



## Presentation of A.T. Cometa Award

At a meeting of the House of Delegates of the New York State Bar Association on March 30, 2012 in Buffalo, the Queens County Bar Association Volunteer Lawyers Project was presented with the New York State Bar's 2012 Angelo T. Cometa Award. Pictured is NYSBA President-Elect Seymour W. James, Jr. presenting the award to QCBA Past President and QVLP Board member David Louis Cohen.

## No-Contest Clauses – Avoiding a Fight or a Contestant's Delight?

BY: LISA M. SCONZO, ESQ.



Lisa M. Sconzo

An “in terrorem” or “no-contest” clause is one of a few tricks in an estate planner’s arsenal to ward off a possible contest in the Surrogate’s Court. But does the inclusion of such a clause in a Will necessarily have the desired deterrent effect?

Yes and no. It largely depends on a thoughtful and well-informed attorney drafts person.

The enforceability of no-contest clauses is set forth in Estates, Powers and Trusts Law (“EPTL”) section 3-3.5(b) and provides, in pertinent part:

A condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative, despite the presence or absence of probable cause for such contest...

A properly included no-contest clause should cause a would-be contestant to stop in his tracks and conduct a serious cost-benefit analysis as to whether undertaking a contest is really in his best interest. To that end, the testator must give the potential contestant something that is valuable enough that the contestant would not want to risk losing it vis-à-vis an unsuccessful will contest.

Oftentimes, however, the testator is so disenchanted with the potential contestant that the notion of leaving that person something of value proves far too unsavory. Thus, Wills that include a no-contest clause are invariably drawn, despite the fact that the anticipated contestant receives nothing under the instrument. Perhaps worse is the Will that includes a no-contest clause that is so antagonistic it practically invites litigation. Take, for example, a Will that couples a no-contest clause with a caustic “one dollar” bequest given for “reasons best known to that person.”

While the dramatic tone of such a clause might be pleasing to a particularly disgruntled testator at the time of the execution, practitioners should not forget that when it comes to discord among family members, emotions run high. There is nothing like adding insult to injury to fuel litigation and an

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## ABA Mid-Year Meeting In New Orleans

BY CATHERINE LOMUSCIO

The American Bar Association convened for its mid-year meeting in New Orleans on February 2-6, 2012. The mid-year meeting is one of the two major association-wide events held every year. The meeting was filled with CLE and networking opportunities, as well as debate on important issues facing our profession and system of justice.

The selection of New Orleans as the host city was quite significant in that it was the first time the ABA had been there since its 1994 Annual Meeting. In 2006, the mid-year meeting had

been scheduled to take place in New Orleans, but Hurricane Katrina abruptly changed those plans in August 2005. The devastation, primarily from flooding, forced the ABA to the move the meeting to Chicago.

In returning to the Crescent City, this year’s ABA President, William T. Robinson, III, felt that the association was sending an important message to the lawyers and other residents of a city that still is rebuilding more than six years



Catherine Lomuscio

after the terrible storm. After touring the 9th District and other destroyed areas, one cannot help but have respect for the resiliency of the residents to recover from such a horrendous disaster.

During this meeting, the ABA’s first major gathering of 2012, the policymaking House of Delegates held seminars, as did the Board of Governors. Additionally, the Nominating Committee announced its

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## THE DOCKET . . .

being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St., Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

### PLEASE NOTE:

The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

### CLE Seminar & Event Listing

#### APRIL 2012

Sunday, April 29 ARTorneys Art Show at Queens College 3:00-6:00 pm

#### MAY 2012

Thursday, May 3 Annual Dinner & Installation of Officers  
 Tuesday, May 15 CPLR Update Seminar  
 Wednesday, May 16 Matrimonial Law CLE  
 Thursday, May 24 Retirement Decisions Workshop - MetLife (no CLE credit)

#### JUNE 2012

Tuesday, June 19 Small Claims Arbitrator Training

#### SEPTEMBER 2012

Monday, September 10 Annual Golf Outing

#### CLE Dates to be Announced

Civil Court  
 Elder Law

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## Speaker's Bureau Committee Speaking Engagement



Pictured above from left to right is Lorene Gilmore, Assistant Commissioner of Probation, Joseph F. DeFelice, President-Elect of the Queens County Bar Association, Mary Clarke, Director of Probation and Katherine Wilinska

On March 30, 2012 incoming President-Elect, Joseph F. DeFelice, gave a PowerPoint presentation at the Department of Probation with the assistance of law intern Katherine Wilinska on behalf of the Speaker's Bureau Committee of the Queens County Bar. The presentation was on Certificates of

Relief from Disabilities and Certificates of Good Conduct, and their availability and purpose for convicted individuals. It was the first such formal presentation made at the Department of Probation for the purpose of advising people who have been convicted of crimes of the availability of this relief.

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## PRESIDENT'S MESSAGE

On March 15, 2012, the Appellate Division, First Department rendered a decision affirming the Order of the Supreme Court, New York County dismissing the petition brought by the five County Bars, pursuant to CPLR article 78, challenging the City of New York Indigent Defense Plan. Fortunately the decision of the Appellate Division was not unanimous. In fact, Justices Abdus-Salaam and Mazzarelli, of the First Department dissented on questions of law from the majority opinion, in favor of the County Bars and held that they would have reversed the Order of the Supreme Court on the law and granted the petition of the County Bars.

Because of the position taken by dissenters, the County Bars were entitled to an automatic right to appeal the adverse decision to the New York State, Court of Appeals.

Thereafter, on November 19, 2012, the Law Firm of Haynes and Boone, LLP, filed a Notice of Appeal challenging the

decision of the Appellate Division to the Court of Appeals.

For those of you who do not know, Haynes and Boone, LLP have been representing the County Bars, pro-bono, since the inception of the litigation against the City of New York. Over two years ago, the County Bars solicited the services of this law firm to represent its interest and that of its members. On behalf of the Association, I want to publicly thank Haynes and Boone LLP for their hard work, dedication and professionalism in representing our interest and that of all interested parties.

It is the position of the five bars that the unilateral decision of the City of New York to make changes to the existing indigent defense plan violates statutory law. Specifically, the City is violating section 722 of the County Law and Section 11 of the Municipal Home Rule.



Richard M. Gutierrez

Conversely, the City claims it has the absolute right pursuant to section 722 of the County Law to enter into a contract with institutional legal providers to have them represent indigent criminal defendants in conflict of interest cases.

If the City ultimately prevails, the impact on 18-B attorneys, who are private practitioners, representing indigent criminal defendants would be significant.

Effectively, these attorneys would face a dramatic reduction in the pool of conflict of interest cases assigned to them.

Moreover, the impact on the County Bars would be to undermine their continued participation in the attorney screening process.

Hopefully, the Court of Appeals will render a decision that is fair and just to the appellants.

Recently, through the concerted efforts

of the Bar Associations a bill was introduced and referred to the Judiciary Committee by Senator Golden and Assemblyman Joseph Lentol that would exempt court appointed referee's from liability for the payment of interest and penalties for a deed caused to be filed in their capacity as an arbiter/referee at a foreclosure sale. If the bill passes, the CPLR will be amended and referees/arbiters will no longer be liable for the payment of penalties and interest, imposed upon them for the late filing of Real Property Transfer Taxes.

Finally, I am currently soliciting the support of the New York State Bar Association to advocate for immediate passage of this bill.

I will keep you informed of any new developments.

Sincerely,

Richard M. Gutierrez, Esq.

## HISTORY CORNER

## The General Slocum Disaster

*A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.*

— Sir Walter Scott

BY STEPHEN FINK, ESQ.

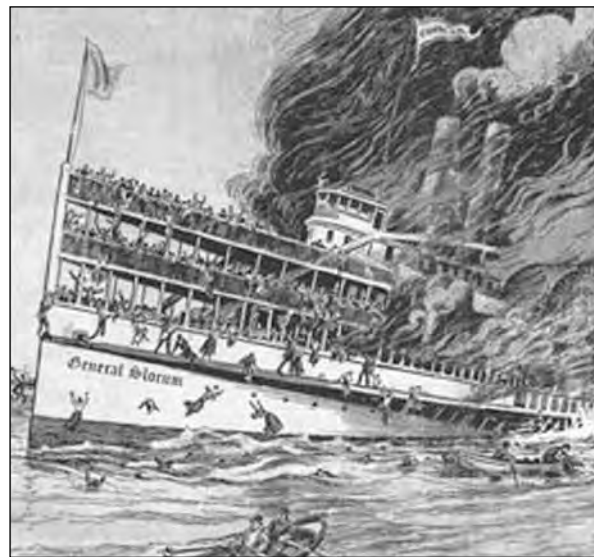
Queens County has ties to the greatest tragic loss of life in New York City other than the World Trade Center (September 11, 2001). In the Lutheran Cemetery on Metropolitan Avenue in Middle Village you will find the monument to the dead of the General Slocum disaster of June 15, 1904. Largely forgotten, it reminds us of the loss of 1,031 people, mostly women and children.

In 1904 the Lower East Side (now the "East Village") was the home of the largest concentration of Germans in the United States. While the area had lost a good portion of this ethnic background, it was still known as "Little Germany". On East 6<sup>th</sup> Street the German Evangelical Lutheran Church of St. Mark was the center of much of its religious activity. Its Pastor, the Reverend George Haas, was a well known and well respected clergyman. He was the leader of his local community and was determined to remain in his position despite lucrative offers elsewhere.<sup>1</sup>

Every year the church held a Spring outing. In 1904 a pleasant picnic was planned for Locust Grove for Eatons's Neck, Long Island to mark the end of the school year. June 15, 1904 was a beautiful, bright and sunny day. Families gathered at the pier on East Third Street to get ready for what was to be a wonderful day.<sup>2</sup> German fare and lots of beer were available as well as a band hired to play on the boat and for the day. Many men still had to go to work that day, but they prepared their families for the excursion, jealous of what they would be missing.

The church had paid \$350.00 to rent the *General Slocum* for the day from the Knickerbocker Steamboat Company. The boat was named after New York Civil War General Henry Warner Slocum and had been built in Brooklyn in 1891. It was a beautiful boat, and its captain was an experienced sailor who made similar trips many times before. Captain William K. Van Schaick, expected no problems that day, especially because the weather conditions were so favorable.

Those boarding the *General Slocum* saw a boat that appeared to be in very good shape. It has been painted numerous times. It had life boats and lots of life preservers. Several weeks before the disaster it had been inspected by two representatives of the United States Steamship Inspection Service. Unfortunately, no one realized that the ship was actually a tinder box. The inspection had been perfunctory at best. The life pre-



The steamship *General Slocum* burned with the loss of 1,031 lives on June 14, 1904.

servers were the original ones from 1891 and totally worthless. The life boats were tied to the ship by wire and could not be removed. Regardless, the Federal inspectors had passed the boat with flying colors which was typical at a time when bribery was common.

So when the long planned trip left the dock the festivities began immediately. The celebrants were in their Sunday best and were ready to enjoy the day. However, within fifteen minutes or so it became clear that there was a problem. A fire had broken out in the Lamp Room. Initially it seemed small and manageable. But soon it began to spread. Fire hoses were put into action by the crew but they proved worthless since water would not flow through them.

As the boat proceeded the fire began to grow. It spread to various parts of the *General Slocum* and panic began to take over the passengers. Realizing there was a problem it was then that Captain Van Schaick made what proved to be a terrible mistake. Although the boat was close to the 125<sup>th</sup> Street on Manhattan Island, Van Schaick believed it was too dangerous to bring the boat there. He felt that if he did so, it would set the immediate area on fire. So he decided to make quickly for North Brother Island which had an infectious disease hospital on it.

As the boat proceeded, the fresh air fanned the fire. It continued to grow quickly and the boat became an inferno. While the captain was eventually able to beach his boat on the island, this mistake probably cost the lives of hundreds.

There is no way to properly describe the various terri-

ble ways people died. Rather than fight the fire, people began to simply jump off the boat and drowned. Parents threw their young children into the water hoping that somehow they would be saved (most were not). Some relied upon life preservers, but soon found that the cork had turned with age and the dead weight pulled them under. Those who could swim were attacked in the water by people seeking their help. Some were struck by people jumping from the boat.

Assistance came from wherever possible. Police, fire fighters, tugboats, and nurses from the infectious disease hospital did what they could. Yet, little could be done and the body count was soon 1,031 - second only than the 9/11 event.

As the day came to an end the results of the event began to become clear. Men came home from work to find their entire family gone. As in 9/11 people searched for family members hoping they had somehow survived. A massive morgue was established to lay out the victims for identification. Funeral directors made preparations for the burials. Some victims were never identified.

The German Lutheran Cemetery in Middle Village, Queens, became the focal point of the burials. At that time Middle Village was a relatively rural area - although part of the City of New York (established in 1898). Pictures show the funeral corteges moving to the cemetery for final interment.

The mayor of the City of New York at that time was George B. McClellan, Jr. - son of the famous Civil War General. He had been mentioned as a possible Presidential candidate on Democratic Party ticket. However, any political ambitions he had were dashed by the tragedy. He acted quickly to care for the victims of the tragedy, but the great loss of life took a toll on his ambitions.

## ENTER THE LAWYERS

Of course lawyers were almost immediately involved. As bodies were being recovered the Knickerbocker Steamboat Company took charge of the Captain and his crew. They were told to say nothing. There were a number of prominent lawyers retained to represent the defendants.<sup>3</sup>

The first legal event was the empanelling of a coroner's inquest. Numerous witnesses were called to stand, including Captain Van Schaick and Frank Barnaby, the owner of the Knickerbocker Steamship Company.

Even with the top notch criminal attorneys who were retained to protect the potential criminal defendants, the jury found Captain Van Schaick, Barnaby, the federal inspector, and others guilty of criminal negligence.

After the coroner's inquest the matter was submitted to a Federal Grand Jury. Initially there were eight indict-

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## EDITOR'S NOTE

# Can the U.S. Government Force a Citizen to Buy Anything?

BY PAUL E. KERSON

Can the U.S. Government force a citizen to buy anything?

This is the legal, philosophical, and key question behind the currently pending U.S. Supreme Court case involving the constitutionality of the 2010 Patient Protection and Affordable Care Act a/k/a "Obamacare". This new law requires us all to buy health insurance or pay a penalty for declining to do so.

Well, surprisingly, it turns out that this question was answered by the Founders of the country in the very beginning of the Federal Government.

The Second Militia Act of 1792 required "free able-bodied white male" citizens to purchase "a musket, bayonet and belt, two spare flints, a cartridge box with 24 bullets and a knapsack."

Naturally, the nation's most important occupations of 1792 were exempt – "Congressmen, stagecoach drivers and ferryboatmen".

Special Note – It was a very different country then. Roads were primitive. There were no cars and no hospi-

tals as we know them today. If you were ill and needed to go to the doctor, he had to come to you. Your doctor was not going to get to your farmhouse without a stagecoach driver and/or ferryboatman.

There was no Pentagon in those days. There were very few City Police Departments. If you needed physical defending, your next door neighbor had better be prepared to defend you as part of a State Militia, the precursor of our State Troopers today.

The Second Militia Act of 1792 was passed by Congress and signed by President George Washington. It was passed in response to the Battle of the Wabash a/k/a St. Clair's Defeat. This was part of the Northwest Indian War. This battle was lost at Fort Recovery, Ohio on Nov. 4, 1791 because the U.S. Government could not afford and did not have enough soldiers.

There is no doubt that our fellow citizens in 1792 out buying muskets, bayonets, bullets and cartridge boxes



Paul E. Kerson

would be bowled over at the sight of an aircraft carrier, drone, nuclear weapon, supersonic bomber or supercomputer designed to disable any enemy's weaponry.

But the point remains – for the good of the whole country, our predecessors bought those muskets, those bayonets, those bul-

lets and those cartridge boxes. They made the U.S. Armed Forces a lot stronger. In turn, this law improved the whole country. The Second Militia Act of 1792 lasted for 111 years, until 1903.

So now, a short 220 years later in a technological world brought about by a stronger U.S. Government, we are asked once again to buy something for the good of our country, for the good of our fellow citizens.

The Enemy has changed since 1792. Our foe is no longer American Indian tribes. They are now part of us. Our foe today is heart disease and cancer, and any number of conditions and injuries that can be cured by

expensive modern medicine.

Do we let any of our fellow citizens suffer because they do not have health insurance? This is Presidents Washington and Obama and the U.S. Congresses of 1792 and 2010 talking.

Please listen – or there will sure to be uninsured, sick people with no ferryboatmen or stagecoach drivers to take them to the doctor in Fort Recovery, Ohio. (It is rare for a doctor to make a house call in 2012).

If you rule that the U.S. Government cannot force people to buy things in 2012, then what exactly was it that we "able-bodied white males" were doing from 1792 until 1903, when we spent 111 years buying muskets and bullets because the U.S. Government told us we had to?

U.S. Supreme Court Justices of 2012: Please help Fort Recovery, Ohio to recover from any illness or injury that befalls its citizens. You owe our dead soldiers from St. Clair's Defeat at least this much. They taught us the lesson that our Federal Government cannot be too weak to protect its citizens.

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# Non-Compete Agreements

Part Two

BY RICHARD H. APAT

Non-compete cases are very fact specific. While the agreements may have similar language, the underlying facts will determine how the case is decided. The Court will look at the industry involved, the work actually done, whether trade secrets or confidential information was involved, confidential customer lists or areas of special or unique services.

Therefore, a close reading of the complaint and time spent with your client early on to really understand what they did will go a long way towards evaluating the case. You must determine what, if anything, your client has done that will ultimately be considered interfering with a valid business interest of the employer. This is time well spent and will begin to give your client confidence that there is a logical approach to these cases and determining the merits of the case.

On a case we handled several years ago our client, an economist, had a non-compete agreement with his employer and was accused of providing information to a client who was looking to hire him away. The information involved an econometric model. The employer argued that these communications by the employee undermined the employer's ability to resell that particular analysis to this client in the future. The employer argued that the program was based on a unique economic model that had been developed by the employer. The model predicted the rate at which commercial backed mortgages would fail in various locations across the country.

The client was very capable and did create sophisticated econometric models while employed with the company. For this reason we were concerned that we were dealing with a trade secret or confidential/proprietary information. The client insisted that this particular model was nothing more than a "Monte Carlo" simulation and was not proprietary. We were confused, up to this point we thought Monte Carlo was a place in Monaco or an American made muscle car with a big engine.

We discovered that Monte Carlo is a computerized mathematical technique for predicting risk in a quantitative way. It has existed for many years and is taught in college level economic classes. It is a risk analysis simulation that provides a range of possible outcomes for a given question posed or course of action chosen.

Of course, before running into court to argue: "Judge, this is a simple Monte Carlo simulation, it's been used by scientists since the creation of the atom bomb (which apparently it was), there is nothing new or unique here!"... we hired an economist.



Richard H. Apat

After speaking to an independent economist he confirmed what the client had told us about Monte Carlo. We were confident that this portion of the employer's complaint to the extent that they based it upon a trade or secret confidential information would be tough to prove. Thankfully, we were proven correct. If we had made a snap decision on this we would have been thinking, complex econometric computer model... proprietary!

Returning to the law, the Court of Appeals in BDO Seidman v. Hirshberg 93 N.Y.2d 382, 712 N.E.2d 1220, 690 N.Y.S.2d 854 (Ct of App. 1999) continues to hold:

New York has adopted this prevailing standard of reasonableness in determining the validity of employee agreements not to compete. "In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" (Reed, Roberts Assocs. v. Strauman, 40 N.Y.2d 303, 307, 386 N.Y.S.2d 677, 353 N.E.2d 590). In general, we have strictly applied the rule to limit enforcement of broad restraints on competition. Thus, in Reed, Roberts Assocs., supra, we limited the cognizable employer interests under the first prong of the common-law rule to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary.

The take home message is that working with generalities in this area of law can be dangerous. There are many factors that can be relevant in a particular case. Spending time with the client to understand what they do for a living and what they did for their employer which is the subject of the lawsuit is an absolute necessity. While every case has its specific facts that can change the liability picture, clearly this is true for non-compete cases. Attention to the facts and details is crucial for the best analysis at the early stages of the case when your client needs it the most.

*Editor's Note: Richard H. Apat is a partner in the firm of Pearlman, Apat, Futterman, Sirotkin & Seinfeld, LLP, with offices in Kew Gardens, New York and Hicksville.*

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## Social Media in Your Law Practice, March 19, 2012



Hilary Topper, Richard Gutierrez and Joseph Carola, III.



Richard M. Gutierrez, President of the Queens County Bar Association.



Hilary Topper with assistant Kristie Galvani taking a question from a participant.



Hilary Topper's Power Point Presentation.



PowerPoint presentation showing Google+ as a social media option.



Kristie Galvani, Hilary Topper's assistant.



Hillary J. Topper, Speaker for Social Media in Your Law Practice.



Joseph Carola, III, Chairperson of the Program Committee.

PHOTO



CORNER

## Social Media in Your Law Practice, March 19, 2012



Mr. Gutierrez thanking Ms. Topper for being our guest speaker.



Michael Abneri, Moderator for the evening.

Photos by Walter Karling

### New York Bar Foundation Grant Presentation to Queens County Bar Association Volunteer Lawyer's Project



April 2, 2012 - Steven Wimpfheimer, Life Fellow of the New York Bar Foundation, presents legal services grant check to the Queens Volunteer Lawyers Project (QVLP) to fund the CLARO-Queens Consumer Debt Clinic. Pictured from left to right; Corry L. McFarland, QVLP Foreclosure Prevention Administrator, Mark Weliky, QVLP Executive Director, Steven Wimpfheimer, Richard M. Gutierrez, President, Queens County Bar Association and Arthur N. Terranova, Executive Director, Queens County Bar Association

### Free Exams



Pictured (from left) are Barbara Flatts, Macon B. Allen Black Bar Association; Donna Furey, Queens County Women's Bar Association; Morgan Lancman, Brandeis Association; Hon. Cheree Buggs, Chairperson of the Cancer Awareness Committee of QCBA; Peter Lane, Catholic Lawyers Association; and Tracy Catapano-Fox, Columbian Lawyers Association

## CULTURE CORNER

BY HOWARD L. WIEDER

My column this month focuses on four young, up-and-coming actors who live in New York City Manhattan and who are starting to earn a lot of attention: **CHARLEY LAYTON**, **LUKAS RAPHAEL**, **DAVID VEGA**, and **AUORE FAGNEN**. They come from the United States and Western Europe. **CHARLEY LAYTON** is American. **LUKAS RAPHAEL** is German-British [German born and British educated], **DAVID VEGA** is Spanish, and **AUORE FAGNEN** is French. Each of these promising film actors combine good looks, impressive talent, a strong cinematic presence, and a keen intelligence. Each of them works at his/her craft by continuous education and intensive, dedicated training.



CHARLEY LAYTON

I believe in their exceptional abilities and would like each of them to succeed, so be on the lookout for these actors.

**CHARLEY LAYTON** teaches first-year Speech to the NYU and Conservatory students at the **ATLANTIC THEATER COMPANY** in Manhattan. **CHARLEY LAYTON** studied acting there through NYU and graduated in 2001 with a B.F.A. in Drama and officially joined the Atlantic Faculty in 2003. **CHARLEY LAYTON** has also worked as a speech coach to various student productions (*Twelfth Night*, *Macbeth*, *Hamlet*, *The Children's Hour*, etc.), as well as teaching foreign accents and dialects to other theater companies and productions in New York City (*The Commission*, *Dealer's Choice*, *Philadelphia*, *Here I Come!* etc.) and to several actors.

**CHARLEY LAYTON** has been hired at Credit-Suisse First Boston Bank as a special consultant, teaching accent reduction to foreign nationals, bank clerks, and technical supporters. **CHARLEY LAYTON** also teaches accent elimination privately to actors, singers and public speakers. As a working actor, **CHARLEY LAYTON** has performed in shows all over the city (The Connelly Theater, The Linda Gross Theater, Chashama, HERE Arts Center, Walkerspace, Soho Playhouse, Dixon Place, Sage Theater, St. Mark's Theater, Atlantic 453 etc.).

**CHARLEY LAYTON** was also a two-

time semi-finalist in the National Shakespeare Competition with the English-Speaking Union at Lincoln Center. He is a gifted actor and superb speech coach, including learning and eliminating accents.

"With his offbeat, rugged good looks and an intense gaze, actor **CHARLEY LAYTON** is a film natural, although the first time I saw him perform it was in a downtown theater piece," says **UNITY STAGE ARTISTIC DIRECTOR SOFIA LANDON GEIER**. Geier was so impressed by Layton's performing abilities that she filed his name away, hoping to work with him in the future. Though the timing hasn't been right yet, Geier hired **CHARLEY LAYTON** as a dialect coach (one of his many talents) for the classic Irish comedy "Spreading the News," an outdoor production that toured city parks in Queens, NY last summer. "Charley is very exacting and rigorous as a coach and, boy, does he get results. Those Irish and British accents rocked," says Geier.

**CHARLEY LAYTON** is also a very fine musician playing several instruments, and you can find some of his performances on [www.youtube.com](http://www.youtube.com). **CHARLEY LAYTON** now a voice and speech teacher in New York who works also on both teaching accents and accent elimination and working on speech impediments can be reached at [charleylayton@gmail.com](mailto:charleylayton@gmail.com) for any lawyers who would like to work on their courtroom voice.



LUKAS RAPHAEL

**LUKAS RAPHAEL** was born in Germany and was raised in Leipzig. From his fifteenth birthday, **LUKAS RAPHAEL** was educated in the United Kingdom where he ended up reading Drama at Exeter University and founded his first theater company with some of his fellow students. During that time, **LUKAS RAPHAEL**, the handsome and personable 25-year old actor, acted in a range of projects and plays from classical to contemporary texts. **LUKAS RAPHAEL** also explored contemporary dance and movement, as well as directing three major Shakespeare productions at the University



Howard L. Wieder

and became a Music Scholar in his final year.

In 2008, **LUKAS RAPHAEL** took part in the summer program at the **LONDON ACADEMY OF MUSIC AND DRAMATIC ART** and was accepted to join the Single Semester in Classical Acting. **LUKAS RAPHAEL** then went

on to further his Movement work in training in Argentine Tango with *ESTUDIO DNI* in Buenos Aires for 10 weeks and returned there for another five months in 2010.

Since 2009, **LUKAS RAPHAEL** has worked on various projects such as touring *Macbeth* with **MOPA THEATRE COMPANY** (playing Ross/Lennox) and short-films as well as creating the London based theater company 'Harbinger Company London' with whom he directed *ROMEO AND JULIET* and co-produced and newly translated Arthur Schnitzler's *LA RONDE*.

**LUKAS RAPHAEL** has also taken courses with the Guildhall School of Music and Drama, the Academia Dell'Arte in Arezzo, Italy, as well as with the Saturday Acting Academy in London, and is currently training at the prestigious **ATLANTIC ACTING SCHOOL** on Ninth Avenue in Manhattan.

In talking with the well-spoken **LUKAS RAPHAEL**, with his mellifluous voice, I was impressed with his knowledge of speech and dialects. This strikingly handsome, classically-trained actor has all the promise of being a great film actor in contemporary drama.

**LUKAS RAPHAEL** has a passion for Shakespeare and live theater, seeing the world from the skies and up-close, dancing, telling stories, and enjoying good wine and food.

**CHARLEY LAYTON**, Professor of speech at the Atlantic Acting School in New York, describes Lukas Raphael as "brilliant." **CHARLEY LAYTON** elaborates: "**LUKAS [RAPHAEL]** is an intelligent, versatile, up-and-coming performer. He brings depth and sophistication to all of his roles and has great potential in the film acting industry."

**DAVID VEGA** is an impressive, dedicated, and determined film actor from Spain. **DAVID VEGA**, a handsome, 30-year-old actor, was a former boxer now turned actor. He applies the same rigorous training that he used for preparing for boxing bouts to his profession, with even more zest, passion, and drive.

Born in Madrid and raised in a small village, Sancibrian in Spain, **DAVID VEGA** has made nearly 70 films. Excerpts of his Spanish-speaking films can be found on [www.youtube.com](http://www.youtube.com), and write-ups of his work are found at [www.wikipedia.com](http://www.wikipedia.com) and [www.imdb.com](http://www.imdb.com).

**DAVID VEGA** is in New York City studying acting at the prestigious **ATLANTIC ACTING SCHOOL** located on Ninth Avenue in Manhattan, where he is also studying acting and speech.

**DAVID VEGA** started to study acting



DAVID VEGA

when he was 12 years old in the "Palacio de Festivales de Santander." In 2000, **DAVID VEGA** started to work in the **MALO Theater Company** directed by Spanish theater director Julio Escalada. **DAVID VEGA** stayed with that theater company for four years in several productions, including playing King Duncan in *Macbeth*.

While acting with the **MALO Theater Company**, **DAVID VEGA** studied audiovisual communication, obtaining a degree at San Pablo CEU University. In 2005, **DAVID VEGA** started the acting degree in the **NIC (Madrid Film Institute)**. Subsequently, he has studied acting with Eva Lesmes and Macarena Pombo. **DAVID VEGA** has worked with several directors, including Max Lemcke and Luis García Berlanga, and he has acted with Pilar Bardem, the mother of noted actor Javier Bardem.

Among the film projects that **DAVID VEGA** has appeared are: "Cinco Metros Cuadrados," [acclaimed at the Malaga Film Festival 2011], "El Sabor Que Nos Une," "La Leyenda del Rey," and "Palomas Blancas." In the USA, **DAVID VEGA** has done a few short films and an independent feature film, "Cut to Black." **CHARLEY LAYTON**, Professor of Speech at the Atlantic Acting School in New York, says of **DAVID VEGA**: "**DAVID VEGA** is a passionate, talented, and experienced actor. As a former professional boxer, he brings the same diligence and discipline from the sport to his work in film."

What I found fascinating about **DAVID VEGA** is his belief in life-affirming principles. **DAVID VEGA** said to me, in an interview: "Every day I act is a perfect day." During the course of our conversation, I observed him giving diet tips to a heavy-set actor who inquired. **DAVID VEGA** encouraged the actor to find the time to get to the gym, and to feed late night hunger by eating "white filets," which he explained were fish and poultry, unrestricted in quantity. "Definitely stay away from the starches -- bread, pasta, and rice."

To a child actress with whom he performed, **DAVID VEGA** was instructing self esteem values. Observing, I was impressed with his intensity. The mom had to remind to her enthralled daughter that she had to feed her and that they had a train to catch to New Jersey.

(Continued on page 9)

## Culture Corner

Continued From Page 8

When I asked **DAVID VEGA** about the challenges of making it as a film actor in the United States, against unbelievable competition, David quoted the immortals. **DAVID VEGA** quoted Napoleon Bonaparte: "Impossible is a word to be found only in the dictionary of fools." **DAVID VEGA** then immediately quoted Julius Caesar: "I had rather be first in a village than second at Rome."

**DAVID VEGA** told me that he liked performing in supporting roles where he could play with and learn from talented leading actors. Among the actors he admired were Oscar winners Christian Bale, Meryl Streep, and Natalie Portman. He admired film performances of originality, identifying those of Anthony Hopkins in *SILENCE OF THE LAMBS*, Robert De Niro in *RAGING BULL*, and Al Pacino in *SCARFACE*, and most roles undertaken by Gary Oldman. **DAVID VEGA** admired the work of film director Christopher Nolan in the Batman films. **DAVID VEGA's** favorite film performance is that of **MAR-LON BRANDO** playing Stanley Kowalski in *STREETCAR NAMED DESIRE*.

Among actors he knows, **DAVID VEGA** cited **ELLA RAE PECK** of *GOS-SIP GIRL* and **ANTONIO BANDERAS** as being encouraging role models.



AUORE FAGNEN

France has produced several great film actresses that combine stunning physical beauty with charismatic film appeal: Simone Signoret [born in Germany], Catherine Deneuve, Brigitte Bardot,

Marion Cotillard, and Berenice Bejo [born in Argentina]. If her dedication is an accurate measure, then **AUORE FAGNEN**, an aspiring film actress, may one day join the ranks of these exceptional actresses.

**AUORE FAGNEN**, a film actress and model, is studying acting at the prestigious **LEE STRASBERG INSTITUTE** in Manhattan. This French actress speaks English beautifully without even a hint of her being born and raised in France. I was, of course, immediately struck by the dazzling physical beauty of **AUORE FAGNEN**, and, in talking with her, soon was impressed with her knowledge, intelligence, charm, humor, and modesty.

**AUORE FAGNEN** was born in the beautiful city of Annecy in France, but lived all her life in Saint Paul de Vence, the world famous artist colony near Nice on the Riviera, France's Cote d'Azur. **AUORE FAGNEN** explains: "I had the chance to grow up with the sun and the sea, which already made me appreciate life."

**AUORE FAGNEN** explains her passion for acting in my recent interview with this talented and beautiful film actress, appearing below. She explained her appreciation and awe of the recent New York production by the Bedlam Theatre [[www.theatrebedlam.org](http://www.theatrebedlam.org)] production of *SAINT JOAN* by George Bernard Shaw, directed by Eric Tucker, at the Access Theatre on White Street in Manhattan that ran from March 9 through April 1. *SAINT JOAN* is a role that she studied and performed in France, and she praised the Bedlam Theatre's recent production.

Here is a portion of my interview with the beautiful and talented **AUORE FAGNEN**

**QUESTION:** "What were some of your early memories?"

**AUORE FAGNEN:** "I've always had this creative part in me since I was little. I'd make little comic books, puppet shows that I'd perform in front of my family. I'd record on tape a fake radio station where I'd both be the interviewer and the interviewee. I could watch my favorite movies 3 times in a row, and I'd know by heart all the lines of the characters by imitating the voices. I had the luck my parents would make me discover different forms of art: I danced ballet, jazz, modern and hip hop music, played the piano and the violin, took singing classes.

**QUESTION:** "When did you turn to acting?"

**AUORE FAGNEN:** "My revelation was when I was seven [years old]. I was on stage for the first time for a school project.

My teacher had a theater project and she made a casting. I remember very precisely how it went: she'd give us some sides to read and would tell us the story. At that very minute, I felt so at ease and thought the idea of being someone else very appealing."

"I got the lead role of the play, which I was really proud of, and I was so excited by this project that I couldn't wait to perform in front of the audience. [Although] I already did some dance shows, I felt this time was different. There was no music, I had to learn lines and interact with my classmates. I remember feeling so comfortable on stage that I wanted to experience this adrenaline again and again!"

"This passion had followed me through the years, it was an evidence I was made to be on stage, but, as time would go by, that became my little secret. I'd talk less and less about it because my friends and my parents didn't really take me seriously, especially because I was the only one in the family to consider becoming a full-time artist. So this desire for the theater and acting diminished for a while, but never died. I knew deep inside that someday I'll do something about it."

"My parents were concerned about my future, so instead of studying theater at Les Cours Florent in Paris, I did a Business School in Nice called SKEMA with a master in Fashion and Luxury Business. I don't regret it because it brought me some knowledge, but also a distance about my life and the way I'd see happiness. It was a good way to grow up, by doing something you don't particularly like, you really value what matters for you!"

**QUESTION:** What led you to New York City?

**AUORE FAGNEN:** "Once I graduated, I decided to go to New York to study at the Lee Strasberg Institute, which changed my life forever. The way I think, observe, and appreciate things and people are totally linked to my acting. [The] Lee Strasberg [Institute] not only taught me to act, but to live in general. I feel I evolve every day, and I am so grateful to be who I am, doing what I want."

**QUESTION:** "Who is your favorite film director?"

**AUORE FAGNEN:** "My favorite director would definitely be Ingmar Bergman, every movie he made touches me for different reasons. He knows how to deal with existential questions like loneliness, life, mortality and I like how he puts in light women in his films."

**QUESTION:** "Who is your favorite film actor?"

**AUORE FAGNEN:** "I wouldn't say that I have one favorite actor in particular because it's hard to find THE actor that could move you in every movie he played in. I'd say I'd be touched by different performances of different actors. Nevertheless, there are some actors that come to my mind: Jack Nicholson, Louis de Funes, Javier Bardem, John Malkovich, Meryl Streep, Glenn Close, Kim Stanley. A mix of these different actors would make my favorite actor for sure."

**QUESTION:** "Do you have any favorite films?"

**AUORE FAGNEN:** "My five favorite movies are *LA GRANDE VADROUILLE* by Gerard Oury, a French comedy from the mid-60's with Louis De Funes and Bourvil. It's the movie I'd never forget because I'd watch it when I was little with my family, and I'd always laugh the same way probably because it's linked to memories."

*MODERN TIMES* by Charlie Chaplin is definitely one of my favorites. I remember it was the first silent movie I'd watch, and I'd be fascinated by it. I was transported in another world with Chaplin, the music, and the story. *PERSONA* by Ingmar Bergman is a movie that marked me for some reason. Technically speaking, I was impressed by how every shot was perfect. *ONCE UPON A TIME IN THE WEST* by Sergio Leone moved me for the colors and the soundtrack, and it was the first time I'd cry by listening to the music. I love *THE SHAWSHANK REDEMPTION* by Frank Darabont because the story and the duo of Robbins/Freeman are phenomenal!"

**QUESTION:** "Any advice for persons thinking of entering the competitive industry of acting and film-making?"

**AUORE FAGNEN:** "What I learnt from this experience is [that] happiness definitely relies on what you do in your life. So ask yourself: What do you need to be happy in life? Don't ever give up on your dreams, on what makes you smile and feel you're alive. Because that's the essence of your life. Be honest with yourself, it's hard, indeed, but essential! You'll find the truth if you're willing to listen to yourself and accept that you're different! It's a matter of taking the risks to make things change, thanks to you and only you."

\* \* \* \* \*

**HOWARD L. WIEDER** is the writer of both "THE CULTURE CORNER" and the "BOOKS AT THE BAR" columns, appearing regularly in *THE QUEENS BAR BULLETIN*, and is **JUSTICE CHARLES J. MARKEY's** **PRINCIPAL LAW CLERK** in Supreme Court, Queens County, Long Island City, New York.

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## POETIC JUSTICE

## Madoff's Mirage

Mists enshrouding a translucent scene  
 Evincing a storied joyous scene  
 A theme of duplicity complex  
 A mirage of Elysian fest

An artifice presaging ruin  
 A ponzi scheme coiled to zoom  
 Lucre begot in splendid excesses  
 With no retaliatory redresses

Some first lured by this specious mirage  
 Abandoned this spectre's entourage  
 Others embracing its disarray  
 Foreshadowed their calamitous doomsday

"It's too good to be true" is still good advice  
 An avaricious mirage should make one think thrice

Arnold H. Ragano, Esq.



Arnold H. Ragano

## ABA Meeting

Continued From Page 1

choice for next year's officers. A highlight of this meeting was the selection of James R. Silkenat as the next President-Elect of the ABA. Jim, a partner at Sullivan & Worcester in Manhattan, will be the first New Yorker in 25 years to head the ABA. He has been a member of the House of Delegates since 1990 and currently represents the New York State Bar Association. Jim's term as President-Elect will begin immediately following the annual meeting this August and he will take the helm as President in August of 2012. Jim is superbly qualified to lead the ABA and I look forward to his term as President.

One of the endeavors of the ABA this year is organizing a powerful public education event to highlight state court underfunding. State court underfunding is a threat to our system of justice. It is harming clients, slowing the nation's economy and undermining our liberty. In order to high-

light this issue for lawmakers and the public at large, the ABA has selected the theme and title of Law Day 2012 on May 1, 2012 to be "No Courts, No Justice, No Freedom." The purpose of this year's Law Day is to draw attention to the need for adequate funding of our courts, so that they may be open, available and adequately staffed to maintain the American system of justice.

The ABA is also in the midst of a membership drive, offering many benefits as incentives to join. There are a multitude of resources available to members, especially solo practitioners and members of small firms. One of the significant new membership benefits is free monthly CLE. Some of the online resources are available free of charge and without ABA membership. I encourage you to check out the ABA Solo and Small Firm Resource Center, as well as many other member benefits at ABA Member Advantage on the ABA website.

The next House of Delegates meeting will occur at the Annual ABA Meeting scheduled to take place in Chicago this August.

## No Contest Clause

Continued From Page 1

overly caustic no-contest clause can easily accomplish just that, running afoul of its intended purpose. Indeed, the Latin term "in terrorem" means "to frighten" not to incite.

In fact, by including an ineffectual no-contest clause in a Will, the attorney-draftsperson has unwittingly given the potential contestant an advantage. Because no-contest clauses are permissible, but generally disfavored, Section 1404(4) of the Surrogate's Court Procedure Act ("SCPA") provides as follows:

[A]ny party to the proceeding, before or after filing objections to the probate of the will, may examine any or all of the attesting witnesses, the person who prepared the will, **and if the will contains a provision designed to prevent a disposition or distribution from taking effect in the will, or any part thereof, is contested, the nominated executors in the will and the proponents.**<sup>1</sup>

As a result of the simple inclusion of the no-contest clause in the Will, the contestant who is already permitted to depose the attorney draftsperson and the attesting witnesses to the Will without risking forfeiture (see EPTL section 3-3.5(b)(3) for more permissible conduct that will not result in forfeiture<sup>2</sup>), gets the added bonus of examining the nominated executors and the proponents to the Will prior to filing objections. Keep in mind that the statute only requires that the will "contain" the clause in order to warrant this additional discovery. That the clause has no practical effect is irrelevant.

Thus, from an estate litigator's point of view, the inclusion of an ineffectual no-contest clause is a win-win situation. First, there is no real risk of forfeiture. Second, the contestant can avail himself of additional pre-objection discovery that he would not have otherwise been entitled to

prior to the filing of objections. Third, and perhaps most painful from a collegial point of view, the attorney-draftsperson has to somehow come up with a plausible explanation at the SCPA 1404 examination for including a useless no-contest clause in the Will. A seasoned estate litigator will not hesitate to explore this drafting blunder at length, asking, among other things, why an ineffectual clause was included, and how the attorney draftsperson explained its function — or lack thereof — to the testator. The end result is that the attorney-draftsperson can appear incompetent and questions can arise as to whether the testator really considered and understood the terms of his Will, thereby casting doubt on the validity of the instrument.

Given the recent decisional law in this area, careful drafting of a no-contest clause cannot be emphasized enough. In Matter of Singer, the Surrogate's Court of Kings County was asked to determine whether the testator's son had violated the in terrorem clauses contained in his father's Will. 841 N.Y.S.2d 212 (Sur. Ct. Kings Cty. 2007). One of the clauses was a general no-contest clause, directed to "any beneficiary" under the Will and prohibiting an extremely broad array of conduct that "directly or indirectly" amounted to an attack on the decedent's estate plan.<sup>3</sup>

The second clause specifically named the son and directed that he "not contest, object, or oppose" the Will or "any part of" the testator's estate plan."

When the testator's son deposed a prior attorney of the decedent, Surrogate López Torres determined that in going beyond the limits of discovery established by the Legislature, both of the clauses had been violated and the son's bequest under the Will was revoked. The Second Department came to the same conclusion. In re Singer, 859 N.Y.S.2d 727 (2d Dep't 2008).

Thoughtful drafting aside, the Court of Appeals, in its now infamous opinion, reversed the Second Department. The Court of Appeals, while paradoxically acknowledging that the paramount consideration in construction proceedings is the testator's intent, held that the permissible

discovery set forth in SCPA section 1404(4) and EPTL section 3-3.5 are not exclusive and the son's examination of the testator's prior attorney, in this particular instance, did not trigger either of the no-contest clauses set forth in the decedent's Will.

Given the obvious thought and care that that attorney-draftsperson put into drafting the no-contest clauses in the Singer Will, to no avail, how does the estate planner go about drafting a no-contest clause that will prevent carte blanche pre-objection discovery? Fortunately, Justice Graffeo, in his concurring opinion, provides some much-needed clarification in this regard:

I believe, however, that an in terrorem clause can be properly drafted to explicitly prohibit this type of inquiry. A testator could, for example, draft an in terrorem clause that incorporates the statutorily-authorized preliminary examinations by explicitly stating that a beneficiary who makes or attempts to make any inquiry about the will other than those permitted by EPTL 3-3.5 and SCPA 1404 shall forfeit his or her bequest and extinguish any interest that the beneficiary's issue may have in the estate.

In re Singer, 892 N.Y.S.2d 836, 841 (2009) (J. Graffeo, concurring).

In short, practitioners considering the inclusion of a no-contest clause in a Will should take care to explain the post-death procedural ramifications to the client, and further, must ensure that if a no-contest clause is utilized, the Will provides the potential contestant with something substantial to achieve its intended deterrent effect. What qualifies as substantial will vary based not only on the wealth of the client, but also on the financial status and the personality of the potential contestant. The attorney-draftsman's notes, subject to disclosure under SCPA section 1404, are essential here, and care should be taken to record the testator's intent and his objectives in including such a clause.

Finally, practitioners who determine that a no-contest clause is warranted must heed the explicit drafting advice of the

Court of Appeals to avoid the outcome in the Singer case. The clause should specifically prohibit any pre-objection discovery that goes beyond the parameters provided for in SCPA 1404(4) and EPTL 3-3.5. Under no circumstances should a no-contest clause in a Will be included as an afterthought, nor should a no-contest clause ever be a "standard" or "boilerplate" paragraph in a draftsperson's Will template. Since the courts view these clauses on a case-by-case basis, it is only fitting that the draftsperson devote the same time and attention to detail in tailoring the clause to the client.

*Lisa M. Sconzo is a partner at Laurino Laurino & Sconzo, a law firm that specializes in contested Surrogates Court matters. Lisa is a member of the Queens County Bar Trusts and Estate's section and is currently serving as a Vice Co-Chair of the Nassau County Bar Trusts and Estate's section.*

1. Since the initial publication of this article in the Nassau Lawyer, July/August 2011 edition, the Legislature, undoubtedly in response to the Singer decision discussed infra, and in accordance with the continuing trend of liberality in the area of pre-objection disclosure, amended the statute to provide that in addition to being able to safely examine the nominated executors in the will and the proponents, the potential objectant faced with a no-contest clause may also examine, "upon application to the court based on special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will." SCPA 1404(4) (2012) (effective August 3, 2011 and applying to estates of decedent's dying after the effective date).

2. Similarly, EPTL

3. This particular clause was modeled after the clause that was at issue in Matter of Ellis, 252 A.D.2d 118 (2d Dep't 1998). In Ellis, the Court looked at the totality of the conduct and determined that the respondents, in seeking disclosure from persons other than those provided for by SCPA section 1404(4) and in coyly serving objections to probate—but not formally filing them with the court—had embarked on a course of "meritless, destructive" litigation, warranting the triggering of the clause.

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## Slocum Disaster

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ments including: Captain Van Schaick, Frank Barnaby, various other officials of the steamship company, and the two boat inspectors. However, only the Captain (at the age of 68) was brought to trial. He was ultimately convicted of criminal negligence and various other charges and sentenced to ten years in jail.

Captain Van Schaick served his time at Sing Sing and was a model prisoner. After 3 ½ years he was released on parole. He was later pardoned (December 19, 1912) by President Taft. He died in 1927, the only person held responsible for this terrible tragedy. While the steamship company received a small fine, its principals avoided criminal prosecution.

### RESULTS OF THE DISASTER

The disaster did lead to better inspection of boats and changes in the Federal inspections. In October of 1904 a full federal investigation was completed which can be found on the internet.

As noted the German community left "Little Germany" behind and moved to Yorkville and other areas of New York City. Quickly the tragedy faded from the public memory. The Triangle Shirtwaist fire of several years later seemed to involve the public more and it remains a powerful memory in New York City. World War I and general

anti-German feelings further reduced the impact of the tragedy. However, you can still visit a memorial fountain constructed for the lost children in Tompkins Square Park dedicated in 1906. Intermediate School 93 in Queens still holds a ceremony honoring the people who lost their lives.

### FURTHER READING

As usual the internet is filled with sites for you to explore. I certainly recommend the book *Ship Ablaze* by Edward T. O'Donnell. The reader can easily find New York Times articles from the accident as well as the trial. For a good overview see <http://joebruno.themob.wordpress.com/tag/captain-h-van-schaick/>

1. The church building still remains on East 6<sup>th</sup> Street. However, it is now an Orthodox Synagogue surrounded by Indian/Pakistani restaurants. The Lutheran church is now part of Zion-Lutheran Church on East 84<sup>th</sup> Street in Manhattan.

2. The piers on the east side were removed to make way for the East River Drive.

3. As noted there were a number of prominent attorneys involved. Former City Court judge Abram Dittenhoefer (1835-1919) was hired to represent Captain Van Schaick. He is also known for his personal recollections of Lincoln's election. Assistant District Attorney Francis P. Garvan prosecuted the coroner's inquest.

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