposal by DEC's Region 1 environmental enforcement personnel. A more permanent solution is expected to come soon when BNE issues regulations implementing the October 2014 rules of the DEA. These rules expand disposal options for ultimate users, such as long-term care facilities, by allowing them to participate in mail back programs or use collection receptacles by DEA approved pharmacies to return unused drugs.

The Suffolk County Department of Health Services (SCDHS), which collects water samples from public and private wells and from groundwater monitoring wells, currently analyzes for about 30 pharmaceuticals and personal care products. To date, 25 of these have been detected in very small concentrations (less than 1 microgram per liter), with the most detections being in private wells. At this time, there is no regulatory standard for these compounds, so the standard applied is the catchall 50 parts per billion for unregulated contaminants.

According to Amanda Comando of the Suffolk County Water Authority (SCWA), the SCWA, which operates 550 wells, currently tests for 26 pharmaceutical compounds of concern and hopes to expand the list to 47 by midyear.

Several legislative initiatives in Suffolk County have begun to address the issue of waste pharmaceuticals. Resolution No. 181-2011 requires hospitals, nursing homes, and long term care facilities to file a written plan with the SCDHS for the disposal of unused or expired medications in a safe manner. Resolution No. 762-2008 established a program, which allows residents to deposit unused/expired medications at county police precincts 24 hours a day, 7 days a week. A companion program uses a ¼ percent sales tax to support the collection of unused medications for the five East End towns.

A lot of questions still remain. What are the cumulative impacts on animals, fish and humans of trace levels of pharmaceuticals in our surface waters and in drinking water? Should there be specific standards? What about compounds for which there is no current testing? How can the efforts of individual groups and municipalities be combined for greater efficiency and impact? What is the proper balance between ensuring that narcotic drugs do not get into the wrong hands and convenient disposal alternatives that are also safe for the environment? What filters or treatment methods are being developed to purify the water for human use? Hopefully, some of these questions will be answered as more public attention is focused on this emerging health and environmental issue.

*Note: Lilia Factor is an associate at Campolo, Middleton & McCormick, LLP, where she practices environmental law and civil litigation. She is the Chair of the Environmental Committee of the Suffolk County Women's Bar Association and Co-chairs the HIA-LI Environmental/Green Industries Committee.*

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-

*(Continued on page 27)*

**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

*(Continued on page 26)*

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

*(Continued on page 27)*

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.

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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.

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# *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.*

# SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

## SUMMER/EARLY FALL CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue are some of those that will be presented during the summer and early fall, 2015.

**REAL TIME WEBCASTS: Many programs are available as both in-person seminars and as real-time webcasts. To determine if a program will be webcast, please check the calendar on the SCBA website** (www.scba.org)**.**

**RECORDINGS: Most programs are recorded and are available, after the fact, as on-line video replays and as DVD or audio CD recordings.**

**ACCREDITATION FOR MCLE:** The Suffolk Academy of Law has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Thus, Academy courses are presumptively approved as meeting the OCA's MCLE requirements.

N.B. - As per NYS CLE Board regulation, you must attend a CLE program or a specific section of a longer program in its entirety to receive credit.

**NOTES:**

***Program Locations:*** Most, but not all, programs are held at the SCBA Center; be sure to check listings for locations and times.

***Tuition & Registration:*** Tuition prices listed in the registration form are for ***discounted pre-registration.*** **At-door registrations entail higher fees.** You may pre-register for classes by returning the registration coupon with your payment.

***Refunds:*** Refund requests must be received 48 hours in advance.

***Non SCBA Member Attorneys:*** Tuition prices are discounted for SCBA members. If you attend a course at non-member rates and join the Suffolk County Bar Association within 30 days, you may apply the tuition differential you paid to your SCBA membership dues.

***Americans with Disabilities Act:*** If you plan to attend a program and need assistance related to a disability provided for under the ADA, please let us know.

***Disclaimer:*** Speakers and topics are subject to change without notice. The Suffolk Academy of Law is not liable for errors or omissions in this publicity information.

***Tax-Deductible Support for CLE:*** Tuition does not fully support the Academy's educational program. As a 501(c)(3) organization, the Academy can accept your tax deductible donation. Please take a moment, when registering, to add a contribution to your tuition payment.

***Financial Aid:*** For information on needs-based scholarships, payment plans, or volunteer service in lieu of tuition, call the Academy at 631-233-5588.

**INQUIRIES:** 631-234-5588.

## SEMINARS & CONFERENCES

*Evening Program*

### ETHICS: A NIGHT AT THE MOVIES

*July 15, 2015, 6:00-9:00 p.m.*

One of our most popular annual programs, this summer treat features clips from current movies and television shows chosen to highlight important ethical issues attorneys face on a regular basis. Participants discuss the ethical issues raised in each scenario in small groups, using the New York Rules of Professional Conduct as a guide, and then share their findings with the larger group. Our esteemed panel of attorneys and judges will then weigh in with their thoughts on each issue. This lively, interactive session is an entertaining way to obtain three full ethics credits, whether you're a newly admitted attorney or a seasoned veteran!.

***Faculty:*** Harvey B. Besunder, Esq., Hon. Carol MacKenzie, Hon. Paul Baisley, Hon. James C. Hudson

**Time:** 6:00 – 9:00 p.m. (Registration from 5:30 p.m.)
**Location:** SCBA Center
**MCLE:** **3 Hours** (Ethics) [Transitional or Non-Transitional]; $90

*Lunchtime Courthouse Program*

### LUNCH WITH A JUDGE – FAMILY COURT

*July 22, 2015, 12:45-2:00 p.m.*

Bring your own lunch to this intimate session with Family Court Judges – get to know the do's and don'ts of practicing in their courtrooms.

***Faculty:*** Family Court Judges
**Time:** 12:30 p.m. – 2:00 p.m. (Registration from noon)
**Location:** Central Islip Courthouse
**MCLE:** **1 Hour** (Skills or Professional Practice) [Transitional or Non-Transitional]; $30

*Lunchtime Courthouse Program*

### LUNCH WITH A JUDGE – SUPPORT MAGISTRATES

*July 29, 2015, 12:45-2:00 p.m.*

Bring your own lunch to this intimate session with Support Magistrates – learn the ins and outs of how support decisions are made.

***Faculty:*** Support Magistrates
**Time:** 12:30 p.m. – 2:00 p.m. (Registration from noon)
**Location:** Central Islip Courthouse
**MCLE:** **1 Hour** (Skills or Professional Practice) [Transitional or Non-Transitional]; $30

*Lunchtime Courthouse Program*

### LUNCH WITH A JUDGE – MATRIMONIAL

*August 5, 2015, 12:45-2:00 p.m.*

Bring your own lunch to this intimate session with Matrimonial Judges and get their 'insider tips' about practicing in the Matrimonial courts.

***Faculty:*** Matrimonial Judges
**Time:** 12:30 p.m. – 2:00 p.m. (Registration from noon)
**Location:** Central Islip Courthouse
**MCLE:** **1 Hour** (Skills or Professional Practice) [Transitional or Non-Transitional]; $30

*Lunchtime Courthouse Program*

### LUNCH WITH A JUDGE – DISTRICT COURT

*August 12, 2015, 12:45-2:00 p.m.*

Bring your own lunch to this intimate session with District Court Judges and find out the keys to success in District Court practice.

***Faculty:*** District Court Judges
**Time:** 12:30 p.m. – 2:00 p.m. (Registration from noon)
**Location:** Central Islip Courthouse
**MCLE:** **1 Hour** (Skills or Professional Practice) [Transitional or Non-Transitional]; $30

*Evening Program*

### PART 36 RECEIVERSHIP TRAINING AND UPDATE

*September 16, 2015, 6:00-9:00 p.m.*

This course will fulfill the Part 36 training requirement for receivers and will discuss the substantive and practical aspects of being a receiver.

***Faculty:*** Hon. Thomas Whelan, Michele Gartner, Esq., Brian Egan, Esq., Hon. John Leo (moderator)
**Time:** 6:00 – 9:00 p.m. (Registration from 5:30 p.m.)
**Location:** SCBA Center
**MCLE:** **3 Hours** (1.5 Professional Practice, 1.5 Skills) [Transitional or Non-Transitional]; $90

# SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

*Full Day Program*

## LAW IN THE WORK-PLACE CONFERENCE

*September 18, 2015, 8:00 a.m.-4:00 p.m.*

This program will include presentations for both private and public sector Labor and Employment Law attorneys and breakout sessions covering significant changes that have affected and continue to affect the world of work and what employees, management and labor must do to keep pace. The conference is presented jointly by the Suffolk County Bar Association's Labor and Employment Law Committee and the Suffolk Academy of Law. The conference agenda will feature prominent authorities in the field of employment law and include networking opportunities for attendees.

***Faculty:*** TBD
**Time:** 8:00 a.m.-4:00 p.m. (Registration from 7:30 a.m.)
**Location:** SCBA Center
**MCLE:** **7 Hours** (6 Professional Practice or Skills; 1 Ethics) [Transitional or Non-Transitional]; $175 (additional attendees from the same organization pay $150 each)

*Evening Program*

## LANDLORD-TENANT UPDATE

*September 21, 2015, 6:00-9:00 p.m.*

The third annual Landlord-Tenant Update will include discussion of Landlord-Tenant issues recently decided by the Courts and their practical implication for practice in this area of the law.

***Faculty:*** Stephen L. Ukeiley, Esq., former Suffolk County District Court and Acting County Court Judge
**Time:** 6:00 – 9:00p.m. (Registration from 5:30 p.m.)
**Location:** SCBA Center
**MCLE:** **3 Hours** (Professional Practice or Skills) [Transitional or Non-Transitional]; $90

*Evening Program*

## HENRY MILLER – THE TRIAL

*September 30, 2015, 6:00-9:00 p.m.*

This "can't miss" program features noted attorney, author and speaker, Henry Miller, discussing trial tips and tactics.

***Faculty:*** Henry Miller, Esq.
**Time:** 6:00 – 9:00p.m. (Registration from 5:30 p.m.)
**Location:** Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY **MCLE:** **3 Hours** (Professional Practice or Skills) [Transitional or Non-Transitional]; $90

*Evening Program*

## CPLR UPDATE WITH PROFESSOR PATRICK CONNORS

*October 13, 2015, 6:00 -9:00 p.m.*

The ever-popular annual CPLR Update returns with Professor Patrick Connors.

***Faculty:*** Professor Patrick Connors
**Time:** 6:00 p.m.-9:00 p.m. (Registration from 5:30 p.m.)
**Location:** Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
**MCLE:** **3 Hours** (Professional Practice) [Transitional or Non-Transitional]; $90

## JULY-SEPTEMBER 2015 REGISTRATION FORM

Return to Suffolk Academy of Law, 560 Wheeler Road, Hauppauge, NY 11788
*Circle course choices & mail form with payment // Charged Registrations may be faxed (631-234-5899) or phoned in (631-234-5588). Register on-line (www.scba.org)*

Sales Tax Included in recording & material orders.

| COURSE | SCBA Member | SCBA Student Member | Non-Member Attorney | 12 Sess. Pass | CLE Bundle | DVD | Audio CD | Printed Course Materials |
|---|---|---|---|---|---|---|---|---|
| Lunch with a Judge – District Court | $30 | $0 | $40 | Yes | Yes | $50 | $50 | $0 |
| Lunch with a Judge – Family Court | $30 | $0 | $40 | Yes | Yes | N/A | N/A | $0 |
| Lunch with a Judge –Support Magistrates | $30 | $0 | $40 | Yes | Yes | $65 | $65 | $0 |
| Lunch with a Judge - Matrimonial | $30 | $0 | $40 | Yes | Yes | $45 | $45 | $0 |
| Ethics Night at the Movies | $90 | $0 | $120 | Yes | Yes | $115 | $115 | $25 |
| Part 36 Receiver Training | $90 | $0 | $120 | Yes | Yes | $115 | $115 | $25 |
| Law in the Workplace – Full Day Program* | $175 | $0 | $175 | Yes | Yes | $200 | $200 | $25 |
| Landlord/Tenant Update | $90 | $0 | $120 | Yes | Yes | $115 | $115 | $25 |
| Henry Miller – The Trial | $90 | $0 | $120 | N/A | Yes | $115 | $115 | TBD |

*If more than one individual from a firm or organization attends the Law in the Workplace conference, the second individual's fee will be $150.

** **MATERIALS**: All materials will be provided electronically via an internet link to a PDF. Bring your laptop or other mobile device if you wish to access materials during the program. Printed materials can be provided for an additional charge (*see above*) and must be ordered in advance.

**FINANCIAL AID**: Call 631-234-5588 for information.

Name: _____

Address: _____

Phone: _____ Email: _____

**TOTAL TUITION** $_____ **+ optional tax-deductible donation** $_____= $_____**TOTAL ENCLOSED**

**METHOD OF PAYMENT** ____Check *(check payable to Suffolk Academy of Law)* ___ Cash
Credit Card: __American Express __MasterCard __VISA __Discover
Account #_____ Exp. Date:_____ Signature: _____

# ACADEMY OF LAW NEWS

## Did you know?

Almost every program the Academy hosts at the SCBA Great Hall is also available as a simultaneous online webcast. There's no need to leave your home or office to attend our CLE programming; simply sign up for the webcast through scba.org and log in at the time of the seminar. You can even ask questions of the presenters by using the web interface. And if you can't make the program date and time, almost all of our programs are available shortly after the program date on demand through your computer, or you can purchase a DVD or CD of the program through the Academy.

Prefer using your tablet or smartphone to a desktop computer? Not to worry – the Academy's webcasts and on demand CLE now available on your mobile device – watch live or at your convenience from your tablet or smartphone.

**CLE bundles are now available**

SCBA Member CLE Bundles are back! You should have received a flyer about our 12 credit CLE Bundles for SCBA Members with your dues notice, but in case you didn't, here are the details:

SCBA Members can purchase a 12-credit CLE bundle with their dues payment (or at any other time during the academic year), for the low discounted price of just $199. Use your 12 credits for any combination of live programs (3 credit evening programs, matinees, lunch and learns, full day programs, etc.) throughout the academic year (June 1, 2015-May 31, 2016). Your bundle is just for you – you can't share your bundle with others, and credits will expire at the end of the academic year. To help you keep track of your CLE bundle credits, we'll send you a credit tracking sheet when you purchase your bundle.

Need a different option for CLE credits to share with your firm? You may wish to purchase our 12-session pass for $720. The 12-session pass may be shared within your firm or agency and can be used by members or non-members alike, although the pass must be purchased by an SCBA member. This is a great value, especially for firms that anticipate sending more than one attorney or support staff person to a program. Like the CLE bundle, the 12-session pass can be used for live programs between June 1, 2015 and May 31, 2016.

Most, but not all of our live Academy programs can be purchased with a CLE bundle or 12-session pass, and pre-registration is required to use one of these payment options. Check program publicity carefully. CLE bundles and 12-session passes cannot be used for CDs, DVDs, or online programming.

**Summer programs**

The Academy is offering a limited number of live summer programs this year, none of which will be webcast. Have lunch with a judge in Central Islip on July 22 (Family Court), July 29 (Family Court Support Magistrates), August 5 (Matrimonial) or August 12 (District Court – Criminal). These lunches are an opportunity to get to know the judges of the different courts in Central Islip in a more intimate setting. Learn the do's and don'ts of practicing in their courtrooms and get the judges' perspectives on how to be successful practicing in their courts.

Our ever-popular Ethics Night at the Movies is also back again this summer. This program, developed by the Professional Ethics Committee, features movie clips from popular movies and TV shows highlighting important ethical issues attorneys face on a regular basis. It's an entertaining way to get your ethics credits. See the Academy CLE spread or the Academy Calendar for more information.

Even though our live summer calendar is limited, if you need CLE credits over the summer, check out our extensive online offerings available through the scba.org website – click on MCLE and then "Online webcasts and video replays."

**Fall CLE Opportunities**

The Academy is already working on its Fall CLE offerings. September will feature Part 36 Receivership Training and Update on September 16, the full day Law in the Workplace Conference on September 18, the Landlord-Tenant Update on September 21 and Henry Miller's trial program on September 30. Later in the fall, we'll have the CPLR Update with Professor Pat Connors, the Auto Liability Update with Professor Michael Hutter, a full day "Hot Button Issues in Matrimonial Law" program, as well as the Criminal Law Update and the full day School Law Conference, which will both be held in Nassau County this year.

**Get Involved – Become an Academy Volunteer**

The Academy welcomes all SCBA members to its meetings, usually held on the first Friday of every month. However, the next Academy meeting after the summer will be held on Thursday, September 10 at 7:30 a.m. in the Board Room at the SCBA. Please come and help us develop CLE programming and other educational opportunities for members of our Bar Association and the legal community at large. Join a committee to help us with sponsorships, program marketing or curriculum development. Volunteer to help develop an Academy program or become a speaker. There are opportunities to network, learn and more through the Academy. Join us!

## ACADEMY Calendar of Meetings & Seminars

Note: Programs, meetings, and events at the Suffolk County Bar Center (560 Wheeler Road, Hauppauge) unless otherwise indicated. Dates, times, and topics may be changed because of conditions beyond our control CLE programs involve tuition fees; see the CLE Centerfold for course descriptions and registration details. For information, call 631-234-5588.

**July**

15 Wednesday — **Ethics Night at the Movies**, 6:00-9:00 p.m., 3 credits, $90. Ethics credits and movie fare!

22 Wednesday — **Lunch with a Judge – Family Court**, 12:45-2:00 p.m., 1 credit, $30. BYO lunch

29 Wednesday — **Lunch with a Judge – Support Magistrates**, 12:45 - 2:00 p.m., 1 credit, $30. BYO lunch

**August**

5 Wednesday — **Lunch with a Judge – Matrimonial Judges**, 12:45-2:00 p.m., 1 credit, $30. BYO lunch

12 Wednesday — **Lunch with a Judge – District Court**, 12:45-2:00 p.m., 1 credit, $30. BYO lunch

**September**

16 Wednesday — **Part 36 Receivership Training,** 6:00-9:00 p.m., 3 credits, $90. A light supper will be served.

18 Friday — **Law in the Workplace,** 8:00 a.m.-4:00 p.m., 7 credits, $175. A continental breakfast and light lunch will be served.

21 Monday — **Landlord-Tenant Update,** 6:00-9:00 p.m., 3 credits, $90. A light supper will be served.

30 Wednesday — **Henry Miller - TheTrial,** 6:00-9:00 p.m., 3 credits, $90. A light supper will be served.

**October**

13 Tuesday — **CPLR Update with Prof. Pat Connors**, 6:00-9:00 p.m., 3 credits, $90. A light supper will be served

***Please note:*** **Materials for all Academy programs are provided online and are available for download in PDF format prior to or at the time of the program. Printed materials are available for an additional charge.**

## *Trusts and Estates Update* *(Continued from page 10)*

should have been apparent, or was brought to the attention of counsel. Notably, to this extent, the executor maintained that although she had informed petitioner's counsel that his claims regarding the post-nuptial agreement were incorrect and misinformed, he nevertheless had instituted the subject proceeding. The executor further maintained that the petitioner's position in the proceeding was baseless. The court agreed, finding the petitioner's arguments to be wholly without merit or basis in law. Accordingly, under the circumstances, the court awarded attorney's fees to the executor in the sum of $500.

*In re Mason,* NYLJ, Mar. 9, 2015, at p. 26 (Sur. Ct. Kings County).

**Contested accounting**

In a contested accounting proceeding, the objectants moved for summary judgment, *inter alia,* denying approval of the petitioner's account, directing petitioner to pay to them the amounts due them as a result of non-pro rata distributions, surcharging the petitioner, awarding interest at the rate of 9 percent per annum, and denying petitioner commissions.

The court found that the petitioner had made distributions of the estate to herself but that no similar pro rata distributions had been made to the objectants at the same time. In her defense, petitioner claimed that she made the distributions in error, but in good faith, and requested that any surcharges or interest charges be mitigated.

The court held that every fiduciary has a duty to deal impartially with the beneficiaries. As such, when a distribution is made to one residuary beneficiary, an equal distribution should also be made to the other residuary beneficiaries. The court found that petitioner's claim of good faith in making the payments to herself was belied by the record, that ignorance of the law was no excuse, and that although petitioner had been aware of her overpayments, she had not made the trust whole despite representations by her counsel to the contrary. Accordingly, summary judgment on this issue in objectant's favor was granted.

As to the rate of interest to be charged, the court held that a decision to award pre-judgment interest and at what rate, for surcharges based on breach of fiduciary duty rests within the discretion of the court. That is, pursuant to that power, the court may properly impose interest on surcharges when the interest is warranted to fully compensate a beneficiary for any losses which he may have suffered, or gains which he may not have fully realized due to the fiduciary's negligence. Based on the foregoing, the court imposed interest at the rate of nine per cent per annum, to be surcharged against the petitioner and paid directly to the objectants.

With respect to commissions, the court held that statutory commissions must be awarded in the absence of bad faith, breach of trust or mismanagement, neglect of duty, misconduct, disregard of fiduciary duties or other comparable acts of malfeasance or nonfeasance. Based upon its finding of bad faith, and its conclusion that the petitioner was familiar enough with her authority as trustee to be able to make significant payments to herself of trust funds, the petitioner was denied commissions.

*In re Wennagel Family Trust,* NYLJ, Jan. 22, 2015, at p. 34 (Sur. Ct. Suffolk County).

**Abandonment**

In a proceeding for leave to compromise and settle a medical malpractice action arising out of the conscious pain and suffering and wrongful death of the decedent, the petitioner, one of the decedent's four children, moved for summary judgment seeking a determination that the respondent, the decedent's husband, and petitioner's stepfather, be disqualified as a distributee of the decedent's estate. More specifically, the petitioner maintained that the respondent's departure from the household prior to the decedent's death, his failure to support the decedent, and his criminal behavior towards the decedent's minor daughters constituted grounds for a finding of abandonment. The respondent opposed the application.

The record revealed that at the time the respondent had left the marital home, the decedent's youngest daughters believed that he never intended to return. However, when he unexpectedly reappeared, they reported that the respondent had raped and sexually abused them over a period of years. Ultimately, the respondent was convicted on 95 counts of raping and sexually abusing the girls, and was incarcerated. Despite the foregoing, the respondent maintained that his marriage to the decedent remained intact until her death, as evidenced by her visits to him in prison, her payment of the legal fees associated with his defense, and his return to the family home prior to his arrest.

The court observed that while the provisions of EPTL 5-1.2(a)(5) authorize a finding of disqualification on the grounds of abandonment, that term is not defined in the statute. Rather, courts have consistently found that the standard used to determine whether a surviving spouse has abandoned the decedent is the standard used to determine whether the party would have been entitled to a decree of separation or divorce on the grounds of abandonment under the Domestic Relations Law.

The court opined that the party asserting abandonment must establish that a spouse's departure from the marital home was without justification, and without the intention of returning. Noting that a person's intent was the more difficult element to prove, the court stated that it could best be gleaned from the actions of the person involved. To this extent, the court observed that while unfaithfulness, cruelty, or inhumanity did not per se disqualify a spouse from inheriting, where the conduct of a spouse fundamentally strikes at the institution of the marriage between the parties, a charge of abandonment will be sustained.

Within this context, the court found "that there are few acts more despicable, more destructive of the fabric of family and marriage, more profoundly emblematic of spousal abandonment, than the repeated rape and sexual abuse of two young girls by their stepfather." Moreover, the court held that the respondent's departure from the home was unjustified, concluding that his intentional and criminal behavior resulted in his incarceration and separation from the decedent for more than a year prior to her death.

Accordingly, the petitioner's motion for summary judgment was granted.

*In re Atta,* NYLJ, Feb. 27, 2015, at p. 41 (Sur. Ct. Kings County).

*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 past-Chair of the New York State Bar Association Trusts and Estates Law Section, and a past-President of the Suffolk County Bar Association.*