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Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500

Vol. 71 / No. 3 / December 2007

Notes from Albany

By STEVEN WIMPFHEIMER

Steven Wimpfheimer

Met a really nice guy from Rochester. He asked me to tell that to all of you.

Never mind. Here is the really important stuff.

Friday morning the State Bar's Nominating Committee met. Of single importance to Queens was the **election** of our own **Seymour James** to the office of **Treasurer**. Arthur tells me that Seymour is the first member of our Bar Association to be elected to State office and this is a stepping stone to the Presidency.

Congratulations Seymour.

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Subversion Of ADR:

Nondisclosure Of Ties By Appointed And Aspiring Arbitrators

by HOWARD L. WIEDER

Howard L. Wieder

Court administrators and private arbitration companies actively dissuade litigants from seeking relief in the courts, urging them, instead, to various forms of Alternative Dispute Resolution ("ADR"). Central to the neutrality of any trier of fact, whether judge or arbitrator, is the requirement to disclose any tie that might threaten not only the ability of the fact-finder to decide a matter fairly, but the very appearance of fairness in reaching the result. Disclosure and disqualification are not the same. Arbitrators should not be able to decide to withhold information, since it is the parties who select from lists of arbitrator candidates. Failure of an arbitrator to disclose ties to a claimant or his/her/its counsel amounts to nothing less than a manipulation of the parties. Failure of a court to vacate an arbitral award that casts shadows on the appearance of impartiality and fairness effectively destroys the promotion of ADR throughout the country and encourages arbitrator self-aggrandizement and lawlessness.

Every single night from Monday through Thursday, in the Small Claims Part of the Civil Court of the City of New York, for example, filled-to-capacity

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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, 90-35 148 Street, 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 County Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

2007 Fall CLE Seminar & Event Listing

December 2007
Wednesday, December 12 — UM/SUM Update
Thursday, December 19 — Holiday Party Terrace on the Park

January 2008
Monday, January 28 — Stated Meeting - Tentative

February 2008
Monday, February 25 — Stated Meeting
Thursday, February 28 — CPLR Evidence Update

March 2008
Wednesday, March 5 — Family Law Seminar
Wednesday, March 26 — Basic Criminal Law Part 1
Monday, March 31 — Past Presidents and Golden Jubilarians Night

April 2008
Wednesday, April 2 — Basic Criminal Law Part 2
Wednesday, April 9 — Civil Court Seminar
Monday, April 14 — Judiciary Night
Wednesday, April 16 — Equitable Distribution Update

May 2008
Thursday, May 1 — Annual Dinner and Installation of Officers

NEW MEMBERS

Murray Daniel Bach
Pierre Bazile
Richard Bryan
David Joseph Conn
Jose Grajales
Karla Antonieta Guerra
David B. Katz
Dimitri Kotzamanis
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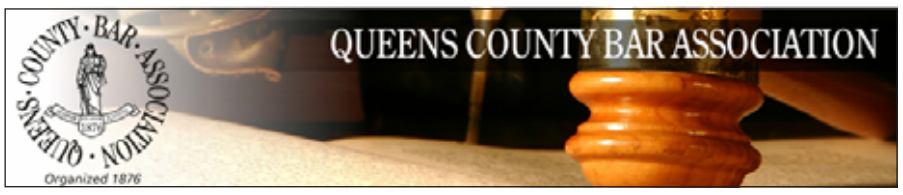

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Les Nizin

EDITOR'S NOTE...

On behalf of the Board of Managers, the entire staff of the Association, and myself we wish you and your families a Very Happy and Healthy Holiday season, and Happy New Year!

LAWYERS ASSISTANCE COMMITTEE

The Queens County Bar Association (QCBA) provides free confidential assistance to attorneys, judges, law students and their families struggling with alcohol and substance abuse, depression, stress, burnout, career concerns and other issues that affect quality of life, personally and/or professionally.

QCBA Lawyers Assistance Committee (LAC) offers consultation, assessment, counseling, intervention, education, referral and peer support.

All communication with QCBA LAC staff and volunteers are completely confidential. Confidentiality is privileged and assured under Section 499 of the Judiciary laws as amended by the Chapter 327 of the laws of 1993.

If you or someone you know is having a problem, we can help. To learn more, contact QCBA LAC for a confidential conversation.

Lawyers Assistance Committee
Confidential Helpline
718-307-7828

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PRESIDENT'S MESSAGE


David Cohen

This past week (November 12-16) I had two experiences that reenforced the pride that I feel in being an attorney. On the 13th I participated in the rally to protest the jailing of lawyers and judges in Pakistan. While I am fully aware and understand that some may question this action, I for one felt compelled to lend my individual support to this cause. We were there not to support or promote any particular political agenda, nor did we seek "regime change". Our purpose was to express our collective concerns over the jailing of judges and lawyers and the blatant governmental disregard for the rule of law. I arrived on the steps of the Courthouse at 60 Centre Street about one-half hour before the rally was to start. Almost no was present except Barry Kamins, President of the City Bar and a few other individuals, one of whom was Ali Ahsan, an attorney in New York City, whose father is under arrest and in solitary confinement. His only "crime" was being the President of the Supreme Court Bar of Pakistan and a leader of the campaign to restore the Chief Judge of the Supreme Court to his position. As the time for the rally neared, it was heartwarming to look out from the Courthouse steps and see hundreds of lawyers converging to join in the rally. Our common concern was to show the world that judges and lawyers everywhere should enjoy freedom and independence. We all were there for the principled reason and not for any other purpose.

As I listened to the powerful presentations made by Barry Kamins and Kate Madigan, President of the NYSBA, I was reminded how fortunate we are in this Country to be members of the legal profession. While there may be many lawyer jokes, when push comes to shove, we are truly a respected profession and, for the most part, unimpeded by the government in doing our best to represent our clients - no matter how unpopular the cause. We as a profession must be ever vigilant to insure that the rule of law and the independence of the judiciary remain on our radar screen. We can never take these bedrock principles of our society for granted. One way that we can preserve our liberties is to support our brother and sister attorneys wherever they are located, when the rule of law and judicial independence are threatened. We must be ever on our guard to defend and protect the rule of law and judicial independence.

Two days later, myself and five other QCBA members John Dietz, Ed Rosenthal, Joe Carola, Steven Orlow, and Judge Ritholtz, answered the call of Guy R. Vitacco, Chair our Speakers Bureau, and spent an entire morning addressing students at Hillcrest High School's Career Day. All of us made accommodations to our schedules in order serve the youth of our community. We lawyers and judges gave of our time to provide these students insight in what a lawyer does and how one goes about entering the legal profession. Our goal was to stimulate their interest not just in the law, but in the value of an education. The future is in the hands of these high school students. By volunteering our time to this effort, hopefully we inspired a few of these young adults to strive to enter our profession and become our colleagues, or at least to continue on with their education.

This selfless effort to help the youth of our community shows that the legal profession is not just about fees. We care about our community and we demonstrate it in no small part by the significant amount of pro bono activities that we participate in. By participating in these two events, my pride in being a part of this noble profession was once again justified. My sincere thanks and appreciation to those who attended the rally and to my fellow QCBA members who gave of their time at Hillcrest High School.

I wish all of you a happy and healthy holiday season. As always, I can be reached at the QCBA or by email at dlc-crimlaw@aol.com. ■

PROFILE OF...

Hon. Cheree A. Buggs

By STEVEN J. SINGER*


Steven J. Singer

The thing with "profiles" is that they are often boring. I shamelessly admit to skipping over them when I am reading the bulletin, or save them for really desperate moments when I am stuck in court and have run out of newspapers. However, that being said, I can truly advise you that there is nothing boring about Cheree Buggs! From the moment she walked into my office for the interview, everything about her was Vavoom! She is a particularly attractive, stylish young woman who oozes professionalism out of every pore. On the day of our meeting she had her hair done in a French twist and was wearing a terrific black pinstriped business suit that fairly screamed "lady lawyer." I was smitten immediately.

It was clear from the outset of our conversation that as the only daughter from a household where she was the youngest child, Ms. Buggs knew just what to do to get everyone's attention. As a fellow committee member who has attended numerous meetings with her, I can state categorically that she is one sharp lady with an established ability to take charge in a room full of mature male counterparts … and that is no mean feat. But of course, she didn't start out that way. She is a Queens girl in every sense of that term. She was born in Elmhurst Hospital, raised in St. Albans and Queens Village, and attended the Alley Pond Elementary School in Bayside. After completing the Nathaniel Hawthorne middle school, she finished her basic education in Benjamin Cardozo High School. How fitting is that for this new jurist? Her college years were spent at N.Y.U. as a commuter, majoring in psychology and journalism. Although she never pursued the writing career, aside from penning several short stories … which I could never get her to share with me … the psychology did come in handy later on, as you are about to learn.

At age twenty she moved to Philadelphia, attending Temple University Law School. She had finally managed to escape from Queens for a while and it was a wonderful experience for her. Philly was totally different from New York and not just because of the cheese steak hoagies. That city had a regulation about the height of their buildings back then, which Cheree found quite amusing. No building could be erected which rose above the head of William Penn, who appeared as a statue on the top of the City Hall. It was an overall "low key" attitude that prevailed in that smaller town and she loved it. Best of all she was not too far from home and could return home to sample some of her Mom's great cooking when the urge struck her.

During the final summer of her law school career she returned to Queens County for a stint in the District Attorney's Office (it was then John Santucci) as an intern. The summer previous to this she had also committed herself to an internship, that time in the office of Joan Specter, the wife of U.S. Senator Arlen Specter. His wife was a City Councilwoman at the time. Attitudes were, in fact. changing and her graduating class from Temple was comprised of women, to the tune of 40%. When I graduated from law school there were two women in our entire graduating class. She has been practicing law for twenty-one years now and has had a varied and most interesting series of job experiences.

Cheree worked for the N.Y.C. Transit Authority as a legal consultant and the Greater N.Y. Mutual Insurance Company doing defense work. A personal injury career proved too mundane for her and while she was still seeking to find her special niche in the legal world she spotted an advertisement for attorneys to do conservatorships. This would provide an opportunity to combine her legal talents with her background in psychology. She worked as a staff attorney for the Department of Human Resources, seeking to have conservators or committees appointed for those persons who were too ill to manage their own affairs and who lacked concerned, qualified family members to assume that role.

Following a two and a half year stint at Human Resources, she ventured into a different government sector, working "per diem" at the Parking Violations Bureau as an Administrative Law Judge. She ultimately gained status there as a "senior" Judge and as the site supervisor of the Queens Adjudication Center, as well as serving on the Appeals Panel from that body. She has assured me that all of those rumors about quota systems (for convictions and fines) and about marking judges "lousy" who were too liberal, are all false. At the same time, while balancing all of the responsibilities at the P.V.B., she began to accept conservatorship appointments from then Judge Kassoff, gaining experience on that side of the fence as well. She has only kind memories of the Judge, who she cites as having a "humanist" attitude towards those who came before him as litigants and respect for the lawyers who represented their causes. Cheree can recall the Judge coming down from the bench to sit with the conservatees and taking the time and trouble to ensure their understanding of the proceedings in non-legal terms. She hopes that she may acquire a similar reputation.

At the same time that she was earning her stripes in the mental health field, she served as counsel for the Health and Hospital Corporation and Jamaica Hospital, dealing with the retention of mentally ill patients, arguing Kendra's Law cases (the retention of

mentally ill persons who have committed crimes and refuse to take their medication), and the like. Believe it or not, Ms. Buggs … who it would seem may have coined the term "multi-tasking" … then became a Commissioner at the Equal Employment Practices Commission, monitoring City agencies for equal employment practice compliance. In the year 2002, she switched over to work at the N.Y.C. Council as a staff attorney to the Committee on Aging. In 2004, she returned to private practice on a full time basis, while somehow managing to keep a hand in the administrative law area by maintaining her per diem work at the N.Y.C. Department of Health and Hygiene, reviewing restaurant violations, lead poisoning cases and pest control issues. She was also … and I'm feeling more than redundant in saying so … doing "per diem" work as an Administrative Law Judge at the Environmental Control Board. This is one Judge with a true multitude of skills and experiences, as well … as we lawyers are most fond of noting … as having an actual background in the practice of law.

The Judge has been an active member of the Queens County Bar Association since 1987. She has served with distinction on our Judiciary Committee … and I know this personally, having served on several sub-committees with her … and as the Vice Chairperson of both the Cancer Awareness Committee and the Judicial Relations Committee. She has also served on our Board of Managers. I was duly impressed with this lady, as you can tell, not only because of her superlative background, but because of her professional attitude. That she had judicial ambitions is hardly a surprise, given her lengthy background as an Administrative Law Judge. She is more than qualified to serve on the Bench and personally, I can't wait to appear before her now that she has been elected to the Civil Court here in Queens County. ■

***Editor's Note: Stephen J. Singer is a Past President (96-97) of the Queens Bar Association and Co-Chair of its Criminal Court Committee. Mr. Singer is also a partner in the firm of Sparrow, Singer and Schreiber.**

Subversion Of ADR: Nondisclosure Of Ties By Appointed And Aspiring Arbitrators

Continued From Page 1

crowd of litigants are urged by a judge not to respond, in the calendar call, "Ready by the Court," but, instead, to simply say "Ready," thereby assenting to a hearing by and the decision of trained and smart arbitrators.

If a rule mandating honest self-disclosure by arbitrators is not enforced to the hilt - - throughout the United States - - then all the promotion and encouragement of arbitration is a cheap, cosmetic show. Without judicial enforcement of arbitrator disclosure, the giving of self-laudatory speeches on Law Day that we are "a country of laws, not of individuals" is nothing less than a tireless exercise in hypocritical posturing.

This year, a decision by the United States Court of Appeals for the Fifth Circuit, sitting en banc, unfortunately gives that Court that aura of hypocrisy, and the failure in June, 2007, of the United States Supreme Court to grant the petition for a writ of certiorari amounts either to disappointing inertia or an ominous rubberstamp of numerous cases where arbitrators failed to disclose ties to claimants and their counsel.

COMMONWEALTH COATINGS

One of the strangest chapters in judicial history is the varied interpretations, misconstructions, and continuing force of the concurring opinion of Justice White, joined only by Justice Marshall, in the United States Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 89 S. Ct. 337 (1968) (4-2-3). Never has such an opinion speaking for only two Justices held such sway.

In that case, Justice Black, writing for a plurality of four Justices of the Court, concluded that an arbitrator's failure to disclose warranted vacating an award for evident partiality even though there was **no** proof of actual bias. In *Commonwealth Coatings*, not only was there no actual bias, no appearance of bias existed, notwithstanding the subsequent, incorrect, almost surreal interpretations of several prominent federal circuit judges. Everyone agreed that this third arbitrator on the panel was absolutely impartial. The arbitrator in *Commonwealth* was never asked to disclose anything. Yet, Justice Black, writing for the Court, vacated the arbitration award because of the third arbitrator's failure to disclose a past business relationship THAT MIGHT HAVE CREATED AN IMPRESSION OF POSSIBLE BIAS. The arbitration in *Commonwealth Coatings* was not vacated for "the appearance of bias": **THE FAILURE TO DISCLOSE A PRIOR RELATIONSHIP CREATED AN IMPRESSION OF POSSIBLE BIAS.** Justice Black stated:

[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards **that might reasonably be thought biased against one litigant and favorable to another.**

(393 U.S. at 149-150; boldface and underlining added for emphasis).

Justice White wrote a concurring opinion, joined by Justice Marshall, stating that he was "glad to join" the "majority opinion" (id. at 151). Justice White's concurrence emphasized that all relationships should voluntarily be disclosed at the outset of an arbitration so as to avoid a situation where the losing, disgruntled party in the arbitration will conduct an investigation to seize upon anything that smacks of bias, unfairness, or a failure to disclose. Justice White, while strongly urging voluntary and complete disclosure before the arbitration of all relationships, nevertheless continued that an arbitrator candidate did not need to provide a "complete and unexpurgated business biography" (*id.*). He concluded that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial" (*id.* at 150).

Both Black's opinion for the Court and White's concurring opinion highlighted the need to make disclosure at the outset. Although Justice White indicated that he was "glad to join" Justice Black's opinion and that he desired to make "additional remarks," and Justice Black's opinion was designated the "opinion of the court," some lower federal courts have seen a conflict between the two writings.

It is difficult to fathom **ANY** basis for confusion about Black's and White's opinions in *Commonwealth Coatings*. The award was vacated by six justices ONLY because the prior relationship of the third arbitrator, minimal and of no consequence to the award, might give the impression of possible partiality.

In *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. July 9, 2007) ("*Applied Industrial*"), the United States Court of Appeals for the Second Circuit just recently made clear that it would not follow Black's four-person opinion, but would, instead, follow White's two-person concurrence. The Second Circuit stated:

In *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 79) (2d Cir. 1984) ("Morelite"), we concluded that the fractured court in *Commonwealth Coatings* and our precedent provided us "with little guidance concerning what standard is to be applied in construing the 'evident partiality' language of the statute." *See Morelite*, 74 F.2d at 83. We held that a father-son relationship between an arbitrator and an officer of one party to the arbitration rose to the level of "evident partiality." Id. at 84. Noting that in *Commonwealth Coatings Justice* Black did not speak for a majority of the Court, we elected to followed [sic] Justice White's reasoning that arbitrators are not subject to the same standards of impartiality as Article III judges. See id. at 82-84.

(*Applied Industrial*, 492 F.3d at 137 [discussed below, the court vacated the award under an incorrect, narrow standard]).

The scenario is bizarre. A plurality opinion in *Commonwealth Coatings* that even the concurrence termed the Court's "majority opinion" gets repeatedly ignored to date by federal and state courts in favor of the two-person concurrence. The Second Circuit is not alone in its confusion in trying to come to terms with *Commonwealth Coatings* or believing that the opinions expressed therein represented a "fractured [C]ourt." Even more bizarre is that, this year, the United States Supreme Court blew a golden opportunity to review the issue.

POSITIVE SOFTWARE

The United States Court of Appeals for the Fifth Circuit took a disastrously restrictive view of arbitrator disclosure in the case of *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 337 F. Supp. 862 (N.D. Tex. 2004), *aff'd as modified*, 436 F.3d 495 (5th Cir. 2006), rev'd, 476 F.3d 278 (5th Cir.) (en banc; 11-5 opinion), *cert. denied*, 127 S. Ct. 2943 (June 11, 2007). In *Positive Softwar*e, the plaintiff licensed a software support program to the defendant. In the lawsuit, plaintiff alleged that defendant copied the program in violation of the parties' agreement. In the United States District Court, the plaintiff secured a preliminary injunction in its favor thus indicating a likelihood of success on the merits. Pursuant to the contract between the parties, the district court sent the case to arbitration. The parties selected attorney Peter J. Shurn III ("Shurn") to arbitrate the case.

After the arbitration, Shurn issued a ruling that not only rejected Positive Software's claims, but ridiculed them. Instead, Shurn awarded defendant New Century $11,500 on its counterclaims and $1,500,000 in attorneys fees. Shurn did not even order defendant to return the software support program that it licensed from Positive Software.

Finding it impossible to square Shurn's rulings with the parties' licensing agreement and the district court's decision that Positive Software had a substantial likelihood of success on the merits, Positive Software's lawyers conducted a search of the federal courts' Public Access to Court Electronic Records service (PACER). Positive Software discovered through the PACER search that Shurn and Susman Godfrey LLP ("Susman Godfrey") had represented Intel Corp. as co-counsel in several litigations. Shurn's name and that of his former firm which was then known as Arnold White & Durkee ("Arnold White"), appeared on pleadings along with the name of Ophelia F. Camiña ("Camiña") and her law firm of Susman Godfrey, New Century's arbitration counsel. More important, Camiña and two fellow partners, including first name partner Stephen D. Susman himself, were very much involved with Shurn for six years.

Invoking the district court's jurisdiction, pursuant to 9 USC section 10(a), Positive Software immediately moved to vacate the arbitration award based on Shurn's failure to disclose information creating a reasonable impression of bias. Positive Software supported its motion with evidence that it only discovered Shurn's relationship with Susman Godfrey after the arbitration, and that it never would have agreed to Shurn's selection had it known about his long-standing relationship with that law firm. The federal district court granted Positive Software's motion and vacated Shurn's award based on its finding that Susman Godfrey and Shurn's law firm of twenty years, Arnold White, had represented Intel in protracted litigations for several years. Susman Godfrey had handled four related Intel actions, Arnold White had handled five, and the two firms had acted as co-counsel in three different matters. Lawyers from both firms frequently signed pleadings on Intel's behalf, listing both firms as counsel of record (Petition for a writ of certiorari, 2007 WL 1093508).

The evidence further demonstrated that Camiña, New Century's co-lead arbitration counsel, and Shurn, a member of Arnold White, were major players in the several litigations. Camiña was counsel of record in three Intel matters, and Shurn handled two Intel cases. For nearly a year, Shurn and Camiña personally represented Intel in one of the several cases, *Cyrix v. Intel*. Their names appeared side-by-side on ten different pleadings - - two of which were signed by Shurn himself. The only witness testimony that New Century proffered, in opposition to Positive Software's motion to vacate, was the four-page affidavit of Camiña, which the district court largely dismissed as not credible. The district court gave no credence to Camiña's insistence that her involvement in the Intel litigations "ceased" in June 1992, two months before Shurn himself got involved in the various litigations, since her claim was betrayed by pleadings plainly revealing her and Shurn's names, side-by-side, as late as June 1993. Tellingly, New Century never submitted an affidavit from Stephen Susman - - or any other Susman Godfrey lawyer - - disclaiming a professional or personal relationship with Shurn (*id.*).

Further revealing her lack of credibility, the district court found that New Century, with Camiña's knowledge, violated the protective order that the court had issued to guard the parties' confidential information during the pendency of the action and that she was aware that New Century's Chief Technology Officer had lied at his deposition about his continued use of the software support program, and, yet, she took no steps to correct his deposition testimony. In addition to misstating the length of her involvement with Shurn in her sworn affidavit to a federal district court, violating a protective order, and knowingly condoning perjured testimony, Camiña and New Century withheld critical documents from Positive Software, committing what the district court recognized as the most pernicious form of discovery abuse.

Having assessed the witnesses' credibility and weighed all the evidence, the district court reached the "firm conviction" that "any reasonable trial lawyer would want to know of an arbitrator-candidate's prior association with opposing counsel before choosing him as the sole arbitrator" (Petition for a writ of certiorari, found at 2007 WL 1093508).

Although Positive Software had requested discovery to uncover the full extent of the relationship between Shurn and Susman Godfrey attorneys, the district court concluded that it had seen enough and that the facts already of record created **A REASONABLE IMPRESSION OF PARTIALITY** that required vacatur under *Commonwealth Coatings* (*id*.).

The appeal from the federal district court's order was determined by a unanimous three-judge panel of the Fifth Circuit. The opinion was written by Judge Thomas M. Reavley, who is one of this nation's most distinguished appellate judges and humanist intellectuals. In affirming the district court's vacatur of the award, Judge Reavley stated: "We hold that the arbitrator was required to disclose the relationship because it might have created an impression of possible bias." (436 F.3d 495, 496). Judge Reavley pointed out Shurn's repeated false and misleading statements on disclosure forms. For instance, Shurn was asked on one form: "Have you had any professional or social relationship with counsel for any party in this proceeding or with the firms for which they work?" (*Id*. at 497). Shurn insisted several times, and one time under written oath, that he had nothing to disclose (Petition for a writ of certiorari, 2007 WL 1093508).

Judge Reavley concluded that "the district court properly vacated the arbitration award by reason of Shurn's failure to reveal to the parties his prior relationship with Susman Godfrey and Camiña" (436 F.3d at 504). While noting that some lower federal courts have seen a conflict between Justice Black's majority opinion and Justice White's concurrence in *Commonwealth Coatings*, the panel nevertheless concluded that both opinions share the same goal of full disclosure at the arbitration's outset. In "maintaining faithfulness to the Court's opinion in *Commonwealth Coatings*" (*id*. at 502), Judge Reavley, writing for the unanimous panel, stated:

[A]n arbitrator selected by the parties displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator's partiality. The evident partiality is demonstrated from the nondisclosure, regardless of whether actual bias is established.

(*id*.). The panel added that "[w]hile an arbitrator to be selected by the parties need not disclose relationships that are trivial, an arbitrator should always err in favor of disclosure" (*id*. at 503).

The Fifth Circuit heard the case en banc and reversed the panel's decision. The Fifth Circuit in *Positive Software* styled *Commonwealth* as a "plurality plus" opinion and concluded that arbitrator Shurn's undisclosed relationship with defendant New Century was trivial and too insubstantial so as to mandate the arbitration award's vacatur (476 F.3d at 281-283). The en banc majority concluded: "[N]ondisclosure alone does not require vacatur of an arbitral award for evident partiality. An arbitrator's failure to disclose must involve a significant compromising connection to the parties" (*id*. at 282-283). The majority of the en banc Fifth Circuit minimized Shurn's involvement with New Century's counsel, Camiña. The majority said that Camiña and Shurn were co-counsel for Intel for only a year - - although the district court found that the relationship was much longer and more involved. The en banc majority, in an effort to justify its result, observed that Shurn and Camiña were only two of 34 lawyers and seven law firms that represented Intel in the various litigations. This "harmless fraction" argument makes little sense since poison, although diluted, still retains its toxic nature. The Fifth Circuit's en banc majority thus permitted Shurn's arbitration award in favor of defendant New Century to stand, without permitting discovery as to the full extent of Shurn's relationships with the Susman Godfrey partners [which the district court said it did not need in light of other evidence].

Five judges dissented, including the three members of the Court who composed the original panel [Reavley, Garza, and Benavides, JJ.]. In dissent to the en banc opinion, Judge Reavley accused the majority of a failure to follow a precedential opinion of the United States Supreme Court. "I dissent because this court may not overrule a decision of the Supreme Court" (*id*. at 286). In beautiful and powerful language that will long be remembered, even though unfortunately it did not persuade his colleagues, Judge Reavley stated:

While I can understand the desire to protect the finality of arbitration awards and avoid a return to extended court expense and delay, this does not justify evading the law of the Supreme Court by misstating it or by avoiding it by bleaching the evidence of possible partiality. Nor should we miss the need to promote the impartiality of arbitrators in this time when that is the favored method of dispute resolution. Influence can so easily corrupt the decision-making process even when it is not recognized by the magistrate or arbitrator himself. And to prove bias or improper influence is rarely possible. It is imperative that we not allow even the good faith or memory of the potential arbitrator to control the disclosure decision for, as the Justices made clear in *Commonwealth Coatings*, it is the protection and reassurance of the party that matters most.

(*Id*. at 288).

Judge Jacques L. Wiener, Jr., wrote a separate dissenting opinion, in which Judge Reavley joined. Judge Wiener emphasized the difference between disqualification and disclosure, correctly stating that the en banc majority confused the two terms. Disqualification applies to judges who must weigh whether a relationship will affect the actual neutrality of the decision-making process or its appearance. Disclosure is what arbitrators are required to do in the forms they must complete so that the parties can make informed and non-manipulated choices of who the decision-maker should be. Judge Wiener eloquently stated:

Continued On Page 10

Queens County Bar Association

90-35 148th Street, Jamaica, New York 11435 | Tel 718-291-4500 | Fax 718-657-1789

NOTICE OF NOMINATING COMMITTEE MEETINGS:

Please take notice that those members who wish to be considered for nomination as Officers or Members of the Board of Managers of the Queens County Bar Association should submit written requests and resumes highlighting your activities in the Association prior to January 16, 2008.

Tentative meetings pursuant to the by-laws have been scheduled by the Nominating Committee on January 23, 2008 and finally on January 30, 2008. Said meetings are scheduled for 5:00 P.M. in the Board of Managers Room - in the Headquarters Building, 90-35 148th Street, Jamaica, N.Y.

At those meetings you may present the names of the persons whom you desire to have considered by the Nominating Committee for nomination to offices to be filled at the Annual Meeting. Hearings will be held at those times for that purpose pursuant to the by-laws.

Richard M. Gutierrez
Secretary

Please submit your requests in writing to the attention of the:

Nominating Committee
Queens County Bar Association
90-35 148 Street
Jamaica, N.Y. 11435

The Annual Election of Officers and Managers will be held on March 7, 2008. The newly elected Officers and Managers will assume their duties on June 1, 2008.

Dated: November 28, 2007
Jamaica, NY

Lawyers' Assistance Committee

Save a license, save a life!

Are you aware of the fact that the Queens County Bar Association has an active Lawyers' Assistance Committee presently in place? We are willing to assist our members and their families when the overwhelming problems of alcohol and drug addiction impair their ability to function.

In 2005, then President George J. Nashak, Jr. revitalized the Committee of Lawyers' Assistance which had unfortunately become dormant over the past decade. His platform included the development and implementation of procedures to assist fellow members suffering from alcohol or drug problems.

This early intervention is designed to divert and prevent formal disciplinary action and loss of license. The Committee which began to function less than two years ago has already had successful results. You might even have seen our tri-fold brochures placed by the elevator bank on each floor of the Supreme Courthouse and in the Supreme Court lobby. Awareness of the existence of our Lawyers' Assistance Committee is just the beginning.

Contacting the Committee through its daily monitored contact number begins the process. No one relishes the idea of suggesting a fellow member of the Bar needs help, or even admitting his own personal problem that involves substance abuse. Alcohol and drug addiction has not only ruined the professional standing of many an attorney but it has also destroyed his family, his health and even taken the lives of numerous lawyers throughout the State.

The Queens Bar Association Lawyers' Assistance Committee has been working in conjunction with the New York State Bar Lawyers' Assistance Program by participating in lectures, presentations, and responding to phone requests for assistance. We have had an eye-opening experience regarding the problems of stress and professional coping that face attorneys throughout the State.

In less than two years, the Committee members have fielded and handled quite a few inquiries regarding victims of alcohol and drug-related problems. Remember that the Queens Lawyers' Assistance Committee is a confidential alternative to the formal and serious charges which could lead to disciplinary proceedings and loss of license. By addressing the problems of our colleagues early on, we perform a service to the affected attorney, his family and our profession.

Why don't you call the Lawyers' Assistance Committee hotline number today for information, to share your concerns or to discuss a troubled member of the Bar. Your call is confidential and will be treated as such. The favor that you are doing such an attorney and his family will never be forgotten. If early confidential intervention prevents a catastrophe, the entire profession also is enriched by the thoughtful moment you have taken to get in touch. Remember, you are not only saving a license, you may be saving a life.

Our 24-hour-a-day confidential hotline number is 718-307-7828.

Someone will be back to you within 24 hours. ■

Three Year Suspension from Practice of Law Questioned

By DENNIS BOSHNACK*

In a case of first impression, last year the First Department suspended an attorney, with an unblemished disciplinary record, from the practice of law for three years (Matter of Caldwell, 27 A.D.3d 124) . It suspended him not for doing anything in his law practice, but for evading liability on his own 167 parking tickets issued in New York City 1997-1999. It characterized his behavior as "deceitful acts," "criminal or fraudulent design," and "dishonest scheme to defraud the City out of parking fines." This article considers the attorney's evasive techniques in light of Vehicle and Traffic Law §§ 238 and 241 and questions whether the suspension is too long.

What the attorney essentially did to evade liability on his parking tickets was to obtain vanity license plates from the New York State Department of Motor Vehicles and affix those plates to family cars. Although he had put those plates on his cars legally, the First Department suspended him from the practice of law for three years because of the following:

(1) The attorney ordered those plates with a particular combination of letters and numbers — 4GZZ5O and Y50V26 — because he believed that those plates would be misidentified in connection with any parking tickets issued to those plates and that such misidentification would result in a valid technical defense to those parking tickets.

(2) On several occasions the attorney, who had been an ALJ for the New York City Parking Violations Bureau (hereafter "PVB") 1991-1995, placed his expired ALJ identification card on the dashboard. In other instances, he covered part of the windshield registration sticker, the part that listed the vehicle plate type.

(3) He did not respond to his parking tickets.

(4) By 1999 he had incurred approximately $12,000 in unpaid parking tickets, not including late fees that could never be assessed because of his evasive techniques. In November 1999 he settled with PVB by paying $8,225, the face amount of all tickets less than two years old. He paid no interest or late fees, and nothing on the older tickets.

(5) He admitted that he obtained the vanity plates for the purpose of tricking the ticketing agents; described what he did as an "error in judgment"; and denied having any intent to obscure the registration sticker, shifting the blame to his occasional driver, who had died in 2002.

In imposing a three-year suspension, the First department stated:

That respondent, a former ALJ, would utilize his expired identification card and his knowledge of the inner workings of the PVB adjudicatory process for his own personal gain, is simply appalling. Moreover, his statement at deposition and at the Referee's hearing to the effect that he was technically not obligated to pay the summonses because they were defective are most revealing. They are demonstrative of respondent's apparent belief that his criminal or fraudulent design is irrelevant and forgivable where a technical defense exists to avoid liability. Respondent is mistaken, and his reliance on technicalities do not take away from the fact that he deliberately attempted to cheat the City out of money that it was rightfully owed. This was not an instance of mere "error of judgment," but rather persistent misconduct by a former judicial officer. In light of respondent's continued inability to appreciate the seriousness of his misconduct, we agree with the Hearing Panel that a three-year suspension is the appropriate sanction under the circumstances [citations omitted]

According to instructions for ticket writers on page 9 of The "New" Parking Summons Issuance Guidelines (New York City Department of Finance, Parking Violations-Analytical Services Unit [1996]):

If the PLATE TYPE for any vehicle cannot be determined because the registration sticker is either covered, faded, defaced, or mutilated, the issuer should check the "N/A" box next to the Plate Tyrpe field as well as state the reason for the omission on line one (1) of the summons. If the "N/A" box is checked off but an explanation is not provided on line one (1) , this constitutes grounds for asking for a dismissal of the charged violation.

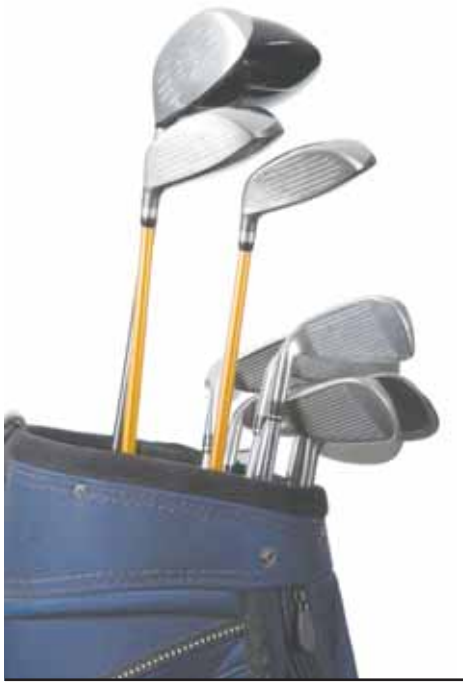
(Emphasis in original).

Instead of writing the attorney's correct plate type ("SRF") or indicating the plate type listed on the registration sticker was covered, the ticket writers usually wrote the plate type as "PAS." If a ticket for a vehicle bearing New York plates lists a plate type, PVB does not attempt to match the ticket with a vehicle having a different plate type even when the ticket describes a plate type that does not exist for the license plate designation listed on the ticket. When a ticket describes the plate type as not shown, however, PVB uses other information contained in the ticket, such as license plate designation, to match the ticket with the correct vehicle.

Regardless of plate type, PVB did not match any ticket with the correct vehicle, because PVB entered the wrong plate designation for the attorney's vehicles. The attorney's vehicles had plate designations containing the letter Q and not the number 0. Many of the 167 tickets issued to those vehicles wrote the plate designation as containing a letter O, while many others wrote the plate designation as containing a number 0 (an O with a slash through it). When entering the plate designation from any of the 167 tickets into its data base, PVB always entered the plate designation as containing a number 0 instead of letter O.

PVB entered the plate designation as containing number 0 regardless of whether the ticket stated the wrong plate type, such as passenger (e.g., ticket 3126213820 issued to plate 4GZZ5O on 7/28/97) ; stated the plate type as "N/A," "covered," "unreadable," etc. (e.g., ticket 3203678974 issued to plate 4GZZ5O on 9/25/97) ; or stated the correct plate type,

Continued On Page 14



Golf Outing September 6, 2007

A wonderful time was had by more than 150 golfers, tennis players and diners at the Annual Golf and Tennis Outing held at North Hills Country Club. The weather was great and the competition hot and heavy. The Golf awards went to John Steigler, President's Cup - Member Low Gross; Member Low Net, Drew Wasserman; Guest Low Gross, John O'Kane; Female Low Gross; Pat Colella, Female Low Net, Maura Nicolosi; Closest to the Pin, John Trotti and Ellie Vreeburg, Longest Drive, Kevin Berry and Jackie Wagner.

In addition to a good time, we raise money for our Pro bono efforts. The following sponsors helped make this outing a financial success:

Empire Bail Bonds, Big Apple Abstract, Orlow, Orlow and Orlow PC, Sterling National Bank, Signature Bank, HSBC, George Nashak, Esq., Crowley and Kaufman, Esqs., Capell Vishnick, LLC, Affordable Bail Bonds, Laurino and Laurino, Esqs., Scott Baron and Associates, PC, Old Republic Title Company, Holt, Rubinstein and Reminick CPAs, and National Bank of New York City. Please support our sponsors as they support the QCBA.

Hope to see you all next year!

David L. Cohen
Chair, Golf Outing

Window is Closing on Unique Chance to Make Charitable Contributions

By MARK WELIKY*

The 2006 Pension Protection Act allows a limited-time opportunity to make tax-free charitable contributions directly from IRAs to qualified charitable organizations such as the Queens Volunteer Lawyers Project. These gifts are tax free – no personal income is realized and no income tax is paid on the withdrawal. This is good news for people who want to make a charitable gift during their lifetime from their retirement assets, but have been discouraged from doing so because of potential tax penalties. It is also good news because traditional IRAs are among the most heavily taxed assets if they remain in your estate upon death – since they are subject to both estate tax and income tax. Between now and December 31, 2007 you may still take advantage of this unique opportunity to support the pro bono program of the Queens County Bar Association. The basics of these "Charitable IRA Rollovers" are:

- Individuals aged 701/2 and older may transfer up to $100,000 per year directly from an IRA (traditional or Roth) to a qualified charity;
- The charitable distribution is tax-free and may be applied toward your annual Required Minimum Distribution;
- Even if you plan other charitable gifts that will fully utilize your allowable federal income tax charitable deduction (50% of your adjusted gross income for cash gifts to public charities), you can take advantage of this legislation.

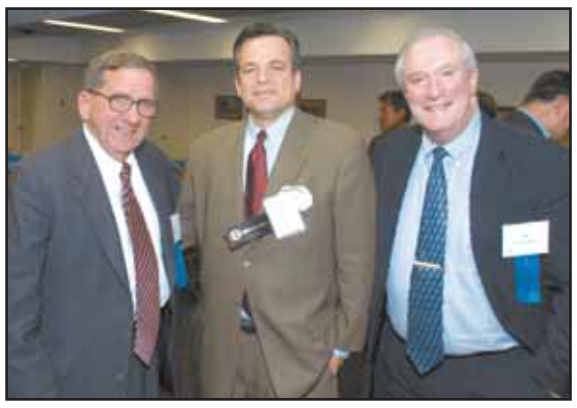
If you wish to make a gift or if you would like more information call Mark Weliky at (718) 291-4500.

***Mark Weliky is Pro Bono Coordinator for the Queens County Bar Association.**

PHOTO CORNER

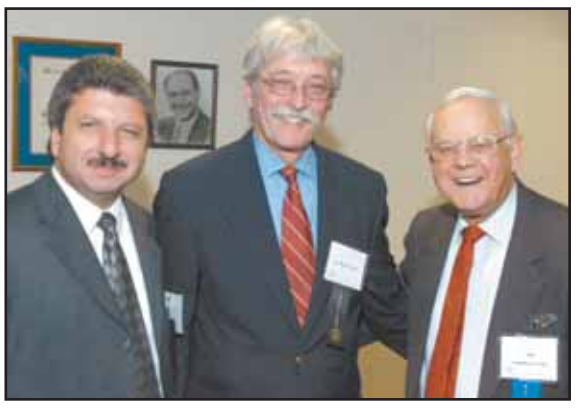
Stated Meeting, Monday, November 19, 2007

Meet Our New Administrative Judge, Civil Term – Hon. Jeremy S. Weinstein



George Nashak, Hon. Jeffrey Lebowitz and Mike Dikman

Hon. Augustus Agate, Tracy Catapano-Fox and Hon. Jeffrey Lebowitz



Hon. Charles LoPresto, Hon. Robert Kalish and Ted Gorycki

Greg Brown and George Nashak, Jr.

Hon. Jeremy Weinstein speaking

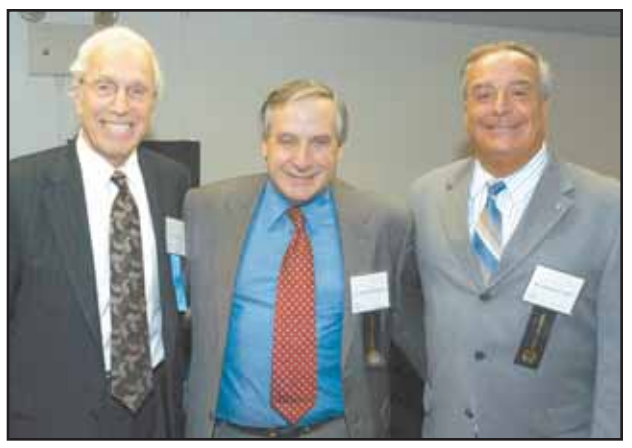
Ed Rosenthal, Jim Pieret, Guy Vitacco, Jr., Mike Dikman and Richard Gutierrez

Hon. Robert Kalish, Hon. Augustus Agate, Hon. Denis Butler, Hon. Charles LoPresto and Nelson Timken

Hon. Bernice Siegal, Tracy Catapano-Fox, Hon. Augustus Agate, Dimitri Kotzamanis , Hon. Jeremy Weinstein, Ira Futterman and James Wrynn

Hon. Martin Ritholtz, Hon. Bernice Siegal, Hon. Charles LoPresto and Jerome Patterson

Hon. James Golia, Tracy Catapano-Fox and Ted Gorycki



Hon. Seymour Boyers, Hon. Jeremy Weinstein and Hon. Augustus Agate

Photos by Walter Karling

Nelson Timken, Hon. Martin Ritholtz and Jim Pieret

Richard Lazarus, Hon. Stephen Knopf, Debra Knopf and Richard Gutierrez

Ted Gorycki, Joseph Risi, Jr. and Angelo Caldi

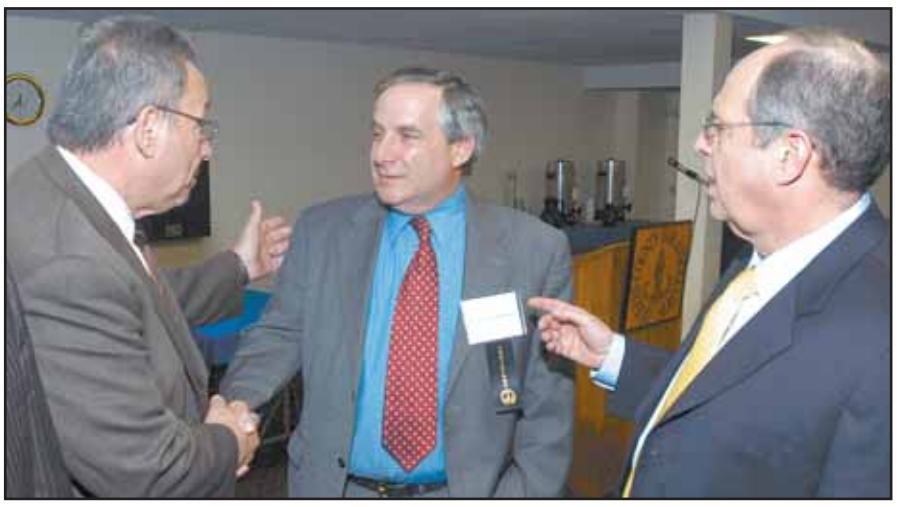
Jerome Patterson, Guy Vitacco, Jr., Joseph Risi, Jr. and Richard Gutierrez

Tracy Catapano-Fox, Hon. Augustus Agate and David Cohen

Wallace Leinheardt, Hon. Denis Butler and Hon. Seymour Boyers

Attendees listening attentively

Attendees of the Stated Meeting



Wallace Leinheardt and Steven Orlow asking questions of Hon. Jeremy Weinstein

David Cohen and Hon. Jeremy Weinstein

Tracy Catapano-Fox, Hon. Jeremy Weinstein and Hon. Bernice Siegal

David Cohen introducing Hon. Jeremy Weinstein

Subversion Of ADR: Nondisclosure Of Ties By Appointed And Aspiring Arbitrators

Continued From Page 5

In federal court, it is the system and the judges who perform the "gatekeeper" function to exclude decision-maker favoritism or its appearance. In arbitration, though, it is the parties who are the gatekeepers, and not the potential arbitrators or the arbitration associations (or their rules). Filtration of partiality in arbitration is the exclusive prerogative and duty of the *parties* - - and only the parties - - as it is they alone who select the decision maker. As gatekeepers, the parties are charged with guarding against favoritism and prejudice, a duty that they cannot possibly discharge in the absence of total disclosure.

* * * * * * *

. . . . For the system to enjoy credibility, each potential arbitrator absolutely must disclose every relationship with the parties and counsel, no matter how minimal or insignificant the aspiring arbitrator might deem it to be. For it is not the prerogative of the candidate to pick and choose, but the prerogative of the parties alone to decide such significance. And that cannot be done with any degree of comfort absent full disclosure. These reasons and those expressed by Judge Reavley compel me to concur in his dissent.

(*Id*. at 293-294; italics in the original).

Both Judge Reavley in the panel decision and Justice White in his concurrence in *Commonwealth Coatings* maintained that they were not concerned with "trivial" ties, although they, too, in an abundance of caution should be disclosed (436 F.3d at 503; 393 U.S. at 150). "Trivial" is exactly what it means: "Once upon a time, we met or were in the presence of each other." No one should have trouble with this understanding of "triviality." The relationship of co-counsel in protracted, lengthy, and sophisticated high-stakes commercial litigations cannot be marginalized as "trivial," infamously done by the en banc majority, together with "bleaching the evidence of possible partiality" (476 F.3d at 288, Reavley, J., dissenting).

Despite a persuasive petition for a writ of certiorari, available on Westlaw at 2007 WL 1093508, showing the division among the federal circuits in the construction of *Commonwealth Coatings* and the injustice sustained by plaintiff Positive Software, which was ordered by Shurn to pay an outlandish sum to a party that copied and stole its software support program, the Supreme Court denied the petition and refused to hear the case (127 S. Ct. 2943 [June 11, 2007])

Perhaps the enticement of summer vacation played a part in the denial of the Supreme Court to resolve a division on how one of its own decisions should be interpreted at a time when businesses and individuals are forced into contractually binding arbitrations. Its failure to address such a question of fundamental importance, which would have provided necessary guidance to lower courts and arbitrator candidates, is nothing less than judicial abdication. The judicial branch's potency lies solely because of public confidence in the integrity of our courts and judicially-mandated proceedings. Failure to address and correct an arbitrator's manipulative nondisclosure does not promote public confidence, when court-ordered arbitrations are under a judicial umbrella.

A COURT'S POWER TO CHOOSE AMONG POLICIES

An interesting aspect of *Positive Software* is a court's ability to decide policy and to choose between competing policies. Of course, the members of the Fifth Circuit had to engage in traditional judicial functions of how to interpret both the federal statute governing the vacatur of arbitration awards and a United States Supreme Court case. In reality, *Positive Software* shows a court's policy-making powers and how judges make decisions on what values or goals that they deem to be important or want to give preference. Consider:

• **ARBITRATIONS NEED FINALITY**. If arbitration awards are not treated with finality, disgruntled parties will keep searching for ways to overturn them.

• **ARBITRATIONS NEED INTEGRITY**. Especially at a time when ADR is being touted and encouraged, we should not trust arbitrator candidates to an honor system in deciding what relationships with parties and their counsel that they need to disclose, without checks-and-balances, safeguards, and penalties to serve as a deterrent in the event of abuse and dishonesty. In order to maintain the integrity of the process, the failure of arbitrator candidates to complete the disclosure form honestly should be a compulsory vacatur of the award with a direction to go back to the starting block. It is not within the province of arbitrators to decide whether they should disqualify themselves. Since the parties must choose among several candidates, the key must be full disclosure of all ties to a party or its counsel. Anything less encourages manipulation and lawlessness. A rule of mandatory vacatur of an award for nondisclosure - - especially when the matter was decided by one arbitrator, as opposed to a panel of three or more arbitrators - - and possibly professional discipline to a lawyer-arbitrator candidate will result in honest disclosure.

The Fifth Circuit's en banc majority, in narrowly interpreting 9 U.S.C. section 10(a)(2) so as to require "evident partiality" and ignoring Justice Black's opinion for the Supreme Court in *Commonwealth Coatings*, opted to reach its policy preference of arbitration finality. Judges Reavley and Wiener, on the other hand, sought to protect the sanctity of the concept of ADR by insuring arbitrator disclosure. Both goals, finality and integrity, are laudable. Ultimately, a case presenting a collision between these two goals force judges to make a policy choice. Equally important, this type of collision between two viable policies forces us to deal with our own internal ethical codes. We ALL promote the concept of arbitrators' self-disclosure, but how far are we willing to fight for the sanctity of a dispute resolution process? Judge Reavley readily prizes the integrity of the arbitration, so essential in keeping the confidence of both the public and the business world in judicially-sanctioned proceedings. In sharp contrast, to attain its goal of finality, the Fifth Circuit's en banc majority in *Positive Software* expediently sacrificed both the need to insure full disclosure by arbitrator candidates and the public's impression of the integrity of the arbitration process.

Incidentally, to the extent that the en banc majority of the Fifth Circuit wanted to avoid finality, it got an unexpected surprise. Positive Software, in the federal district court, has now sued the Susman Godfrey lawyers for tortious conduct and conspiracy with New Century in the unlawful copying of the software (John Council, "Susman Godfrey Sued over Alleged Fraud, Conspiracy," Texas Lawyer, Aug. 27, 2007, available at www.law.com).

Judge Reavley, in both the panel opinion of *Positive Software* and in his dissent to the en banc opinion, got it right. In the aftermath of *Positive Software*, the decision of what standard to apply in deciding whether or not to vacate an arbitral award as the result of an arbitrator's nondisclosure is unsettled. More likely, vacatur will be determined by the narrow, impressionistically-laced standard of "evident partiality" - - contravening the intention of the six Justices of the *Commonwealth Coatings* Court that vacated an arbitration award for nondisclosure, based upon AN IMPRESSION OF POSSIBLE BIAS, even though everyone agreed that the arbitrator there was unquestionably and actually impartial. Since honesty in disclosure is hard to enforce and an investigation of an arbitrator's actual candor is costly and can be undertaken by only financially well-heeled litigants, that standard of "evident partiality" leaves in place an unworkable honor system of disclosure.

RECENT NEW YORK CASES

In *Applied Industrial*, *supra*, 492 F.3d 132, the United States Court of Appeals for the Second Circuit, which still adheres to Justice White's two-person concurrence, and interprets it very narrowly, nevertheless held found "evident partiality" of an arbitrator, warranting vacatur of the arbitration award. In *Applied Industrial*, the arbitrator learned of a potential conflict of interest arising from contract discussions between the arbitrator's company and the parent of a party to arbitration. The arbitrator instead, on his own initiative, decided to erect a "Chinese Wall" instead of investigating further and failed to inform the parties of the problem or the "Chinese Wall."

The New York state courts also ignore Justice Black's opinion for the *Commonwealth Coatings* Court and instead quote Justice White's concurrence. The New York Court of Appeals, following White's opinion, in *J.P. Stevens & Co., Inc. v. Ryder Corp.*, 34 NY2d 123, 129-130, 356 NYS2d 278, 283 (1974), similarly stated: "[I]n the interest of fairness . . . all arbitrators before entering upon their duties should make known any relationship direct or indirect that they have with any party to the arbitration, and disclose all facts known to them which might indicate any interest or create a presumption of bias." Just recently, in *SOMA Partners, LLC v. Northwest Biotherapeutics, Inc.*, 41 AD3d 257, 838 NYS2d 519 (1st Dept. 2007), the appellate court, also following Justice White, recently vacated the award because the arbitrator learned that a lawyer who was "of counsel" to his large law firm's D.C. office was connected to and knew one of the parties, and the arbitrator failed to disclose that fact.

In *Matter of Seligman v. Allstate Insurance Company*, 195 Misc. 2d 553, 756 NYS2d 403 (Sup. Ct. Nassau County 2003), the petitioner's attorney learned that 25 years earlier, the arbitrator had worked for Allstate for 20 years but had not disclosed this fact. Briefly citing *Commonwealth Coatings*, without referring to either the Black or White opinions, Justice Peter B. Skelos, in *Seligman*, vacated the arbitration award, stating: "The determination of whether the relationship is trivial or not does not rest with the arbitrator, but rather must in the first instance be passed upon by the parties" (*id*. at 557, 756 NYS2d at 407).

A recent, excellent law review article, Rossein & Hope, "Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What Is Sufficient to Vacate Award," 81 St. John's L. Rev. 203, 256 (2007), concludes:

Disclosure must occur at every stage of the arbitration, as arbitrators have a continuing duty to disclose, and sometimes a continuing duty to investigate, circumstances or relationships which may provide evidence of evident partiality, WHETHER THAT BE AN IMPRESSION OF BIAS OR FACTS WHICH WOULD LEAD A REASONABLE PERSON TO BELIEVE AN ARBITRATOR IS BIASED. Where an arbitrator has completely followed his obligation under rules and terms of the parties' agreement, which she or he believes might disqualify him as impartial arbitrator, an arbitration award cannot be set aside on ground of arbitrator bias. [Boldface and capitalization added].

AN UNWORKABLE HONOR SYSTEM

Justice White urged all arbitrator candidates to make disclosure of all ties at the very outset of the arbitration process so as to avoid a subsequent, ugly, and expensive challenge by the losing party to the arbitration. A recent article by Pulitzer Prize-winning economics and financial affairs commentator Gretchen Morgenson brilliantly exposes that such an honor system cannot work. In "When Arbitrators Are Their Own Judges," NY Times, Aug 12, 2007, at Business section, p. 1 [available at www.nytimes.com], Morgenson focuses on one case. Harley McDonald, a retired lawyer, and his wife, Carol, had a retirement account valued at $60 million. His investment advisers at Piper Jaffray ("Piper") gave advice that resulted in the nest egg losing 80% of its value. Unlike in Positive Software, in which the arbitration was heard by a sole arbitrator, the McDonalds' dispute was to be submitted to a panel of arbitrators. With only three-four days left to the start of the arbitration, the McDonalds' lawyer discovered that the chairman of the panel, attorney Mark F. Marshall, failed to disclose that his law firm, Davenport, Evans, Hurwitz & Smith in South Dakota, represented Piper, the defendant in the arbitration on numerous, repeated occasions. In 1999, Davenport, Evans represented Piper in a litigation; in 2003, it represented Piper in a case involving alleged misconduct of three of its brokers; and, in both 2002 and 2006, it provided legal representation to Piper regarding the underwriting of public offerings. Violating his written oath as to the truth of his disclosures,

attorney Marshall did not reveal his law firm's solid ties to and repeated legal representation of the defendant to the McDonalds in the arbitration about to commence. After reading Morgenson's recent, excellent expose, would you now feel comfortable in submitting your controversy to binding arbitration?

Marshall failed to return phone calls to Ms. Morgenson for comment. His failure to disclose or to explain his nondisclosure speaks volumes about an arbitral process with the possibility of not only mere mischief, but abuse and corruption. American courts will not hesitate to enforce a contract mandating arbitration (*see, e.g., Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 [1989] [pre-dispute agreement to arbitrate claims under the federal Securities Act was enforceable]; *McGraw-Hill Companies, Inc. v. School Specialty, Inc.*, 42 AD3d 360, 840 NYS2d 47 [1st Dept. July 19, 2007] [dismissing complaint, court enforced ADR provision of the agreement]). In light of uniform judicial enforcement of agreements to arbitrate disputes, despite the lure of summer recess, the United States Supreme Court should have exercised its concomitant responsibility to hear cases reaching the integrity of the arbitration process. By denying the petition for certiorari in Positive Software, the Supreme Court failed both in performing its duty and in demonstrating real judicial leadership.

NONDISCLOSURE CAN BE SUBJECT TO ATTORNEY DISCIPLINE

A judge who fails to disqualify himself or herself is subject to review and criticism by appellate courts, a Commission on Judicial Conduct, and, not least, law review commentators. A lawyer who is a candidate for appointment as an arbitrator may calculate [incorrectly] that, even if his or her duplicity is caught, the chances of professional discipline are minimal. At most, in the face of nondisclosure, his or her name will be struck, not from the rolls of admitted attorneys, but from the lists of qualified arbitrator candidates of only the host arbitration company, and perhaps only temporarily, thereby free to solicit work from competing ADR firms. He or she may be tempted not to disclose in order to gain a healthy fee, while either assisting a friend, former comrade, or supporter or, as in Mr. Marshall's notorious case, to reward and favor a client of the potential arbitrator's law firm. A rogue arbitrator's decision to refrain from honest disclosure is further protected, as a practical matter, by the prohibitive cost of paying for an investigation of the arbitrator's background and maintaining a post-arbitration vacatur litigation.

Such thinking is not foolproof. In one case, the Supreme Court of Colorado held, in *In re Attorney* D., 57 P.3d 395 [2002], that an attorney's conduct of falsely signing an oath in 1992 and failing to disclose a financial, business, or professional relationship in connection with his appointment as an insurance arbitrator fell clearly within the meaning of "fraud" for purposes of the rule excusing compliance with a five-year limitations period to initiate an attorney disciplinary investigation.

My research has not found any New York case of an arbitrator-lawyer being subject to attorney discipline for failing to disclose a relationship or tie and making a false statement on the arbitration company's disclosure forms. Will New York follow the Colorado lead of pursuing professional discipline against an appointed or aspiring arbitrator who failed to disclose a relationship? Probably. In *In re Forrest*, 265 A.D.2d 12 (2000), the First Department imposed reciprocal discipline upon a lawyer who failed to disclose to an arbitrator and opposing counsel that his client, the claimant, had died. Since many states, such as New York, impose professional discipline - - including disbarment - - on lawyers who misstate or falsify credentials on their bar application papers and resume (*see, e.g., In re Parker*, 777 NE2d 677 [Ind. 2002] [disbarment ordered]; In *re Osredker*, 25 AD3d 199 [4th Dept. 2005] [same]), there is no valid reason why that rule should not be extended to lawyers who fail to make the proper disclosure in the arbitration forms, especially when they are signed under oath.

Neither Shurn nor Marshall were deterred by the language of oaths or current penalties when they repeatedly made false and misleading responses. The failure to impose an enforceable and clear standard for the courts to follow in vacating arbitral awards based on nondisclosure and to mete stiff professional discipline upon rogue arbitrators who misrepresent their ties to parties or their counsel, by commission or omission, will defeat the goal of encouraging ADR, promote an atmosphere of lawlessness, and lose public confidence in judicially-sanctioned proceedings. If appointed and aspiring lawyer-arbitrators cannot, by moral conscience, voluntarily disclose ties and tell the truth, then the commencement of disciplinary proceedings against such rogues will have a beneficial cleansing and cathartic effect.

No one was asking for their unabridged professional and personal biographies when lawyer-arbitrator Peter Shurn, in *Positive Software*, and lawyer-arbitrator Mark F. Marshall, in the *McDonald v. Piper* arbitration, falsely responded that they had nothing to disclose when they were required to list any relationships or ties to the parties and their counsel in the underlying arbitrations.

No one is afraid of toothless tigers. Holmes, writing for the Supreme Court's majority in *The Western Maid*, 257 U.S. 419, 433 [1922], stated: "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." Judge Wiener, in dissenting in *Positive Software*, described the already slender, even "anorexic" reed of truthful self-disclosure which is the underpinning of arbitration (476 F.3d at 294). Without taking any steps to protect the integrity of arbitrations, the promotion of ADR is hollow. Judges can describe arbitration as both fast and final - - but honest? By the eloquent and fact-filled accounts of Judge Reavley, Judge Wiener, and journalist Morgenson - - not always.

The appeal to arbitrators to disclose relationships in *Continental Coatings*, decided in 1968, is almost 40 years old. Despite such judicial appeals, abuses have occurred. The time has arrived to implement meaty, meaningful mechanisms to enforce honest disclosure. Imposing attorney discipline upon lawyer-arbitrators who make false statements in the arbitration forms and adopting the clearer standard urged by Judge Reavley of vacating awards where the nondisclosure creates the impression of the appearance of bias will produce the even playing field that is the aspiration of every party to an arbitration. ■

THE CULTURE CORNER

The Metropolitan Opera, discussed in last month's column, for opera aficionados, is not the only opera show in town. **THE AMATO OPERA** and **THE NEW YORK CITY OPERA** also deserve your attention and patronage.

THE NEW YORK CITY OPERA

"Vanessa," which probably ranks as the greatest American opera to date, by composer Samuel Barber, enjoyed a magnificent run at **THE NEW YORK CITY OPERA**, closing on the matinee of November 17. Both Lauren Flanigan in the title role and Katharine Goeldner as Erika, Vanessa's niece, were superb opera singers and performers.

Howard L. Wieder

After seeing Bellini's famous classic "Norma" at the Metropolitan Opera, the next day I saw "Vanessa" at **THE NEW YORK CITY OPERA**. As a result of scheduling coincidence, I noticed their identical themes, even though the two operas have different time periods and settings. Both "Norma" and "Vanessa" are stories regarding the complete loyalty of one woman to her female friend or relative, sacrificing her happiness for her friend/relative, although desirous of the love of the same man. In "Norma," Adalgisa, a Druid priestess, immediately and suddenly breaks off her relationship with Pollione as soon as she learns that High Priestess Norma is the mother of his two young sons and that Norma still loves him. In "Vanessa," Erika, the title character's niece, even covers up the fact that she is carrying Anatol's child when she learns that her reclusive aunt Vanessa has finally found love after 20 years of waiting futilely for Anatol's late father.

As opposed to the themes of "Cavalleria Rusticana" and "Pagliacci," discussed below, where tragic consequences are the brutal pay when lust triumphs over marital fidelity, in both "Norma" and "Vanessa" a woman's friendship and fondness for her female friend/relative is a great gift, with sacrifice, where loyalty triumphs over passion.

THE NEW YORK CITY OPERA'S production of Handel's "Agrippina" was similarly innovative and visually arresting, in addition to the brilliant performance of Nelly Miricioiu. Massenet's "Cendrillon" was a fairy tale in four acts starring Cassandre Berthon and Joyce Castle. Beth Clayton was a sensuous, sultry, and seductive Carmen in the New York City Opera's critically acclaimed production. Her beautiful mezzo-soprano voice and performance as the passionate vixen captivated a filled-to-capacity audience.

The New York City Opera's schedule for spring 2008 runs only from March 5 to April 20, 2008, so you better purchase tickets now at www.nycopera.com or call 212-721-6500.

THE AMATO OPERA

What do the **AMATO OPERA** and the State of Israel have in common? Both were founded in 1948, and in May, 2008, they will be both celebrating their 60th year of existence!

One of the great hidden gems of New York City's pulsating cultural life can be found at the corner of the Bowery and Bleeker Street, on the edge of Manhattan's SoHo. Right near the elegant Bowery Hotel, the **AMATO OPERA** [www.amato.org] is located at 319 Bowery [tel. 212-228-8200] and provides a much needed venue for up-and-coming opera singers and musicians to perform. If you think that seats to the **AMATO OPERA** are easy to come by, think again. Each of the weekend performances on November 24 and 25 were sold out, and I witnessed the House staff adding chairs to accommodate persons who would not be turned away and insisted on seeing the operas!

To get a feel and understanding of the **AMATO OPERA**, I attended three separate performances [November 17, 24, & 25] of both of the twin-bill productions that just concluded on November 25, "Cavalleria Rusticana" and "Pagliacci," usually referred in the trade as "Cav/Pag" because of the worldwide coupling of the two operas. These two operas, written by different composers, are usually presented as a twin-bill for several reasons. First, they are both short operas and deal with the same theme: marital infidelity, jealousy, rage, and revenge. Second, the settings of both operas take place in 19th century Italy. Third, they were daring at their creation as opera verismo. Fourth, for both composer Pietro Mascagni [1863-1945], the composer of Cavalleria Rusticana, and for Ruggero Leoncavallo [1857-1919], the composer of Pagliacci, these two operas marked their finest achievement, and nothing else written by them remotely reached their musical beauty and splendor. Fifth, in each of these two operas, the infidelity is exposed to the betrayed spouse by a rejected suitor; in Cav, it was the tormented, loving, and despairing Santuzza, desirous of Turridu's affection and return, who informed Alfio of his wife Lola's betrayal, and in Pag, Tonio, upset that Nedda rejected his advances, blew the whistle to Canio of her extramarital liaisons with Silvio. Finally, the scores in both are so beautiful and memorable that they have made the basic opera repertoire throughout the world. Mascagni's Intermezzo during "Cav" is a renowned piece of composition, and numerous tenors have performed the immortal "Vesti la Giubba," where the clown Pagliacci expresses his searing pain.

Now, turning back to the fascinating **AMATO OPERA**, it is soon celebrating its 60th year of existence under the direction of its Artistic Director, Italian-born tenor **ANTHONY AMATO** and the watchful management eye of his niece, **IRENE FYDEL KIM**, its executive director. **THE AMATO OPERA** is a hidden gem in New York City, unknown to many culture lovers, although it is the subject of articles on www.wikipedia.com and on www.pbs.org.

The **AMATO OPERA** is believed to be the only self-sustaining opera house in the United States. It is a not-for-profit corporation, and all checks and donations made to this very worthy Opera Company are tax-deductible. The **AMATO OPERA** was founded in 1948 by **ANTHONY AMATO** [born 1920] and his late devoted wife **SALLY AMATO** [1917–2000], with two goals in mind: to perform entertaining opera at a reasonable price and to give promising singers experience and a training ground with full-length productions. The **AMATO OPERA** has gained a reputation for mounting first-class productions, receiving commendations and awards from several New York City Mayors. The Amatos have been inducted into City Lore's Peoples' Hall of Fame, honored by the American Cultural Roundtable, and the Italian Heritage and Cultural Committee, in recognition for their contribution to the artistic life of New York City.

In 1964, Amato Opera found a new permanent home in a four-story white building, which was converted into a 107-seat theater with a 20-foot stage, orchestra pit, rehearsal space, storage for 55 sets, and seating in both orchestra and loge.

Each season includes six different operas, typically a mix of comedies and tragedies. Performances of each opera run over five weekends with six to ten different casts. Throughout its life the Amato Company has maintained a policy of keeping prices low, charging only $1.80 a seat when it moved into its current building in 1964. By 1975 ticket prices were only $3-4. Today, at only $35 for an orchestra seat ($30 for students, children, and seniors), ticket prices are still a fraction of the prices for comparable seats at larger opera houses.

The Amato Opera also mounts, each season, popular Saturday morning Opera-In-Brief performances, at 11:30 A.M., where each performance is only 90 minutes long so as to present only highlights to young children. The cost for these operas is $15 for each child under 12 years of age and only $20 for everyone else accompanying the child. Aimed at children, the Opera-In-Brief series performances are full-length short operas or abridged versions of longer operas interspersed with narration.

The next production, Puccini's "La Boheme" premieres on December 8, 2007 and closes with the performance on January 13. A special Saturday matinee will be held on December 29. Other operas that will be performed during the 2007-2008 CONSECUTIVE 60th Anniversary Season include: Donizetti's comic "Don Pasquale" from February 16 through March 16, including a special Saturday matinee on March 8; Verdi's "Il Trovatore" from March 29 through April 27, and Mozart's comic "Cosi Fan Tutte" from May 10 through June 9. The complete list of operas is located on the AMATO OPERA's web site of www.amato.org.

Upon arrival, you will be warmly greeted by **IRENE FYDEL KIM, ANN BONEY**, who, working for 50 years with the Amato Opera, now sells tickets after having been a soprano in numerous productions, and the professional House Manager, **JOHN KIM**. This year, two overhead screens in the theater conveniently give simultaneous English subtitles and summaries, similar to that employed by the New York City Opera. A well-stocked refreshment stand, with reasonable prices, is located at the back of the theater.

For anyone who hasn't planned New Year's Eve, I heartily recommend buying tickets for the New Year's Eve Gala, commencing at 7:30 P.M. At only $125.00 per person, the gala includes a splendid buffet dinner, champagne, and the continuation of food and drink after the performance of Puccini's beautifully composed and emotional heartbreaker "La Boheme." You will need to hurry to make reservations for New Year's Eve, since the seating capacity is almost full. On May 4, 2008, the **AMATO OPERA** will present a similar gala, with elaborate and exquisite Italian homemade cooking, to celebrate its 60th season. Tickets are available for that gala as well.

THE AMATO OPERA can be proud of the talent it has amassed in its rotating casts. Among the performers, I enjoyed the remarkable voices of **JAMESON JAMES, ENRIQUE REXACH, CHERYL LYNN WARFIELD,** and the conducting talent of **ANDREW WHITFIELD**. Their life stories are a tribute to the vital work to which **ANTHONY AMATO** and the late **SALLY AMATO** have devoted their lives in founding **THE AMATO OPERA**.

Handsome, noble looking, and vocally-gifted tenor **JAMESON JAMES**, playing Beppe, a supporting role in "Pag," is a true talent with an enormous future ahead. He has the potential for reaching the opera world's heights. In the role of Beppe, his singing was clear and showed great range in all registers. His pronunciation of Italian was flawless in a rapid-fire, crucial scene, where Beppe successfully prevents Canio [in his first attempt] from killing his wife. **JAMESON JAMES'S** acting skills were excellent in that scene, maintaining, as the linchpin, the intensity and believability of the moment. Later in the opera, despite the carelessness of some company members causing plates and cups to tumble repeatedly, Mr. James seamlessly scooped up a fallen prop and made it seem natural.

JAMESON JAMES, born in Austin, Texas, has sung for Boston Lyric Opera, Bronx Opera, Dicapo Opera, Amato Opera, Aspen Opera Theater Center, New Texas Festival, and Rome Opera Festival. He received his Bachelor of Music from Rice University's Shepherd School of Music, and a Master of Music from the New England Conservatory in Boston. In 2007, **JAMESON JAMES** was a regional finalist at the prestigious Metropolitan National Council Regional Auditions in San Antonio, Texas. In addition, he is a versatile singer and has had the opportunity to create roles for new works. In 2008, he will sing the role of the Beast in Dicapo Opera's production, Beauty and the Beast.

By day, 31- year-old tenor **JAMESON JAMES** works in a noted wine store, Moore Brothers Wine Company, at 33 East 20th Street in Manhattan. On Sunday mornings, **JAMESON JAMES**

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can be seen and heard as a soloist at St. Patrick's Cathedral on Fifth Avenue. His dream, however, is of attaining his professional quest as an operatic tenor. That means money to support numerous lessons over years with noted and costly vocal coaches. I hope that Mr. James, who has already played Count Almaviva in Rossini's "Barber of Seville" at the Amato Opera, will get the chance to tackle even meatier roles, such as the title character in Gounod's "Faust."

JAMESON JAMES attributes his interest in music to his mother's musical side of the family. Although his maternal grandmother wanted all of the grandchildren to play musical instruments, no one turned to singing. Then only 12 years old, Mr. James saw a production of Mozart's "Die Fledermaus" and was hooked on the operatic art form. Opera, to **JAMESON JAMES**, is a "totally integrated art form. Music, theater, sets, costumes, voice - - all of it must be communicated effectively to an audience. It is the ultimate challenge." Among his favorite opera singers are: Alfredo Kraus, Luciano Pavarotti, Renee Fleming, Bryn Terfel, and Thomas Hampson.

Puerto Rican born **baritone ENRIQUE REXACH**, possessing another beautiful voice, is literally inches away from the Met Opera. To support his operatic and vocal studies, he works regularly at the gift shop of the Metropolitan Opera at Lincoln Center, in the hope of, one day, reaching its stage. In "Cav," he performed the role of Alfio, the jealous husband who, despite early suspicions, is rudely awakened by Santuzza to his wife Lola's wandering eye. **ENRIQUE REXACH** brought a mature understanding to the role of Alfio, shunning interpretations depicting him as a Sicilian male brute and buffoon. **ENRIQUE REXACH's** Alfio is the loyal, hard-working husband, who, consistent with prevailing Sicilian mores, is constrained to homicide to avenge a humiliation and dishonor.

Smart shoppers will buy tickets now to hear and see **ENRIQUE REXACH** play Marcello in the Amato Opera's production in "La Boheme," with a December 8 premiere. Starting March 29, at **AMATO OPERA**, his home away from home, **ENRIQUE REXACH** stars as Count di Luna, a wonderfully villainous role, in Verdi's "Il Trovatore" [with the famous "Anvil Chorus"].

ENRIQUE REXACH has immense gratitude for Alicia Morales, or "Cucha" as he calls her, for being his very best friend, vocal coach, and "second mother." Ms. Morales was a concert pianist, who graduated from Juilliard and studied with the great Russian pianist Rosa Levine. Her aunt was the piano accompanist of the famous Puerto Rican tenor Antonio Paoli, whom Mr. Rexach worships. **ENRIQUE REXACH**, who is fiercely proud of his Puerto Rican roots, also has taken voice lessons with Eva De La O [not a typo, visit www.evadelao.com] and Mercedes Alicea, both of whom have helped Mr. Rexach develop the beautiful, rich, dark color in his baritone voice.

Gifted **soprano CHERYL LYNN WARFIELD,** a native of Warren, Ohio, has become a well-known interpreter of Verdi heroines to New York audiences. She debuted with the Woodstock Chamber Orchestra ("WCO") as Leonora in Verdi's "Il Trovatore" in the spring of 2006, followed by performances as Micaëla in "Carmen" and Donna Anna in "Don Giovanni." Her newest role is Leonora in Verdi's "La Forza del Destino." She made her operatic debut in Rome as Fiordiligi in Mozart's "Cosi fan tutte." She has appeared with the renowned Bregenz Festival in Austria, at the Theater des Westins in Berlin, and in Sweden and the Czech Republic.

In New York, **CHERYL LYNN WARFIELD** has performed over 15 lead roles in the standard Italian repertory, and she appeared on Broadway in Hal Prince's Tony Award-winning revival of Jerome Kern's masterpiece "SHOW-BOAT." She has appeared frequently in the spirituals concert "Paul Robeson: A Celebration of Culture," and the one-woman show she wrote and directed "Meet Dorothy Maynor," about the life and artistry of the famous soprano and founder of the Harlem School of the Arts.

CHERYL LYNN WARFIELD's portrayal of Santuzza, in "Cavalleria Rusticana" at THE AMATO OPERA, for three performances this past Fall, was a virtuoso triumph. Her voice was beautiful and, indeed, flawless, and her performance was a tour de force. **CHERYL LYNN WARFIELD** listened to recordings of both Renata Scotto and Renata Tebaldi before taking on this complex role. **CHERYL LYNN WARFIELD** captured the emotional vulnerability, clinging, hopeful ardor, and tormented desperation of Turridu's rejected lover. When she, as Santuzza, informs Alfio that her boyfriend Turridu has been seen with his wife too often, the confession is not of a vengeful woman, as misinterpreted by several operatic actresses, but an act of desperate impulse. To reach the climatic moment, and to understand the pivotal communication as one of impulse, not revenge, required acting of a superior and exceptional force and a mature, deep understanding. **CHERYL LYNN WARREN** grasped the role!

This type of Santuzza was not the product of picking up the script, but of hard work, study, and rehearsal. Too often, Santuzza can be played as a one dimensional, tormented and suffering martyr. **CHERYL LYNN WARFIELD** portrayed Santuzza as emotionally vulnerable and frail, clearly tormented, yet longing and hopeful, spiritually pious — although shunned by her religion and fellow citizens, and determined to resort to every persuasive means to SAVE, not to destroy, her man. The result of **CHERYL LYNN WARFIELD's** performance of a lifetime was that I had tears in my eyes toward the end of the opera, regarding Santuzza's emotional pain. Only the callous-hearted would not have so responded.

CHERYL LYNN WARFIELD's insights into Santuzza's character were brilliant. During the playing of Mascagni's moving and lovely Intermezzo, for example, Ms. Warfield's Santuzza, excommunicated by the Church, leaned against the Sicilian Cathedral, while mouthing silently the prayers. No other operatic actress I have **ever** seen revealed such penetrating insight into Santuzza's character as a spiritual woman, although barred by an organized religion from attending a house of worship, and **CHERYL LYNN WARFIELD** knew how to use a musical interlude in order to enrich the audience's understanding of a character.

Earlier this year, I saw famous and gifted mezzo-soprano Dolora Zajick do great justice to the role of Santuzza at the Metropolitan Opera, but Miss Warfield's performance of the role at **AMATO OPERA** was the **performance of a lifetime**, extraordinary in beauty and use of voice and intense method acting. Here's a **word to the wise** for opera agents and managers: **CHERYL LYNN WARFIELD's** acting and vocal gifts are ready **NOW** for the major leagues of the operatic world: **LA SCALA** in Milan and the **METROPOLITAN OPERA** in New York!

By day, **CHERYL LYNN WARFIELD** is the Director of Finance at The New York Sun newspaper. She is developing an opera pod cast that will be available at www.nysun.com.

I was also impressed generally by other performers. Associate conductor **ANDREW WHITFIELD**, also a singer and musician, was in terrific form, energetically conducting the Cav/Pag twin-bill on both days of the sold-out weekend of November 24-25. He kept the momentum of the music, briskly leading the orchestra, while discreetly and almost undetectably signaling cues to the singers and the ensemble cast. **ANDREW WHITFIELD** understood the sweep of both the Mascagni and Leoncavallo scores, and he moved the orchestra, to tap its maximum best. This young, talented conductor is a name to remember.

ANDREW WHITFIELD grew up in Brookline and Cambridge, Massachusetts. From the age of five, he started taking violin lessons and spent much of his earlier musical life playing in orchestras and chamber music, switching from violin to viola to cello, as needed. At the age of 15, he started taking voice lessons and devoted his life to voice, working with such people as Phyllis Curtin, Richard Cassilly and Marlena Malas, while continuing with the violin lessons.

After graduating from Boston University in 2000, **ANDREW WHITFIELD** moved to New York City and, within a few months, started singing at the Amato Opera. Under the guidance of Anthony Amato, the **AMATO OPERA** has served as his musical home. At the beginning, Anthony Amato assigned him supporting roles and chorus. As his voice matured into that of a lyric tenor, he started singing major roles including Alvamiva (Il Barbiere di Siviglia), Eisenstein (Die Fledermaus), Danilo (The Merry Widow), Alfredo (La Traviata), Nemorino (L'Elisir D'Amore), Don Ottavio (Don Giovanni), and Fenton (Falstaff).

ANDREW WHITFIELD's foray into conducting happened quite by accident; it was during a new production of "Faust," in 2001, that **ANTHONY AMATO**, needing a backstage conductor for the small buried orchestra pit at the **AMATO OPERA**, instinctually turned to **ANDREW WHITFIELD**. In 2003, Andrew conducted his first complete opera, Verdi's beautiful "La Traviata." In 2004, he conducted "Le Nozze di Figaro." In 2006, he took the position of musical director at the **AMATO OPERA** and has gone on to conduct numerous famous operas, including "Tosca," "The Merry Widow," "Aida," "Don Giovanni," "Faust," "Rigoletto," "Die Fledermaus," "La Forza del Destino," "Madama Butterfly," "Falstaff," "Il Barbiere di Siviglia," among many others.

The 29-year old, handsome virtuoso conductor, violinist, and tenor, has the unique life's experience to be a great conductor, sensitive to the needs of both singers and musicians. The singers that I interviewed, **JAMESON JAMES, ENRIQUE REXACH**, and **CHERYL WARFIELD** were unreserved in their praise for **ANDREW WHITFIELD'S** talent, style, skills, and understanding. **ANDREW WHITFIELD** admires conductors James Levine of the Metropolitan Opera and Anthony Amato for their ability to juggle many operas at the same time. He also admires Wagnerian opera singers Gwyneth Jones, Birgit Nilsson, and Lauritz Melchoir.

Setting designer **RICHARD CERULLO** performed a fine job of creating sets for the Cav/Pag productions that evoked the Italian villages. The costumes by **RINEKE AKKERHUIS** and **PATRICIA MCCRAY** also contributed to the realism of the rich, Italian setting.

Among other excellent performers in the Cav/Pag performances that I attended were the vocally gifted **HELEN VAN TINE** [as the tormented Santuzza in Cav], **VINCENT TITONE** [a magnificent Turridu in Cav], and **KERRY ANN ERICKSON** [Lola in Cav], **DEBORAH SURDI** [brilliant actress and singer, who brought insights into Canio's unappreciated wife, Nedda, and her sexual frustration and energy in Pag] and **EVELYN THATCHER** [as Nedda in Pag], and **IVAN AMARO** [showing great promise and vocal power and range as Tonio in Pag].

Some of the voices are truly excellent, and a lot of other talented voices are gifted works-in-progress. Several alumni of the Amato Opera have graduated to full-time, professional opera careers. **SO BE ALERT:** in the performance you attend of **THE AMATO OPERA**, you may be hearing the next Renata Tebaldi, Maria Callas, Tatiana Troyanos, Benjamino Gigli, and Franco Corelli. ■

HOWARD L. WIEDER is the sole editor/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 IAS Part 32 of Supreme Court, Civil Term, in Long Island City, New York.

Three Year Suspension from Practice of Law Questioned

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namely, "SRF" (e.g., ticket 3204866774 issued to plate 4GZZ5O on 7/28/97)

Even if he had committed the charged parking violations, the attorney was not liable to pay any parking ticket that misdescribed his vehicle's plate type or plate designation (Wheels, Inc. v. Parking Violations Bureau of Dept. of Transp. of city of New York, 80 N.Y.2d 1014 [1992]; People v. Gabbay, 175 Misc.2d 421, 423 [Sup Ct. App. T. 2nd Dep't 1997]; VTL § 238 [2] [2-a]).

In Matter of Wheels, supra, although the official case summary points out (at 1014) that the petitioner, who had been issued parking tickets, "had not alleged prejudice," the Court of Appeals dismisses those parking tickets for misdescription of plate type and holds (at 1016) that "a misdescription of any of the five mandatory identification elements [the vehicle's license plate designation, plate type, registration expiration date, make or model, body type] also mandates dismissal." In People v. Gabbay, supra, the court holds that a parking ticket's omission of a mandatory identification element requires dismissal of the ticket on appeal despite a plea of guilty in the court below.

VTU § 238 (2) requires a parking ticket to contain certain information, including those five mandatory identification elements. VTU § 238 (2-a) provides:

(a) Notwithstanding any inconsistent provision of subdivision two of this section, where the plate type or the expiration date are not shown on either the registration plates or sticker of a vehicle or where the registration sticker is covered, faded, defaced or mutilated so that it is unreadable, the plate type or the expiration date may be omitted from the notice of violation [parking ticket]; provided, however, such condition must be so described and inserted on the notice of violation.

(b) If any information which is required to be inserted on a notice of violation is omitted from the notice of violation, misdescribed, or illegible, the violation shall be dismissed upon application of the person charged with the violation.

Covering the plate type on a registration sticker is an open act, not a fraudulent one. It constitutes a parking violation (34 RCNY 4-08 [j] [3]), not a crime (see VTL § 155). Nor can it justify misdescription of plate type (see VTL 238 [2-a] [a]), much less misdescription of plate designation.

The attorney made no response to his parking tickets, because errors made by ticket writers, who misdescribed the plate type or plate designation, and by PVB data entry clerks, who entered a number 0 for the license plate designation even when the ticket described that plate designation as containing a letter O and not a number 0, stopped PVB from matching those tickets with the attorney's cars and, in turn, would stop PVB from pursuing those tickets after they were over two years and thirty days old. PVB, a creature of statute, has no authority to pursue a ticket more than two years after the expiration of the time for entering a plea (normally 30 days) unless PVB renders a default judgment on the ticket before those two years expire (see VTL § 241)

With the attorney's parking tickets never adjudicated by PVB and his liability for them and his need to respond to them doubtful or nil under VTL §§ 238 (2) , (2-a) , and 241 (2) , does the three-year suspension here for evading that liability appear too long? Or do the expectation that City employees will misidentify lawfully displayed license plates and the belief that such misidentification will result in a technical defense to parking tickets issued to those plates essentially merit that three-year suspension from the practice of law? ■

***Dennis Boshnack is an attorney in New York and a former administrative law judge for the New York City Parking Violations Bureau. The views expressed in this article are his own.**

Notes from Albany

Continued From Page 1

The rest of the officers are:

President Elect: Mike Getnick of Utica

Secretary: Bruce Lawrence of Rochester

The nominating committee's meeting was a grueling affair, lasting till after 6:00 PM. Our delegates were yours truly, Chanwoo Lee, with Arthur as the alternate.

General Meeting called to Order at 10:15 by the President Elect, Bernice Lieber. The first order of business was giving directions on evacuating the building in case of fire. An auspicious beginning.

Treasurer's Report – boring. State Bar has money.

Finance——————More Boring. The State Bar has more money and is thinking of ways to make more.

Seymour's wife, the Hon. Cheryl Chambers then presented the report and recommendations of the Committee on By-laws. These included increasing the term of members at large to two years (presently one year) and the formation of an independent audit committee as per Sarbanes Oxley. Both recommendations passed without opposition.

Hon. George Bundy Smith reported on the Special Committee on Civil Rights. He was for more Diversity. The report looks two inches thick and is merely informational. More to come.

President Madigan reported on her activities this year. This Report can be obtained from the Bar Association or on-line at the State Bar web site. She is very involved and active.

The final report and recommendations of the Committee on Standards of Attorney Conduct (COSAC) was presented: This is important stuff. It effectively changes our current Disciplinary Rules and adopts the Model Rules with some changes suitable to New York. After debate they passed and they will be transmitted to the Appellate Divisions for their consideration.

The proposed Rules are voluminous:

The ones presented at this meeting dealt with: representation of organization as clients, confidentiality of information, declining or terminating representation, duties to prospective client, candor toward tribunals, fairness to opposing counsel, truthfulness in statements to other, preamble and scope.

At this point the meeting got really interesting. The topic was the revelation or use of confidential information. The original proposed rule:

"6 (b) (3) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary, to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."

At the apparent behest of the City Bar (formerly the Association of the Bar of the City of New York) this was changed to:

"6 (b) (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's past, ongoing or intended commission of a crime or fraud in furtherance of which the client is using or has used the lawyer's services."

After a heated, erudite discussion (an erudite discussion is defined as anything I don't understand), the City Bar's proposal was soundly defeated and the original proposal was adopted and will be shipped off to the Four (4) Appellate Divisions for their consideration..

After the COSAC report all else was anti-climatically. The following reports were presented but did not require action on the part of the House of Delegates.

Report and recommendations of Committee on Standards of Attorney Conduct re Ethical Considerations pertaining to lawyer advertising.

Report of Task Force on Eminent Domain

Report and Recommendation of Committee on Minorities in the profession concerning the measurement of racial and ethnic diversity among New York Lawyers.

Report re Medical Malpractice Liability Task Force.

Bar Foundation Report.

Time for lunch and going home. ■