www.qcba.org

Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500 **Vol. 74 / No. 2 / November 2010**

Discoverability Of A Personal Injury Plaintiff's Facebook And Myspace Pages

BY: GLENN VERCHICK, ESQ.

To what extent are a personal injury plaintiff's self-restricted private pages of his or her social networking websites, such as Facebook and MySpace, discoverable? The question was recently addressed in a well reasoned and thoroughly researched decision by Justice Jeffrey Arlen Spinner, of the Supreme Court, Suffolk County.

In Romano v. Steelcase,[1] the Court ultimately held that plaintiff's private, self-restricted MySpace and Facebook pages, as well as deleted and historical data from such sites, were discoverable where plaintiff had put her physical condition and loss of enjoyment of life in issue and where her right to privacy concerns were outweighed by the defendants' need for the discovery.

In Romano, plaintiff sued defendants alleging that she sustained personal injuries as a result of defendants' negligence. The exact nature and extent of the plaintiff's injuries in Romano are not detailed in the decision but it is revealed that plaintiff claimed to have, "sustained permanent injuries as a result of the incident and that she can no longer participate in certain activities or that these injuries have effected her enjoyment of life."[2] She also claimed to be, "largely confined to her house and bed"[3] but is depicted on the public portion of her Facebook page as, "smiling happily in a photograph outside the confines of her home."[4] Defendants took the position that the portions of the plaintiff's Facebook and MySpace pages, to which they had free access, painted a picture of plaintiff's post-accident life that was contrary to her claims of physical limitations and loss of enjoyment of life which were being made in her case. As such, defendants argued that plaintiff's restricted information on her Facebook and MySpace sites were discoverable.

For those not familiar with social networking sites such as MySpace and Facebook, it should be related that such sites allow a user, at their own discretion, to post information about themselves, such as biographical information, hobbies, likes, dislikes, photographs and other personal information to share with people visiting their site. The user can choose to post information for all to see or post information to be viewed by invitation only.

In Romano, plaintiff had both public and restricted postings on both her Facebook and MySpace pages. Since defendants were blocked from the restricted portions of the plaintiff's sites, they asked for authorization from plaintiff to view such portions. The plaintiff objected to the request. Defendants made a motion for authorization to view the restricted portions and any previously deleted postings. In support of the motion, defendants argued that, based on the freely accessible portions of plaintiff's sites (which showed plaintiff post-accident engaged in an active lifestyle which included trips to Pennsylvania and Florida), it could be inferred that the private portions would lead to discoverable information.

In opposition to the motion, plaintiff argued that the private content of her social networking sites was protected by her Fourth Amendment right to privacy and this right outweighed defendants' need for the information.

The decision in Romano carefully analyzed the Fourth Amendment and the protections it provides and compared those protections to the material claimed by plaintiff to be protected there under. The Court concluded that because of the nature of social networking sites, particularly the fact that the sites advise users that they cannot guarantee that restricted information will remain private, plaintiff could not successfully argue that she had a reasonable expectation of privacy.

The Court stated:

Thus, when the plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature

Continued On Page 5

Hon. Fred Santucci Receives Award

Hon. Fred Santucci with Chanwoo Lee, Presiding Justice Prudenti and Spiros Tsimbinos.

State Bar News

BY DAVID LOUIS COHEN*

David Louis Cohen

The New York State Bar Association held its Executive Committee meeting on November 5, 2010. As the Vice President for the Eleventh Judicial District, I serve as a member of the Executive Committee. While a number of issues were discussed at the meeting , the most important news for us was the announcement that the Nominating Committee of the State Bar has selected Seymour W. James, Jr., as the next President-Elect of the New York State Bar Association. Seymour, a past president of the QCBA, will be the first president of the NYSBA from Queens County. On behalf of the entire QCBA family we offer our congratulations to Seymour and his family.

Of interest to some of our members is the proposed Code of Judicial Conduct. Consideration of this matter has been deferred until April so that all interested individuals and groups can have their positions before the House of Delegates. The proposed Code and the NYCLA Report are rather lengthy. Anyone who would like a copy can contact me at dlccrimlaw@aol.com.

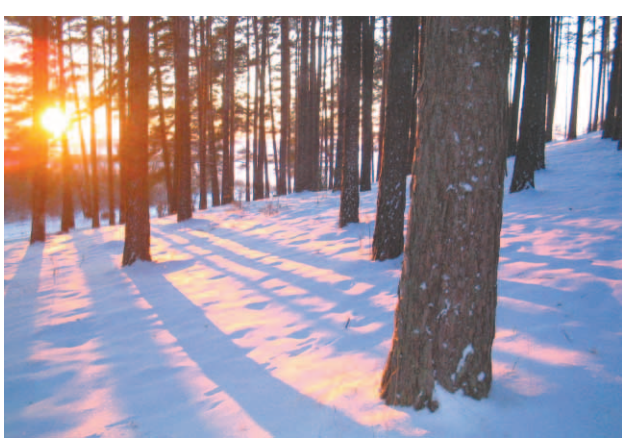
Also discussed at the Executive Committee was the Report of the Special committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence. This report, which took five years to complete, reviews the current bar exam methods and makes some innovative suggestions as to how changes can be made to make it more reflective of one's ability to practice. Again, I can make the report available to anyone who is interested.

We are planning a meeting at the QCBA with representatives of the State Bar, including our own Seymour James, in an attempt to create a mutually beneficial working relationship between the two organizations. The State Bar has resources to act on major issues that affect the practice of law. The QCBA comprised of mostly solo and small firm practitioners provides grass roots representation and a large amount of pro bono to the community. We are attempting to create a model where each association can benefit the other in its areas of expertise.

All members of the QCBA and NYSBA will be invited to attend a forum in the spring to discuss how we can work together for the benefit of all lawyers in Queens.

As always, if there are any questions you have or issues you wish to raise, please contact me.

**Editor's Note*: David Louis Cohen is a Past President, 2007-2008, of the Queens County Bar Association, Chair of the Golf Outing Committee and an attorney in private practice in Kew Gardens.



INSIDE THIS ISSUE

THE DOCKET . . .

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

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

2010 Winter CLE Seminar & Event Listing

December 2010

Wednesday, December 1	UM/SUM Update 2010
Wednesday, December 8	Holiday Party at Floral Terrace
Friday, December 24	Christmas Eve, Office Closed
Friday, December 31	New Year's Eve, Office Closed

January 2011

Monday, January 17	Martin Luther King, Jr.'s Birthday, Office Closed

February 2011

Thursday, February 3	Seminar by Farrell Fritz PC

March 2011

Wednesday, March 2	CPLR Update (Tentative)
Wednesday, March 23	Basic Criminal Law - Pt 1
Wednesday, March 30	Basic Criminal Law - Pt 2

April 2011

Wednesday, April 6	Equitable Distribution Update
Thursday, April 14	Civil Court Committee Seminar
Friday, April 22	Good Friday, Office Closed

May 2011

Thursday, May 5	Annual Dinner & Installation of Officers

CLE Dates to be Announced
Elder Law
Labor Law

NEW MEMBERS

Nicholas George Blatti	Christopher Jannes	George F. McCartney
Karen Lynn Dehnert	Albina Khaimova	Uwayne Mitchell
Andreea Laura Dumitru Parcalboiu	Eileen Lin-Khanali	Kathleen Musich
	Ami Kim	Jennifer Pelton
Christina Marie Gallante	Zelideth Maguina	Gina Redrovan
Eugene Girin	Nazneen Malik	Lisa-Sheri K. Torrence
Carla M. Guzman	Nicholas James Mattia	Kevin William Turbert
James Russell Howard	Petra Harris Maxwell	James Michael Villani
Angel Hristov		Andrew Patrick Wenzel

NECROLOGY

Cosmo J. Di Tucci — Lawrence Halfond

2010 Golf & Tennis Outing Report

BY DAVID LOUIS COHEN

The Annual Queens County Bar Association Golf and Tennis Outing was held on September 13, 2010, at the Garden City Country Club. Over 100 golfers, tennis players and dinner guests had a most enjoyable day. The weather cooperated and the staff at the Club made sure that a great time was had by all.

We are most grateful to our sponsors whose participation enables us to run a first class outing. Empire Bail Bonds sponsored the dinner and our Tee Sponsors were: Tri Star Reporting, Scott Baron, Esq., Steve Orlow, Esq., Scott Kaufman, Esq., Mattone Group, LLC., Signature Bank, Sidney Frank Imports, Grassi Consulting, Big Apple Abstract, Ridge Abstract, Bianco and Dooley Insurance, HSBC, Sterling National Bank, Eric Bauman-DWI and Psychological Evaluations , Robson Forensics, and Mahon, Mahon, Kerins and O'Brien. Thanks also goes to Max Leifer (The Brandy Library), Big Apple Abstract, HSBC, Signature Bank, Sterling National Bank and the Garden City Country Club for their kind donation of raffle prizes. We at the QCBA and all those who attended the outing thank you all for your continuing support of this event.

The Golf Committee offers a special thank you to Joseph Risi who arranged for the beer and rum on the course, and the putting contest.

Our prize winners were:
Putting Contest:
Michael Wagner and Jerry Magaldi.
Closest to the Pin:
John Pittoni
President's Cup-Low Gross Member:
John Steigler
Low Gross Guest:
Michael Canny

I hope you all had a wonderful time and we look forward to seeing you next year on September 12th, 2011 - Garden City Country Club.

QVLP Summer 2010

Thanks to Emily Small & Nabeel Gadit (Touro Law Center) – top Greg Cheung (St. John's Law) & Deidre Baker (CUNY Law) for the great job they did interning for our pro bono programthe Queens Volunteer Lawyers Project for the summer of 2010!

Publisher:
Long Islander Newspapers, LLC. under the auspices of Queens County Bar Association. Queens Bar Bulletin is published monthly from October to May.

Advertising Offices:
Long Islander Newspapers, 149 Main Street, Huntington, New York (631) 427-7000

Send letters and editorial copy to:
Queens Bar Bulletin, 90-35 148th Street, Jamaica, New York 11435

Editor's Note: Articles appearing in the Queens Bar Bulletin represent the views of the respective authors and do not necessarily carry the endorsement of the Association, the Board of Managers, or the Editorial Board of the Queens Bar Bulletin.

"Queens Bar Bulletin"
(USPS Number: 252-520) is published monthly except June, July, August and September by Long Islander Newspapers, LLC., 149 Main Street, Huntington, NY 11743, under the auspices of the Queens County Bar Association. Entered as periodical postage paid at the Post Office at Jamaica, New York and additional mailing offices under the Act of Congress. Postmaster send address changes to the Queens County Bar Association, 90-35 148th Street, Jamaica, NY 11435.

PRESIDENT'S MESSAGE

Greetings!

I hope that each of you had a wonderful Thanksgiving.

In this season of giving (and giving thanks!), I'm proud of how generously QCBA members have given to our Association, and the entire legal community. The list of dedicated volunteers is long, but I would particularly like to thank and congratulate the following people:

Congratulations to **Stephen Singer**, a former co-chair of QCBA's Criminal Court Committee and a past President of the QCBA, on his recent retirement from legal practice. From my earliest days as a practicing attorney, I remember, Stephen as an institutional figure, walking down the hallway of the Queens County Criminal Court building. His passion for justice and his firm commitment to the QCBA have been outstanding throughout his career, and I hope that you were lucky enough to attend one of the outstanding yearly criminal law seminars that Stephen organized with his co-chair, and past Association President Les Nizin.


Chanwoo Lee

Spiros Tsimbinos, another past President of the Association, has been commuting to Queens from his semi-retirement in Florida to Chair our Judiciary Committee meetings and organize the annual Frank S. Polestino Memorial Lecture on the Recent Significant Decisions from Our Appellate Courts. This year's event drew more than 200 attendees and was highlighted by a special presentation to the Honorable Fred T. Santucci, Associate Justice of the Appellate Division, Second Department, in recognition of his retirement and his contribution to the legal community. We were fortunate to also have the participation of A. Gail Prudenti, Presiding Justice, Randall Eng and Sheri Roman, Associate Justices of the Appellate Tterm Second Department, and Daniel W. Joy, former Associate Justice. (Justices Eng, Roman and Joy are from Queens and are members of our Association.) Thank you, Spiros, for bringing this distinguished group together.

Congratulations to **Seymour James**, Attorney in Charge of the Criminal Defense Division of the Legal Aid Society and a past president of the QCBA, for his nomination as President Elect of the NYSBA. Seymour, the first person from our Association to hold this important position, will serve as NYSBA President in 2012.

And finally, congratulation to **Rich Gutierrez**, the current President Elect of QCBA, on his appointment by A. Gail Prudenti, Presiding Justice of the Appellate term, to Chair the Grievance Committee for the Second Eleventh and Thirteenth Judicial Districts.

Our Association, and the entire legal community, benefits from the participation of these dedicated members. And that same commitment is manifested in QCBA's **CLE Programs**, which are the work product of many dedicated Committee Chairs. As just one example, in response to our member's demands and the needs of newly-admitted attorneys, the Supreme Court committee, led by Joseph Carola, Co-Chair has put together a **luncheon series CLE focused on basic legal skills**.

With the help of all our dedicated Committee Chairs, QCBA will continue to evaluate and improve the programs and services provided to our members. QCBA could not exist without the leadership of these members, and we are grateful for your service!

Chanwoo Lee,
President

The First Amendment and State Action

BY ANDREW J. SCHATKIN*

The First Amendment to the United States Constitution provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

As such, in pertinent part, the First Amendment has a provision that Congress shall make no law abridging the freedom of speech. There has developed a First Amendment Action where free speech is attacked or compromised. However, there is a limitation on the viability and nature of this type of legal action, if brought, in the Courts. That prohibition, or caveat, is that there must be some sort of State Action or involvement. If the State is the object-defendant of the lawsuit, brought by the plaintiff, the State Action issue is no issue. State Action becomes an issue when a private entity is involved.

Thus, it is black letter law that the First Amendment only protects where free speech is compromised by State actors or actions and provides no help with respect to purely private conduct.[1]

A more detailed and explicit rule as to what state actions must be pleaded and proved where a private entity is involved is set forth in Gorman-Bakos v. Cornell Cooperative Extension of Schenectady County[2]. In Gorman-Bakos, former volunteers with a youth program sued a government-funded cooperative that ran the program, and its officers, directors, and board members, alleging that defendants retaliated against them by, inter alia, terminating their volunteer status and participation in the program, in violation of their Federal and State Constitutional rights. The defendants moved for Summary Judgment, and the United States District Court for the Northern District of New York granted the Motion, but denied the defendants' request for attorneys' fees.

In this case the Gorman-Bakos Court, proceeded to analyze whether the cooperative was a State actor. The Court of Appeals noted that, in this case, the District Court assumed that the cooperative was a State actor, but provided little or no discussion with respect to the issue. The Court concluded, because the parties did not argue it on Appeal, the Court declined to reach it. The Court concluded, however, that its own sense of the law suggested that the cooperative could be treated as a State actor for First Amendment purposes, citing Loce v. Time Warner Entertainment Advance/New House Partnership, 191 F.3d 256 (2nd Cir. 1999). In Loce, the Gorman-Bakos Court noted, that, in order to establish a First Amendment claim against a private entity, based on that entity's relationship to the State, the plaintiff must demonstrate a close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be treated as that of the State itself. The Loce Court stated that such a nexus could be found when a private actor is a willful participant in joint activity with the State or its agents, but that, in the absence of such a nexus, there can be no finding of State action, based on the private entity's creation, funding, licensing, or regulation by the government.


Andrew J. Schatkin

The Court noted that a private entity is not a State actor, merely because its conduct is authorized by a State law. The Gorman-Bakos Court went on to state that State action can be found, when the State exercises its coercive power or significant encouragement; when a private actor is a willful participant in joint activity with the State; when an entity is controlled by the State or an agency thereof; when an entity has been delegated a public function by the State; when an actor is entwined with government policies; or when the government is entwined with the entity's management or control, citing Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed.2d 807 (2001).

The Court concluded that the corporate defendant, the cooperative, was a State actor in this case. The Court noted that it was originally created and funded under a Federal program providing for cooperative extension programs to operate in conjunction with the United States Department of Agriculture and State Land Grant Universities to disseminate useful information for individuals living in rural areas. The Court went on to analyze that, under New York Law, a "subordinate governmental agency" is an organization, which either through legislative act or contract with the State, or subdivision of the State, performs governmental functions, and that the New York County Law allows a County Board of supervisors to pay for the support of an extension service, including staff salaries, and to levy taxes to support the cooperative. The Court further stated that the County law defined the scope of the extension service's programs, which may extend to "agriculture, home economics, 4-H, and community betterment", as well as its organizational structure. The Court further, went on to state, that, under the cooperative's by-laws, its form and organization are subject to approval by Cornell University as an agent of the State, and that the policies and programs of the cooperative are set by its Board of Directors in conjunction with the Director of extension programs of Cornell University. The Court concluded that its Board of Directors must include a representative of the Director of Extension Programs and a member of the Schenectady County Legislature, and that, finally, the cooperative entered into a memorandum of understanding with Cornell University, as an agent of the State, and as a designated agent of the United States, for Cornell to provide extensive support and oversight for the cooperative.

In sum, the court concluded that the cooperative was created pursuant to State law to carry out County, State, and Federal educational functions; was funded by Federal, State, and County governments; was subject to a significant oversight by Cornell University, as an agent of the State; and was defined in State law as a subordinate governmental agency. The Court ended its analysis with the statement that these factors demonstrated that the cooperative was a creature of the State, and so a State actor for First Amendment purposes.

Loce v. Time Warner Entertainment Advance/New House Partnership[3] cited in Gorman, bears some detailed analysis. In Loce, independent producers of cable television programming brought an action for Declaratory and Injunctive Relief against a cable operator, alleging that the operator violated First Amendment and the Communications Act of 1934, when pursuant to its Indecency Policy, the cable operator refused to transmit certain programs submitted by producers on its leased access channels and suspended producers' rights to make further submissions. The cable operator moved for Summary Judgment. The United States District Court dismissed most claims, but declared void that portion of the Indecency Policy that permitted suspension of program providers.

More specifically, most important, the United States District Court held that the cable operator was not a State entity for First Amendment purposes. The Court stated, in its analysis, of the plaintiff's claims under the First Amendment, that, in order to establish a First Amendment claim against a private entity, based on the entity's relationship to the State, a plaintiff must demonstrate a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter must be fairly treated, as that of the State itself. The Court cited, in support of this proposition, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed.2d 477 (1974). The Court went on to state that such a nexus can be found where the private entity has operated as a willful participant in

Continued On Page 4

The First Amendment and State Action

Continued From Page 3

joint activity with the State or its agents, but may not be premised on the private entity's creation, funding, licensing, or regulation by the government.[4]

The Court also stated that a private entity is not a State actor, merely because its conduct is authorized by State law. The Court concluded, on the facts before it, that the District Court correctly ruled that there was no basis to infer that Time Warner's Indecency Policy constituted State action. The Court stated that the fact that Federal Law requires a cable operator to maintain leased access channels, and the fact that the cable franchise is granted by local government, are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as State action. The Court concluded its analysis of this issue that it did not suffice that cable operators, in their management of leased access channels, are subject to statutory and regulatory limitations.

Chan v. City of New York[5] is also helpful and instructive on the issue of what may be said to be State action such as to constitute a First Amendment claim against a private entity. In Chan, laborers under municipal contracts sued a contractor, City, and City Department of Housing Preservation and Development for back wages, alleging that they were not paid prevailing wages as required by the Housing and Community Development Act (HCDA). The United States District Court for the Southern District of New York denied in part the defense motion to dismiss and certified Interlocutory Appeal. The United States Court of Appeals held, in pertinent part, that the contractor was a State actor under the close nexus test for purposes of Section 1983 action.

Initially the Court cited a number of cases including Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 453, 42 L. Ed.2d 477 (1974); Hadges v. Yonkers Racing Corp., 918 F.2d 1079, 1081 (2d Cir. 1990); San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 547, 107 S. Ct. 2971, 2985, 97 L. Ed. 427 (1987); and Blum v. Yaretsky, 457 U.S. at 1004, 102 S. Ct. at 2786 (1982).[6]

The Court analyzed, based on the rule of law established by the aforecited case law, that the present Complaint met the close nexus test, because the facts alleged, and supported by the contracts relied on, easily permit the inference that CPC could not pay wages at the level required by Section 5310 because of strictures imposed by the municipal defendants. The HPDRFPs provided that the contractor's overall budget was to be determined by setting a "person-day rate", multiplied by the number of trainees, multiplied by the number of days worked. That rate was to include wages paid to the worker, and all other expenses of running the program. HPD placed a dollar ceiling on the "person-day rate". The Court went on to state that to win the contracts, CPC was required to make its bids based on wages below those levels. The Court concluded that, in sum, the facts alleged would suffice to permit a finding that HPD effectively requires CPC to pay less than the minimum wages required by Section 5310, and that the actions by CPC, in paying those sub minimum wages was the responsibility of the municipal defendants, and that CPC's conduct was therefore a State action.

In conclusion, the analysis of what constitutes State action under Pickering, Gorman-Bakos, Loce, and Chan reveals a fairly set nexus rule that the nexus must be substantial, if not willful participation with the State or its agents. Funding or licensing or authorization by State law is not enough. There must be some form of coercive power, if not significant encouragement. If there is no willful participation in a joint activity with the State. It is not enough that the private entity is a business effected with the public interest; that the State approved of or acquiesced in the initiatives of the private entity; that a business in subject to extensive regulation; was publicly subsidized, or had been given monopoly status by the State. The nexus requirement, as stated in Chan, is to assure that Constitutional standards are invoked, only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.

It is not enough that a State actor is chartered by Congress as stated in Loce. One may say that to be a State actor or to prove State action, there must be close nexus or connection with the State by the private entity.

It would appear that the State actor rule in the form of the close nexus test is clear on its face. However, there are exceptions to this strict rule requiring State action in First Amendment cases. A leading treatise on Employment Law explains these exceptions.[7] In that treatise, the authors opined and concluded that there was a three part test stated in the leading case, Pickering v. Board of Education[8] to determine whether the discharge of a "public employee" was made on the basis of protective speech. The authors then stated, analyzing Pickering, that first the employee must be speaking on a matter of public concern; second, the court must balance the interest of the employee, as a citizen, on commenting on matters of public concern, against the government employer's in running an efficient operation; and third, the employee's protected conduct must be a motivating factor or causation in the government employer's decision to discharge.

The authors then cited two additional cases on this issue, Connick v. Meyers[9] and Rankin v. McPherson[10]. In Rankin, the United States Supreme Court held a statement by a clerical employee in the County Constable's office, after hearing of the attempt to assassinate the President that, "if they go for him again, I hope they get him" when the statement was made in the course of a conversation with a co-employee concerning the President's cutting back on Welfare and other services, did not amount to a threat punishable as a crime, but rather dealt with a matter of "public concern" and thus was protected by the First Amendment.

Again, the United States Supreme Court held in Connick, that the discharge of a former assistant district attorney did not violate her constitutionally protected right of free speech, where, when the district attorney proposed to transfer an attorney, she strongly opposed, expressing her views to several of her supervisors, and thereafter prepared a questionnaire, which she distributed to the attorneys concerning the office transfer policy, office morale, the need for a grievance committee, level of confidence in supervisors, and whether employees felt pressure to work in political campaigns, and except for the question regarding pressure upon employees to work in political campaigns, questions posed in questionnaire did not fall under the rubric of matters of "public concern".

"Potentially, the most likely basis for a sweeping expansion of the right to freedom of expression for private sector employees would be through an expansion of the public policy exception to the at will rule. In a leading, but still singular case, *Novosel v. Nationwide Insurance Co.,* a district claims manager for an insurance company was discharged for refusing to lobby the Pennsylvania legislature in opposition to a "no fault" insurance bill under consideration. The Third Circuit concluded that concern for the rights of political expression and association is sufficient to state a public policy under Pennsylvania law. The case was remanded for application of balancing considerations based on *Pickering* and later cases. A related public policy argument also may be based on state constitutional provisions, which protect freedom of expression. In addition, some employee speech may constitute 'opposition' activity, which is protected under the antiretaliation provisions of Title VII and other civil rights statutes.

In evaluating freedom of expression claims in the private sector, the courts often differentiate between internal and external speech. Statements by employees, often complaints, made within the workplace are generally afforded less protection by the courts. Thus, for example, discharges have been upheld where employees complained about internal accounting practices, inadequate service to customers, and defective products. By contrast, external speech is much more likely to be protected under either whistleblowing laws or common laws. This includes statements to government agencies, to the news media, and in some public fora."[11]

Novosel v. Nationwide Ins. Co.,[12] is interesting and instructive in stating a new rule in this respect. In Novosel, a former employee brought a wrongful discharge action against a former private employer. The United States District Court for the Western District of Pennslyvania granted the former employer's Motion to Dismiss and the former employee appealed. The United States Court of Appeals for the Third Circuit held that the former employee's allegations of discharge for refusal to participate in the former employer's lobbying effort, and his privately stated opposition to the company's political stand, stated a claim for wrongful discharge under Pennsylvania law.

The Court proceeded to analyze whether a cause of action for wrongful discharge was cognizable. The Court stated that although Novosel was not a government employee, the public employee cases do not confine themselves to the narrow question of State action, rather, the court stated, these cases suggest that an important public policy is, in fact, implicated wherever the power to hire or fire is utilized to dictate the terms of employee political activities.

The Court concluded that an important public policy was at stake, and when dealing with public employees the cause of action arose directly from the Constitution. The court then stated that the protection of important political freedoms goes well beyond whether the threat comes from State or private bodies. The Court stated that the inquiry before it was whether the concern for the rights of political expression and association, which animated the public employee cases, was sufficient to state a public policy under Pennsylvania law. The Court concluded that since an important public policy was at stake, under Geary v. United States Steel Corp.[13], Novosel's complaint disclosed no plausible and legitimate reason for terminating his employment, and that his discharge violated a clear mandate of public policy. The Court stated that the holding of the Supreme Court in Geary was to be interpreted to extend to a non-Constitutional claim, where a corporation conditioned employment upon political subordination.

Clearly, the holding in Novosel establishes a private cause of action for a First Amendment violation on the grounds of public policy to the extent that the right of free speech and free expression is extended to political expression on the part of private sector employees.

The author also suggests that a related public policy argument also may be based on State Constitutional provisions, which protect freedom of expression. Finally, the authors, and this is most significant and important, state that employee's speech may constitute "opposition" activity, which is protected under the anti-retaliation provisions of Title VII and other civil rights statutes. The authors also point out that external speech may be protected under either whistleblowing laws or common law and this includes statements to government agencies, statements to the news media, or in public fora.

Clearly, this leading treatise defines and isolates several areas in which private sector free speech is protected without the requirement of State action including, 1.) the public policy exception; 2.) employee speech which is "opposition" activity protected under the anti-retaliation provisions of Title VII; and 3.) speech protected under either whistleblowing laws or common law, which includes, the author points out, statements to the news media. [14]

CONCLUSION

This analysis of what constitutes State action for First Amendment claim purposes reveals a basic rule that State action must be shown, or rather pleaded and proved, on the basis of the close nexus test established by the leading cases of Pickering, Gorman-Bakos, Loce, Hurley, Loce and Chan. Although this rule seems well set and not subject to modification or inversion, there are emerging sub-rules. They include a public policy exception as stated in Novosel v. Nationwide Ins. Co.[15] and other exceptions such that the employee speech may constitute "opposition" activity, which is protected under the anti-retaliation provisions of Title VII and other civil rights statutes and that external speech may be protected either under common law or whistleblowing law, and this includes statements to government agencies, statements to the news media, and in public fora.

Thus, it would appear that the apparent set rule of Pickering and the other cases cited here is far from fixed and that other rules are developing and exceptions evolving.

* Andrew J. Schatkin practices law in Jericho, New York and is the author of over 150 legal articles and the contributor to five books. In addition to his law degree he has a Dip. in International Human Rights from Strasbourg, France and a Certificate in International Law from the Hague in the Netherlands. He is listed in *Who's Who in America*.

Endnotes

1 See Hurley v. Irish American Gay Group of Boston 515 U.S. 557 (1995) See also Pickering v. Board of Ed. of Township High School Dist. 205, Will County, Ill., 391 U.S. 563 (1968)
2 252 F.3d 545 (2nd Cir. 2001)
3 191 F.3d 256 (2nd Cir. 1998)
4 See Loce v. Time Warner Entertainment, Supra at 266
5 1 F.3d 96 (2nd Cir. 1993)
6 Chan v. City of New York, Supra at 106
7 Rothstein, Craver, Schroeder, Shoben, and Vandervelde, *Employment Law*, West 1994, pp. 313-316
8 Id.
9 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed.2d 708 (1983)
10 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed.2d 315 (1987)
11 Rothstein, Craver, Schroeder, Shoben and Vandervelde, *Employment Law*, West 1994, pp. 315, 316
12 721 F.2d 894 (3rd Cir. 1983)
13 456 Pa 171, 319 A2d 174 (1974)
14 Id
15 Id.

QCBA Adopts NYSBA Lawyers Assistance Model Policy

The Queens County Bar Association Board of Managers at their September 2010 Board meeting has adopted the NYSBA Lawyers Assistance Committee Model Policy. Below is the resolution.

WHEREAS, the Queens County Bar Association is committed to assisting persons in the legal profession who are dealing with impairment issues that affect job performance; and

WHEREAS, practice management studies have demonstrated that early intervention and treatment of law firm or legal department professionals can assist a firm or department to avoid negative consequences that can result from a failure to deal with impairment and to protect the interests of the clients; and

WHEREAS, the Queens County Bar Association's Lawyer Assistance Committee has adopted the "NYSBA Model Policy for Law Firms/Legal Departments Addressing Impairment" ("Model Policy") to assist law firms and legal departments in addressing impairment issues;

NOW, THEREFORE, IT IS

RESOLVED, that the Queens County Bar Association encourages law firms and legal
departments to develop appropriate policies, tailored to their own needs and purposes and the needs and interests of the clients, to address impairment issues; and it is further

RESOLVED, that the Association hereby approves the Model Policy as a voluntary guide for law firms and legal departments to use in developing their own specific policies for legal professionals, and to encourage development of policies with respect to other employees; and it is further

RESOLVED, that the officers of the Association and the Lawyer Assistance Committee are hereby authorized to distribute and promote the Model Policy and to take such other and further action as they may deem appropriate to implement this resolution.

The policy is now available on the QCBA Web site, www.qcba.org.

Discoverability Of A Personal Injury Plaintiff's Facebook And Myspace Pages

Continued From Page 1

of these social networking sites else they would cease to exist."[5]

With regard to guiding precedent, the opinion states that, "there is no New York case law directly addressing the issues raised by this application, there are instructive cases from other jurisdictions."[6] The Court carefully analyzed and discussed cases on point from other jurisdictions and, in addition, provided a succinct primer on social networking sites. The Romano decision is a must read for the personal injury bar as it is an early guideline for pursuing and defending against, discovery of a plaintiff's social networking site. Note to the plaintiff's bar: there is nothing in the Romano decision that would prohibit a plaintiff from obtaining disclosure of the private pages of a defendant's social networking site, assuming a showing is made that defendant's position in the course of defending the case is inconsistent with information contained on defendant's public portions of their site.

In addition, the Romano case does not stand for the proposition that a defendant in a personal injury case be given unqualified access to a plaintiff's restricted content on his or her social networking site. The case implicitly limits discovery of a litigant's private restricted Facebook or MySpace pages. According to Romano, a defendant must first make a showing that content in the public portion of a plaintiff's Facebook or MySpace page is inconsistent with a position taken by plaintiff in the law suit. Then, and only then, can discovery of the private restricted portions be considered. In this regard, the Court in Romano compared the limitations/disabilities claimed by plaintiff in the lawsuit, with the public portions of the plaintiff's two sites, and concluded:

Thus, it is reasonable to infer from the limited postings on plaintiff's public Facebook and MySpace profile pages that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence.[7]

Therefore, before a defendant can delve into a plaintiff's private site content, a defendant must first establish that an inference can be drawn from plaintiff's unrestricted site content that material useful in defending the case is likely to be contained in the private portions.

With the ever growing use of on-line networking sites and the increasing use of computer on-line research and investigation by lawyers who practice in the field of personal injury litigation, we will no doubt see more cases defining the discoverability of parties' self-restricted on-line postings in personal injury cases.

Glenn Verchick, Esq., is a partner in the Brooklyn law firm of Werbel, Werbel and Verchick, LLP, as well as a trustee of the Brooklyn Bar Association and Managing Editor of the Brooklyn Barrister. The foregoing is reprinted with permission of the Brooklyn Bar Association.

[1] Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (S.C. Suff. Cty., Sept. 21, 2010, J. Jeffrey Arlen Spinner)
[2] Id. at 653.
[3] Id. at 654.
[4] Id. at 654.
[5] Id. at 657.
[6] Id. at 654.
[7] Id. at 655.

Books At The Bar

BY HOWARD L. WIEDER

VOICES OF THE DEATH PENALTY DEBATE:
A CITIZEN'S GUIDE TO CAPITAL PUNISHMENT
BY RUSSELL G. MURPHY
Paperback: 328 pages
Available at **www.amazon.com** for $35.95, not including shipping
Publisher: Vandeplas Publishing (May 18, 2010)
Language: English
ISBN-10: 1600421083
ISBN-13: 978-1600421082

THE HIDDEN HISTORY OF ESSEX LAW SCHOOL
BY EDWARD J. BANDER
Trafford, 2010. Available on Amazon
$15.50. 291 p. $19.50
ISBN 978-1-4269-3077-5; 3078-2 [ebook]

This column gives you two great suggestions for affordable and excellent holiday gifts for lawyers, lawyers-to-be and well informed readers. Both are written by law professors, but are written in an engaging style that captures the reader. **PROFESSOR RUSSELL G. MURPHY** has written a wonderful book on the death penalty, **VOICES OF THE DEATH PENALTY DEBATE: A CITIZEN'S GUIDE TO CAPITAL PUNISHMENT**, that does not take a position, but shows both sides of the coin. His beautifully written book is not only filled with pertinent statistics, but contains the testimony of persons on the subject, both for and against the death penalty, that will leave you with long standing reflection and pause for contemplation. Especially for Christmas and the holidays, a time for reflection, Russell Murphy's easy to read, engaging book on the death penalty makes a great gift.

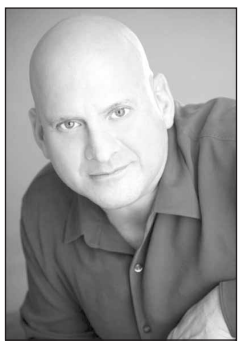
PROF. EDWARD J. BANDER, a professor emeritus of Suffolk University School of law, who taught me legal research and writing at N.Y.U. School of Law during 1975-1976, has written a delightful work of fiction, **THE HIDDEN HISTORY OF ESSEX LAW SCHOOL**. **PROF. BANDER's** book will provide delightful amusement, the perfect dessert after reading **RUSSELL MURPHY's** book on the death penalty.

Confirming my assessment of the excellence of both **PROF. MURPHY'S** book on the death penalty debate and **PROF. BANDER'S** book of fiction, both books got the highest grades from reviewers on www.amazon.com.

VOICES OF THE DEATH PENALTY DEBATE: A CITIZEN'S GUIDE TO CAPITAL PUNISHMENT
BY RUSSELL G. MURPHY
Paperback: 315 pages

RUSSELL G. MURPHY is Professor of Law at **SUFFOLK UNIVERSITY LAW SCHOOL IN BOSTON, MASSACHUSETTS**. During his 37-year career as legal teacher, law school administrator and scholar, he has published numerous articles on such diverse subjects as international human rights, the rights of criminal defendants, the admiralty law of treasure hunting, punitive damages and capital punishment. **PROFESSOR RUSSELL G. MURPHY** was a witness at the New York Hearings. **VOICES** is based on his decade-long work on the subject of capital punishment and honors the memory of murder victim Jill Russell Cahill, whose story was central to the New York Hearings.

VOICES OF THE DEATH PENALTY DEBATE ["VOICES"] is a deliberately different book. It provides a balanced account of the arguments pro and con for the death penalty, focusing on the State of New York. It seeks to educate a national and international citizenry about capital punishment through testimony at the historic 2004 and 2005 Hearings held by several committees of the New York State Legislature on whether the death penalty should be reinstated in New York State.


Howard L. Wieder

VOICES presents arguments on both sides of this issue from experts, ordinary citizens, victims, organizations, religious leaders, and the exonerated. An explanatory narrative by the author accompanies this testimony. Topics include death penalty facts and figures, constitutional limitations, justifications for capital punishment, costs, the prosecutorial process, race, mental illness, executing the innocent and the international perspective.

Describing **RUSSELL MURPHY's** book **VOICES OF THE DEATH PENALTY DEBATE: A CITIZEN'S GUIDE TO CAPITAL PUNISHMENT, Professor EDWARD J. BANDER**, whose most recent book is described later in this column, provides this illuminating and articulate review:

"If I were asked, as a librarian, for one book to recommend on the subject of capital punishment, it would be Professor Murphy's *Voices*. This is a straightforward, unbiased report on the subject based on public hearings in New York State "on every aspect of death penalty practice and policy." [p. 1] Professor Murphy has masterfully stitched together the testimony in the following categories: Justification for capital punishment (retribution, deterrence, incapacitation and rehabilitation), costs and the prosecutorial process, race, mental illness and innocence. He also provides death penalty facts and figures, constitutional principles, and an international view of the subject. The volume has an index to witness statements, and lists Assembly Committee Chairs and Appearances. See Professor Rustad's review essay on this book, "Why the Death Penalty Should be Abolished" (draft copy at the time of reading).

"What impresses me most about the book is the demeanor of the witnesses. There are no politicians here looking for votes. Here are people looking for answers that have been sought since at least the Crucifixion. Read Scott Turow, Barry Scheck, Robert Morg[e]nthau, Robert Meeropol and other witnesses and you find people looking for answers not proselytizing. And compare that Governor Dukakis may have lost the Presidency on the issue of capital punishment with an item in the New York Times (9/3/10, p. A16) about a man whose wife and children were murdered and is seeking the death penalty for the guilty parties (a much used hypothetical come to life that is used in testimony in Professor Murphy's book). Mr. Dooley wrote that the Supreme Court follows the election returns and a responsible citizenry needs books to educate the voters. The issue demands the attention Professor Murphy has given it.

"What Professor Murphy's book does is ask the reader to expand his horizon. His book should be on any shelving on the subject that might include:

Actual Innocence- Five Days to Execution and Other Dispatches from the Wrongly Convicted. Jim Dwyer (2000); *Actual Innocence: When Justice Goes Wrong and How to Make it Right*. Jim Dwyer, Peter Neufeld, Barry Scheck (2001); *The Airman and the Carpenter: The Lindbergh Kidnapping and the Framing of Richard Hauptman*. Ludovic Kennedy (1985); *All Things Censored. Mumia Ab-Jamal*. N. Hanrahan, ed. (2000); *Dead Man Walking: An Eyewitness Account of the Death Penalty in the U.S*. (1993, 1994); *Dead Wrong: A Death Row Lawyer Speaks Out Against Capital Punishment*. Michael A. Mello (1997); *The Death Penalty*. Mark Tushnet (1994); *Death Penalty in America: Current Controversies*. Hugo Adam Bedau, ed. (1997 anthology); *Divided Passions: Public Opinion on Abortion and the Death Penalty*. Kimberly J. Cook (1998); *The Encyclopedia of Capital Punishment in the U.S*. (2001); *A Handbook on Hanging*. Charles Duff. Christopher Hitchens introduction (1961, 2001); *In Spite of Innocence: Erroneous Convictions in Capital Cases*. Michael L. Rodelot, H.A. Bedau and C, E. Putnam (1992); *Is the Death Penalty Dying* Austin Sarat (2008); *Just Revenge: Costs and Consequences of the Death Penalty*. Mark Costanzo (1997); *The Killing State: Capital Punishment in Law, Politics, and Culture*. Austin Sarat (1999); *A Murder: From the Chalk Outline to the Execution Chamber*. Greg Fallis (1999); *Proximity to Death*. William S. McFeeley (2000 – Georgia and capital punishment); *Sentenced to Death: The American Novel and Capital Punishment (1937); Sentenced to Death-Capital Punishment in American*. Raymond Paternoster (1991); *When the State Kills: Capital Punishment and the American Condition*. Austin Sarat (2001); *Who Owns Death? Capital Punishment, The American Conscience, and the End of Executions*. Robert J. Lifton and Greg Mitchell (2000).

"Professor Murphy's book suggests that capital punishment should not be left to the experts. In "Just Trying to be Human in This Place" Storytelling and Film in the First-Year Law School Classroom, Kate Nace Day and Russell G. Murphy, 39 *Stetson Law Review* 247 (2009) write that storytelling and film should be an integrated part of the law school curriculum. And certainly capital punishment and fiction are bedfellows as the following list indicates: *American Tragedy* by Theodore Dreiser; *Anatomy of a Murde*r by Robert Traver; *Billy Budd* by Herman Melville; *Ethel-The Fictional Autobiography of Ethel Rosenberg* by Tema Nason; *Executioner's Song* by Norman Mailer; *In Cold Blood* by Truman Capote; *The Lottery* by Shirley Jackson; *McTeague* by Frank Norris; *Measure for Measure* by William Shakespeare; *Native Son* by Richard Wright; *The Ox Bow Incident* by Walter Von Tilburg Clark; *A Tale of Two Cities* by Charles Dickens; *Winterse*t by Maxwell Anderson. While many of these novels and plays have been made into movies, in many instances they lose something in the script writing.

"Professor Murphy's book is a thinking person's *vade mecum*. It is vital for the American people to be informed by people without rancor and just as you should not leave war to the generals you should not leave this issue to the politicians. This country needs more Sydney Cartons than the knitting Madame Defarges. I have not made a division in this listing of books as to what philosophy you would take from reading any one of them. Like Russell Murphy in his classic book, I leave it to the reader. You are the jury."[1]

I wholeheartedly concur with Professor Edward Bander's review of **RUSSELL MURPHY's** book on the death penalty. If you want a book that is preachy, self-righteous, and has an ax to grind, go elsewhere. **MURPHY** presents facts and statistics and then quotes testimony from the New York State legislative hearings that will leave you absorbed by the exquisite account, emotionally spent when you read the testimony of what hell was endured by prisoners in New York State who were unjustly convicted of murder, whose complete innocence was established after spending many years in prison, and, if you are a thinking person, who is not rigid in your views, and, above all, well informed.

I especially appreciated **RUSSELL MURPHY's** chapter on "innocence." I could not put down his book. I was gripped by the excellently written, horror stories of poor souls who spent years in prison before their innocence was confirmed by the Innocence Project and talented lawyers, including Barry Scheck. In one case, a swab was found lying in a box that was found only by visual inspection of the boxes, and not just reading an inventory or table of contents. That swab proved the innocence of a man wrongfully convicted of murder who was falsely accused of rape and murder despite having had confirmed alibis. The book relates also the overreaching of zealous prosecutors and perjured testimony by law enforcement officers. Sadly, some of the wrongful convictions were repeatedly affirmed on appeal, and only, with luck, the true story with real evidence of innocence was discovered. That chapter alone is worth the modest price of this phenomenal book. Even those who are not lawyers will appreciate and understand the down-to-earth, captivating writing of **RUSSELL MURPHY**.

THE HIDDEN HISTORY OF ESSEX LAW SCHOOL
BY EDWARD J. BANDER
Trafford, 2010. Available on www.Amazon.com
291 pages, priced between $15.50 to $19.50
ISBN 978-1-4269-3077-5; 3078-2 [ebook]

THE HIDDEN HISTORY OF ESSEX LAW SCHOOL is the latest work of the prolific and entertaining author **EDWARD J. BANDER**. The best description is stated by one reviewer describing the book at **www.amazon.com**:

"What Turow's *One L* and John Jay Osborn's *Paper Chase* was for first tier law schools, *The Hidden History of Essex Law School* (available on **www.Amazon.com**) is for the other tiers. Tom Jones, Jr., Essex Law Librarian, is asked to write a centennial history of the law school. He decides to write two histories: the one the dean wants and the real one. His interviews with practitioners, judges, and law professors uncovers sexu-

Continued On Page 14

Court Notes

The Following Attorneys Were Disbarred By Order Of The Appellate Division, Second Judicial Department:

Adrien J. Wooley (January 19, 2010)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations of professional misconduct including fraud and conflicts of interest in the course of representing a client in a real estate transaction as well as mishandling client funds entrusted to him as a fiduciary.

Edward Murray Fink (January 26, 2010)

The respondent was disbarred, on consent, effective immediately, by order of the Supreme Court of New Jersey dated May 11, 2009. Upon the Grievance Committee's application for reciprocal discipline pursuant to 22 NYCRR §691.3, he was disbarred in New York.

James T. Hytner, admitted as James Thomas Hytner, a suspended attorney (January 26, 2010)

The respondent was disbarred, on default, upon a finding that he was guilty of 10 charges of professional misconduct, including failure to cooperate with the investigation of five (5) complaints of professional misconduct filed against him.

Matthew S. Abramowitz, admitted as Matthew Seth Abramowitz (February 23, 2010)

The respondent tendered an affidavit of resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations that he misappropriated client funds entrusted to him as a fiduciary, failed to insure that adequate funds were on deposit for a series of checks issued from attorney operating accounts maintained incident to his practice of law and failed to comply with his fiduciary responsibilities with respect to the handling of two attorney escrow accounts maintained incident to his practice of law.

Nat J. Azznara, admitted as Nat John Azznara (February 23, 2010)

The respondent tendered an affidavit of resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations that he, *inter alia*, breached his fiduciary duty by failing to safeguard funds entrusted to him.

Donna A. Campbell, a suspended attorney (February 23, 2010)

The respondent tendered an affidavit of resignation wherein she acknowledged that she could not successfully defend herself on the merits against allegations that she, *inter alia*, neglected a legal matter entrusted to her and breached her fiduciary duty regarding the maintenance of client estate funds.

Dustin Dente, admitted as Dustin John Dente (February 23, 2010)

The respondent tendered an affidavit of resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations of improprieties involving real estate transactions in that he failed to promptly pay or deliver funds to clients and/or third parties and failed to properly safeguard funds in his attorney trust account.

Frank I. Goodman, admitted as Frank Ivan Goodman (February 23, 2010)

The respondent tendered an affidavit of resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations of irregularities in his attorney escrow account, including a dishonored check.

Diana J. Szochet

Christopher Paul McCarthy (February 23, 2010)

On March 16, 2009, the respondent was convicted, upon his plea of guilty in Supreme Court, Nassau County, of operating a motor vehicle while under the influence of alcohol, a class E felony; aggravated unlicensed operation of a motor vehicle in the second degree, an unclassified misdemeanor; and leaving the scene of an accident, a class A misdemeanor. By virtue of his felony conviction, the respondent ceased to be an attorney pursuant to Judiciary Law §90(4)(b) and was automatically disbarred as of March 16, 2009.

Seth Muraskin, a suspended attorney (February 23, 2010)

On February 27, 2009, the respondent entered a plea of guilty in the County Court, Suffolk County, to grand larceny in the fourth degree, a class E felony. By virtue of his felony conviction, the respondent ceased to be an attorney pursuant to Judiciary Law §90(4)(b) and was automatically disbarred as of February 27, 2009.

Herbert N. Posner, admitted as Herbert Nelson Posner (February 23, 2010)

The respondent tendered an affidavit of resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations that he breached his fiduciary duty regarding the maintenance of client escrow funds and made misrepresentations to a tribunal in connection with pending litigation.

Barnett R. Rogers, a suspended attorney (February 23, 2010)

The respondent tendered an affidavit of resignation wherein he acknowledged that he could not successfully defend himself on the merits against pending charges that he, *inter alia*, failed to safeguard funds entrusted to him as a fiduciary; engaged in conduct prejudicial to the administration of justice; and violated the disciplinary rules with respect to the handling of his escrow account.

Edmond S. Berookhim (March 2, 2010)

On June 19, 2009, the responded was convicted, upon a plea of guilty in Supreme Court, New York County, of grand larceny in the third degree, a class D felony. By virtue of his felony conviction, the respondent ceased to be an attorney pursuant to Judiciary Law §90(4)(b) and was automatically disbarred as of June 19, 2009.

Stuart M. Gorman, admitted as Stuart Michael Gorman (March 2, 2010)

The respondent tendered an affidavit of resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations that he failed to properly account for and safeguard $84,425 entrusted to him; failed to insure that a bar claims action was timely resolved, resulting in $8,000 not being distributed for more than four years; failed to preserve $73,500 that he was required to hold in escrow; and failed to timely cooperate with the Grievance Committee.

Warren E. Hamburger (March 2, 2010)

On February 19, 2009, the respondent entered a plea of guilty to four counts of grand larceny in the second degree, a class C felony. By virtue of his felony conviction, the respondent ceased to be an attorney pursuant to Judiciary Law §90(4)(b) and was automatically disbarred as of February 19, 2009.

John D. Lewis, admitted as John David Lewis, a suspended attorney (March 2, 2010)

On October 21, 2008, the respondent pleaded guilty in Supreme Court, Queens County, to one count of criminal facilitation in the fourth degree, a class A misdemeanor. The Appellate Division, Second Judicial Department, thereupon suspended the respondent, pending further proceedings, as a result of his conviction of a serious crime. The respondent thereafter tendered an affidavit of resignation wherein he acknowledged that he could not successfully defend himself on the merits against disciplinary charges predicated upon his serious crime conviction. Pursuant to Judiciary Law §90, the respondent was disbarred, and his name was stricken from the roll of attorneys, effective immediately.

Matthew A. Marino, admitted as Matthew Adam Marino, a suspended attorney (March 2, 2010)

The respondent tendered an affidavit of resignation wherein he acknowledged that he could not successfully defend himself on the merits against disciplinary charges predicated upon his plea of guilty in the United States District Court for the Southern District of New York on September 3, 2008, to misprision of a felony. Previously, the Appellate Division, Second Judicial Department suspended the respondent, pending further proceedings, based upon his conviction of a serious crime.

Christian Bernard (March 16, 2010)

On December 16, 2008, the respondent was convicted in the County Court, Westchester County, upon his plea of guilty to Grand Larceny in the Second Degree, a class C felony. Upon his conviction of a felony, the respondent automatically ceased to be an attorney and was disbarred pursuant to §90(4) of the Judiciary Law.

Michael S. Goodman (March 30, 2010)

The respondent tendered a resignation wherein he acknowledged that he could not successfully defend himself on the merits against allegations of irregularities in his attorney escrow account, including a dishonored check.

David J. Resnick (March 30, 2010)

On July 30, 2009, the respondent pleaded guilty in Supreme Court, New York County, to filing false personal income tax returns, a class E felony. Upon his conviction of a felony, the respondent automatically ceased to be an attorney and was disbarred pursuant to §90(4) of the Judiciary Law.

Glenn B. Allyn (April 20, 2010)

Following a disciplinary hearing, the respondent was found guilty of, *inter alia*, entering into an improper business relationship with a client; improprieties in the handling of the Law Office of Glenn B. Allyn IOLA account at North Fork Bank; and improprieties in the handling of the Allyn, Hausner & Montanile escrow account at North Fork Bank.

Paulette R. Bainbridge, admitted as Paulette Rose Bainbridge, a suspended attorney (April 20, 2010)

The respondent was found guilty, on default, of neglecting client matters; failing to provide a domestic relations client with a retainer agreement; failing to keep in communication with a client; making a misrepresentation to a client regarding the status of the client's matter; and failing to cooperate with the Grievance Committee.

Serge Yakov Binder, a/k/a Serge Y. Binder, admitted as Sergi Yakov Pereplyotchik (April 20, 2010)

On July 30, 2009, the respondent pleaded guilty in Supreme Court, New York County, to filing false personal income tax returns, a class E felony. Upon his conviction of a felony, the respondent automatically ceased to be an attorney and was disbarred pursuant to §90(4) of the Judiciary Law.

Philip Brent Hover (April 20, 2010)

By order of the Supreme Court of New Jersey dated August 31, 2009, the respondent was voluntarily disbarred in that state as a result of his misappropriation of client funds. Upon the Grievance Committee's application to impose reciprocal discipline pursuant to 22 NYCRR §691.3, the respondent was disbarred in New York.

The Following Attorneys Were Suspended By Order Of The Appellate Division, Second Judicial Department:

William M. Joyce, admitted as William Michael Joyce, a suspended attorney (January 26, 2010)

By decision and Order on Motion of the Appellate Division, Second Department dated June 11, 2007, the respondent was suspended from the practice of law pending further proceedings. Following a disciplinary hearing, the respondent was found guilty of, *inter alia*, conduct prejudicial to the administration of justice, which reflects adversely on his fitness to practice law, as a result of his failure to submit a written answer to a complaint of professional misconduct filed against him; conduct prejudicial to the administration of justice, which reflects adversely on his fitness to practice law, as a result of his failure to comply with a lawful demand of the Grievance Committee; neglecting a legal matter entrusted to him; and conduct prejudicial to the administration of justice, which reflects adversely on his fitness to practice law, as a result of his failure to maintain his Attorney Registration with the Office of Court Administration (OCA). He was suspended from the practice of law for a period of two (2) years, commencing immediately, with credit for the time elapsed under the interim suspension previously imposed, and continuing until the further order of the Court.

John R. Hibner (March 23, 2010)

Following a disciplinary hearing, the respondent was found guilty of allowing

Continued On Page 10

P NER

Annual Dinner & Installation of Officers – May 6, 2010 – Pt II

Brian Orlow, Steve Orlow, Hon. Jodi Orlow and Adam Orlow

Dave Adler, Seymour James and Jay Abrahams

Deborah Garibaldi, Annamarie Brown, Hon. Edwin Kassoff and Hon. Robert Kohm

Gerald Chiariello, II, Art Terranova, Hon. Bill Viscovich, Joe Risi, Jr., Steve Hans and Richie Gutierrez

Hon. Sheri Roman, Wally Leinheardt, Hon. Sy Boyers, DA Richard Brown, Hon. Joe Golia, Al Gaudelli, Hon. Bernice Siegal, Matt Lupoli and Hon. Jim Golia.

Hon. Sid Strauss, Mike Dikman and Guy Vitacco, Jr.

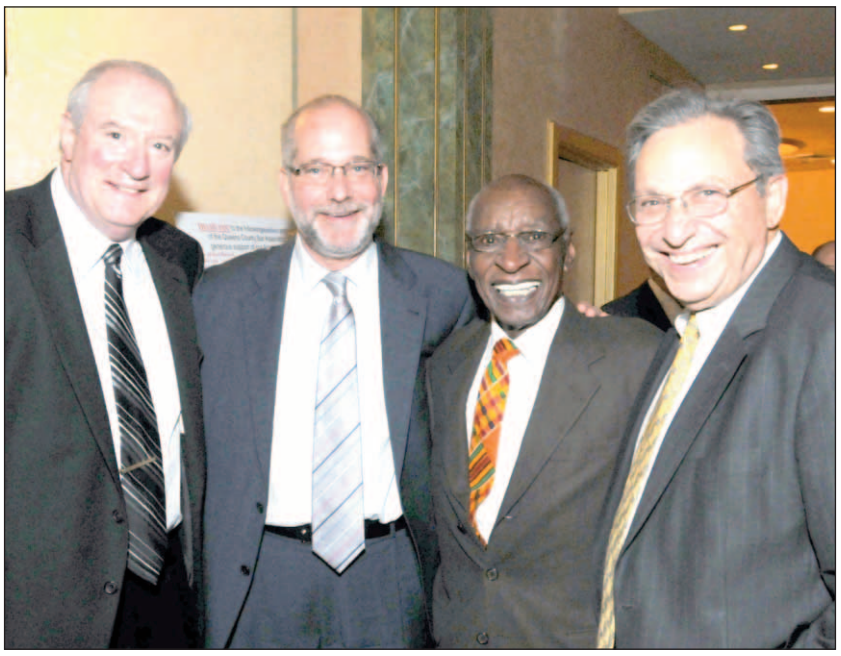
Photos by Walter Karling

P NER

Annual Dinner & Installation of Officers – May 6, 2010 – Pt II

Guy Vitacco, Jr., Chanwoo Lee and her niece Eda Lee and Richard Gutierrez

Dimitri Kotzamanis, Jessica Kronrad, Greg Newman and Jim Cowley



Mike Dikman, Dave Cohen, Hon. Daniel Joy and Wally Leinheardt

Chanwoo Lee with her family

Linda Povman, Elly Vreeburg, June Briese and Maddy Egelfeld

Hon. Carmen Velasquez, Peter Koo, Chanwoo Lee and Hon. Diccia Pineda-Kirwan

Photos by Walter Karling

Court Notes

Continued From Page 7

his professional judgment on behalf of his clients to be affected by his own financial, business, property or personal interests in that, during the course of his representation of two clients in a child neglect matter pending in Family Court, he had the clients convey title to their home to him to prevent a foreclosure sale of the property and, thereafter, sought to evict them while continuing to represent them in the Family Court matter; engaging in conduct that adversely reflects on his fitness as a lawyer by reason of the foregoing; entering into a business transaction with his clients wherein they had differing interests, the clients expected him to exercise professional judgment for their protection, he failed to disclose, in writing and in a manner reasonably understandable to the clients, the terms of the transaction, and he failed to obtain the clients' consent, in writing, to the terms of the transaction and his inherent conflict of interest; engaging in conduct that adversely reflects on his fitness as a lawyer by reason of the foregoing; intentionally prejudicing or damaging his clients during the course of their professional relationship by seeking to evict them from their home during the pendency of the neglect proceeding; engaging in conduct that adversely reflects on his fitness as lawyer by reason of the foregoing; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by knowingly offering a deed for filing containing a false notarization and by falsely testifying under oath about the circumstances surrounding the execution and notarization of the deed; and engaging in conduct prejudicial to the administration of justice, which adversely reflects on his fitness as a lawyer, by reason the foregoing. He was suspended from the practice of law for a period of four years, commencing April 23, 2010, and continuing until further order of the Court.

Alvin Pasternak (March 26, 2010)

On December 8, 2009, the respondent pleaded guilty in the United States District Court for the Eastern District of New York to mail fraud and filing a false tax return. He has not yet been sentenced. Upon the Appellate Division's own motion, the respondent was immediately suspended from the practice of law, pending further proceedings, as a result of his conviction of a serious crime, pursuant to Judiciary Law §90(4)(f).

Scott M. Zucker (March 30, 2010)

Following a disciplinary hearing, the respondent was found guilty of neglecting a legal matter entrusted to him in that he failed to timely submit, on behalf of his client, a sufficient and complete arbitration claim with the National Association of Securities Dealers (NASD) and, after being notified of deficiencies, failed to cure them, resulting in the closing of the arbitration proceeding; failing to promptly pay or deliver, at his client's request, funds in his possession that the client was entitled to receive; and engaging in conduct that adversely reflects on his fitness as a lawyer by reason of the foregoing. He was suspended from the practice of law for a period of one year, commencing April 30, 2010, and continuing until the further order of the Court.

Timothy C. Quinn (April 6, 2010)

The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest based upon uncontroverted evidence of professional misconduct.

John J. D'Emic, admitted as John Joseph D'Emic (April 22, 2010)

On October 1, 2009, the respondent entered a plea of guilty in Supreme Court, Queens County, to a violation of New York State Judiciary Law §491, which prohibits the sharing of compensation by attorneys with non-lawyers, a misdemeanor. Upon the Appellate Division's own motion, the respondent was immediately suspended from the practice of law, pending further proceedings, as a result of his conviction of a serious crime, pursuant to Judiciary Law §90(4)(f).

Michael N. Durante (April 27, 2010)

The respondent was immediately suspended from the practice of law, pending further proceedings, upon a finding that he was guilty of professional misconduct immediately threatening the public interest based upon substantial admissions he made under oath that he committed acts of professional misconduct and other uncontroverted evidence of professional misconduct.

The Following Attorneys Was Publicly Censured By Order Of The Appellate Division, Second Judicial Department:

Bruce E. Cohen (February 23, 2010)

Following a disciplinary hearing, the respondent was found guilty of conduct involving dishonesty, fraud, deceit and misrepresentation by virtue of signing his client's name on a document and notarizing said document when it had not been shown to the client or sworn to before the respondent; conduct adversely reflecting on his fitness as a lawyer by reason of the foregoing; conduct involving dishonesty, fraud, deceit and misrepresentation by virtue of causing a document to be filed with the Supreme Court, New York County, which the respondent had notarized and which contained information he knew to be false; and conduct prejudicial to the administration of justice, which adversely reflects on his fitness as a lawyer, by reason of the foregoing.

Eileen Coen Cacioppo (March 30, 2010)

Following a disciplinary hearing, the respondent was found guilty of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by knowingly executing and filing with the Surrogate's Court, Suffolk County, affirmations and supporting documents containing false or misleading statements in connection with three applications for fees for legal services rendered as a guardian ad litem and engaging in conduct prejudicial to the administration of justice, which adversely reflects on her fitness as a lawyer, by reason of the foregoing.

The Following Suspended or Disbarred Attorneys Were Reinstated As Attorneys And Counselors-At-Law By Order Of The Appellate Division, Second Judicial Department:

Lance H. Falow, admitted as Lance Howard Falow, a suspended attorney (March 2, 2010)

Edmund Fitzgerald, admitted as Edmund G. Fitzgerald, Jr., a disbarred attorney (March 2, 2010)

Continued On Page 14

CULTURE CORNER

BY HOWARD L. WIEDER

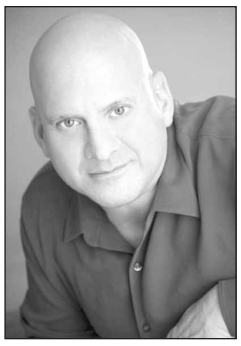
CANTOR YITZCHAK MEIR HELFGOT and SYMPHONY OF THE SOUL

Afficionados of classic, Jewish cantorial music should buy seats for a great cantorial concert to be held on Saturday, December 4, 2010, at 8:30 P.M. The program is entitled "SYMPHONY OF THE SOUL" and features **Chief Cantor YITZCHAK MEIR HELFGOT** of New York City's Park East Synagogue, at 163 East 67th Street, where the concert will be held, and **Senior Cantor Shimon Farkas**, of Australia's Central Synagogue in Sydney. I have covered concerts featuring **Chief Cantor YITZCHAK MEIR HELFGOT** in past years, and his voice is a true gift. A dessert collation traditionally follows the concert and is covered with the admission. For tickets, call 212-737-6900 or go visit www.parkeastconcert .com.

PERFECT HARMONY

Actors Kobi Libii And David Barlow In Perfect Harmony

"PERFECT HARMONY" had its official Off Broadway opening on October 27, 2010, having been successfully produced at the Fringe festival in New York several years ago. It is now playing at the Acorn Theater in Theatre Row, 410 West 42nd Street, but will soon move locations. Written and directed by **ANDREW GROSSO**, the show is fabulous and is an audience favorite. The cast of 10 actors is excellent, playing two competing groups of a capella singers, male and female. Among the talented cast members are **DAVID BARLOW** and **KOBI LIBII**, in exceptional performances. The show is an excellent treat for the holidays and has an open run. The show runs for an hour and 45 minutes without an intermission, but the pacing and material kept me riveted all the time. Occasional racy references make the show less suited for children under 12 years of age. **BECKY LASKY's** costume design was great, colorful, eye-catching, and in **"PERFECT HARMONY"** with the show's material. Don't miss it!



Howard L. Wieder

THE DYBBUK by JULIA PASCAL

Many Polish Jews, as correctly described in historian **PAUL JOHNSON's HISTORY OF THE JEWS,** believed in a concept of a "dybbuk" -- literally meaning a "devil," but also a transmigrated soul that cannot enter heaven or hell and thus invaded and dwelt within the body of a living person. The famous story of "The Dybbuk" was written by S. Ansky in 1914 is available in two wonderful translations: S. Ansky, **THE DYBBUK** [transl. S. Morris Engel, publ. Univ. of Southern California, rev. 3rd ed. 1974] or S. Ansky, **THE DYBBUK AND OTHER WRITINGS** [ed. David G. Roskies, pub. Schocken Books 1992], and provides playwright JULIA PASCAL with the springboard for her play "THE DYBBUK" that ran from August 10-25, 2010, at the **THEATER FOR THE NEW CITY**, a wonderful theater space located in the East Village. Her play made its United States premiere on those dates, after successfully touring in Europe.

In **JULIA PASCAL's** play, during the Holocaust, in Eastern Europe, five non-religious Jews, mentally and physically exhausted from the knowledge of the fate that awaits them, interact on the day before deportation to the Auschwitz concentration camp. The play includes five minutes of no speech, simply dance and movement, brilliantly conceived by **THOMAS KAMPE**. The acting was superb, and the use of props was also the most ingenious I have seen in theater. The play concludes with the sound of railroad trains moving overlain with the rising crescendos of **MOZART's *REQUIEM***.

Written and directed by **JULIA PASCAL**, ***THE DYBBUK*** deserves a return engagement!

OFFICE HOURS

A.R. GURNEY is a veteran and accomplished playwright**,** whose latest work, ***OFFICE HOURS*** was extended at **THE FLEA THEATER, at 41 White Street,** right by the courts in lower Manhattan. The play, using six actors to play 28 characters in 10 different vignettes, covers several facets of academic life at an American university in the early 1970s, during the presidency of Richard M. Nixon, when the Vietnam War was raging. **A.R. GURNEY** has a right to speak on the subject since he is a former professor at MIT and holds honorary doctorate degrees.

THE FLEA is a well-managed theater company that has recently bought a new building for its future home. **THE FLEA** is a noted Off-Broadway company that boasts a formidable repertory company of actors called **THE BATS**. **OFFICE HOURS** has two alternate casts, called "Dante" and "Homer," and I attended the performance of the Homer cast, with **ANDY GERSHENZON, JOHN RUSSO, TOMMY CRAWFORD, KATHERINE FOLK-SULLIVAN, LOUIZA COLLINS,** and **TURNA METE** -- all wonderful, gifted actors. The play ran 90 minutes without an intermission, and I was absorbed by the 10 vignettes of life in a university campus in the early 1970s.

The vignettes include: a confrontation between a professor and a student regarding plagiarism of a paper, and the eagerness of a student ready to take on the professor on the subject and "make a record" for the university's senate, although her attempted fraud is exposed directly by a kind-hearted professor, who despite her sharp attack, is determined to save the student from self-destruction; the attempt by a professor to dissuade her student to leave her science-oriented boyfriend; one professor giving a class on Bible studies in a deliberate wry, sardonic way; a professor seeking a secondary home in the office of a colleague many nights to escape a loquacious wife and crying baby, but finding a temporary loss of inspiration in his work as a teacher; a male, gay student trying to reach out to a male, gay professor to mentor him; a former, now crazed student who was drafted for fighting by the army and sent to Vietnam because his professor gave him an "Incomplete" and now confronting that professor with a [fake] gun; a flirtatious professor coming on to his female student; and two professors, married to other persons and team-teaching a course on Dante, becomingly wildly embroiled in a passionate affair that has disturbed the university's administration.

All the actors are excellent. **KATHERINE FOLK-SULLIVAN** is mesmerizing, enchanti-

Continued On Page 12

Culture Corner

Continued From Page 11

ng, and hysterically funny especially as the passionate professor of Dante, in love with her fellow professor, Lenny Silverstein, who she calls "Leonardo." **KATHERINE FOLK-SULLIVAN's** Italian-pronounced words are delicious in that scene, each word brimming with ardor ready to boil over. **TOMMY CRAWFORD** is excellent as the half-crazed former student returning from the Vietnam War to confront the professor whose grade, in effect, sent him there, the gay student, and the flirtatious professor. **ANDREW GERSHENZON, JOHN RUSSO, LOUIZA COLLINS, and TURNA METE** are remarkable in a variety of roles.

Finally, the direction by **JIM SIMPSON** was flawless. Every part of the stage was used to strategic advantage in the blocking. The performances were crisp, thanks to a great ensemble and wonderful direction. I was impressed by a supremely gifted team that **Mr. SIMPSON** assembled for the production. **JESSICA PABST** should be nominated, at the very least, for some award for her great costuming. Although there were only six actors, playing 28 roles, the use of makeup and clothes made me feel that I was watching more than six actors**. KATE SINCLAIR FOSTER's** set was inspired with two side by side offices, with no need for a wall between them, and a set of three doors in the background; **JEANETTE OI-SUK YEW's** lighting was excellent, and **JILL BC DU BOFF's** sound design was also impressive. It is a tribute to **JIM SIMPSON** for having assembled, not only two talented casts for this play, but a stellar support team of gifted specialists for the costumes, set, lighting, and sound.

PENNY PENNIWORTH

One of the funniest shows that ran this autumn was **PENNY PENNIWORTH**, at the **Emerging Artists Theatre** at the **TADA! Youth Theater** at 15 West 28th Street in Manhattan. Four brilliant actors played multiple roles in this spoof of Charles Dickens. Anyone who loves Dickens knows that the immortal author specialized in forming unusual and fascinating characters, and the plots had multiple twists. In this ode to Dickens, Penny Penniworth includes characters as: Hapless Penniworth, Malodorous Dump, Mr. Pinchnose, Rupert Stryfe of the House of Stryfe, who kept the appendage of his name, when making introductions, and the British solicitors of Bunting, Bunting and Swag. The audience kept laughing nonstop at the opening night performance that I attended on September 13, 2010. Written by **CHRIS WEICKER** and directed by **MARK FINLEY**, this charming show was joyful and funny. Actors **CHRISTOPHER BORG** and **ELLEN REILLY** were especially talented, energetic, versatile and hilarious.

CHOPIN JAZZ CELEBRATION

On October 4, 2010, I attended "**FREDERIC CHOPIN'S 200TH BIRTHDAY PARTY: A POLISH JAZZ CELEBRATION**," at **CARNEGIE HALL**. Imaginatively conceived, the show was primarily a jazz tribute to Chopin by primarily Polish artists. The show's energetic music director was **KRZESIMIR DEBSKI**.

VIOLINIST ALEXANDER MARKOV

Noted Russian violinist **ALEXANDER MARKOV** showed different facets of his talent at **CARNEGIE HALL** on October 9, 2010. In the first half of the program, he played Tchaikovsky's violin concerto. It was one of the finest and most moving renditions of this famous work that I have ever heard. It was a bravura performance worthy of the great traditions of Russian classical composers and artists.

In the second half of the show, Alexander Markov changed outfits, from the tuxedo he wore for the Tchaikovsky concerto, to wear a velvet coat with white shirt and he turned rock musician, another of Markov's passions. He performed **"THE ROCK CONCERTO"** that he composed together with **JAMES V. REMINGTON**. **"THE ROCK CONCERTO"** is a fusion of rock and classical music**. STEVEN BYESS** conducted an unnamed classical musical orchestra. **GREGG GERSON** performed percussion and guitar**. IVAN BODLEY** played bass and synth. **NEAL COOMER** was outstanding in vocals. Also singing on stage was the **LaGUARDIA HIGH SCHOOL SENIOR CHORUS.**

"THE ROCK CONCERTO" did not integrate the rock style and the classical music component that it set out to do. The classical music served as a supporting actor to the rock music. Nevertheless, I noticed that the event attracted a filled-to-capacity Stern Auditorium at **CARNEGIE HALL**, and many young persons attending came specially for the second half of the program, to see **THE ROCK CONCERTO**. The night was certainly an event, and anything that brings more young people to like classical music should be termed a success.

AT CARNEGIE HALL: PHILADELPHIA ORCHESTRA WITH MAESTRO CHARLES DUTOIT CONDUCTING!

CHARLES DUTOIT is one of the great, towering giants of the classical world. He brings greatness to every performance, so it was a pleasure to hear him direct the Philadelphia Orchestra. The first composition on the program, ***TIMBRES, ESPACE, MOVEMENT, OU LA NUIT ETOILEE,*** was that by French composer **HENRI DUTILLEUX** [born 1916], who turns 95 in January 2011. The composition is a beautiful, fragile-like, delicate, and abstract work, beautifully conducted by **CHARLES DUTOIT.**

The rousing event was a magnificent rendition of **Liszt's Piano Concerto No. 1** in E-flat major, that can either be magnificent or dreadful based on the interpretation and performance. Pianist **JEREMY DENK** was outstanding, even extraordinary, and was greeted by a standing ovation by the capacity-filled audience that night. **DUTOIT** and the **PHILADELPHIA ORCHESTRA** concluded the night with noted highlights from **Prokofiev's *Romeo and Juliet***.

METROPOLITAN OPERA: LES CONTES D'HOFFMAN

The **METROPOLITAN OPERA** is packing new audiences with eye-catching productions. The production of Offenbach's **THE TALES OF HOFFMAN** or, by its original French title, **LES CONTES D'HOFFMAN**, was magnificent. You may view the entire 2010-2011 season of the **METROPOLITAN OPERA** online at either www.metopera.org or www.metopera.com and purchase tickets at those web sites.

VICTORIA PITTL in *THE CHILDREN'S HOUR*

One of the many venues to see young talent is the Frank Sinatra High School of the Arts in Astoria, Queens County. That school recently performed a revival of **LILLIAN HELLMAN's** play ***The Children's Hour***, which was controversial in 1934 for its theme of lesbianism. That play took on added significance during the 1950s with the Communist witch-hunt conducted by, soon to be disgraced, Senator Joseph McCarthy. The reason Hellman's play became a classic during the McCarthy era and beyond is in one of the striking themes of the play that the concocted slander of evildoers often sticks with horrific results.

The action of the play takes place in a Massachusetts boarding school for girls in the 1930s started by teachers Martha Dobie and Karen Wright. Wright is engaged to be married, and Dobie is struggling with strong feelings for her colleague Wright. Of course, in the 1930s, such a story line was taboo, and even two remakes of the movies were not able to tell the story for fear of either censors or public reaction. Today, in more tolerant attitudes, that early reaction is comical, but true. Interestingly, in Hellman's play, the word "lesbian" is not mentioned.

In the revival this year at Frank Sinatra High School, two alternating casts packed the house in playing the roles. The ensemble casts were excellent. Actress **VICTORIA PITTL** was outstanding in her portrayal of Martha Dobie, whose life is ruined by the whispering of a malicious, evil child with her own ax to grind. Victoria brought nuance and emotion to the role of Martha. **VICTORIA PITTL** has a lot of theatre credits, even before she reaches her 20th birthday, having had experience as a Stage Manager for Off Broadway productions.

MUCH ADO ABOUT NOTHING

For those of you who do not want to spend any money on entertainment, New York City offers wonderful entertainment at no cost. **WILLIAM SHAKESPEARE's MUCH ADO ABOUT NOTHING** was given a revival by an energetic guerilla repertoire theater company called **BLACK HENNA PRODUCTIONS**. The production toured all boroughs this past summer, courtesy of the New York City Parks Department. I viewed the production at Forest Park in Queens, amidst overcast skies and rain.

The actors with **BLACK HENNA PRODUCTIONS** get their training. Neither the scattered rainfall nor the blaring sounds of passing fire engines diminished the enthusiasm of the actors. The material was compressed from five acts to three and performed without an intermission. The ensemble cast was lively. **CHARLEY LAYTON** was brilliant in his role as Claudio, one of the lead roles. **CHARLEY LAYTON** is an actor and speech teacher. He teaches speech to actors at the well-regarded Atlantic Acting School in Manhattan. He also teaches accent minimization to foreign students, accents and dialects to actors, and proper speech to trial lawyers on a private basis. He can be reached at charleylayton@yahoo.com.

KEVIN SCHWAB was also a charismatic actor in the role of Leonato. At one performance, in Staten Island, when a fellow cast member was late for the performance, SCHWAB, without a beat, summed up the plot in his own character's voice to make up for the missing actor who was supposed to be on stage. At the performance in Queens, **KEVIN SCHWAB** had the presence to hold up his hand as the blaring fire engines made listening to the actors impossible. His remarkable, improvised gifts for the unexpected were wondrous.

FRINGENYC 2010 AND FRINGE ENCORE 2010

At the end of World War II, with the thought of uniting and rebuilding Europe through art and culture, organizers began the Edinburgh Festival Fringe, which, today, is the largest world cultural event. That Festival is a powerhouse, and attracts audiences and performers from all over the world. During the Edinburgh Festival Fringe, in 2009, over 2,000 plays and musicals were presented during a three week period. New York City's effort is, by comparison to Edinburgh, Scotland, more modest, but still breathtaking in scope. Confined to participating theaters in the East Village, West Village, SOHO, and Greenwich Village, New York City, this past August 2010, presented **FRINGENYC XIV**, billed as "New York's Best Staycation." FringeNYC 2010 presented 197 plays and musicals during a three week period, and I was amazed at the wonderful organization of the **FRINGENYC Festival**. FringeNYC 2010 was immediately followed, in September 2010, by the **FRINGE ENCORE** series, choosing among the outstanding and most popular productions.

I attended many of the plays and musicals, but space limitations of this column confines me to discuss only a select number. Among the outstanding plays and musicals at the **FRINGE ENCORE SERIES** were:

1. ***HEARTS FULL OF BLOOD***, by Chicago's NEW COLONY theater group made its successful New York City premiere at the Fringe, with a wonderful ensemble of actors **GARY TIEDEMANN, SARAH GITENSTEIN, MARY HOLIS INBODEN,** and **EVAN LINDER**. These actors are truly talented, gifted, with both dramatic and comedic talent.

GARY TIEDEMANN played a loving husband who discovers that his wife is actually his natural sister. The couple's six years of happiness and bliss as a couple is marred by their frustration at the wife's three miscarriages. The husband's close friend, a lawyer with well-placed connections in the judiciary, gets an order signed for the husband to unseal his adoption papers, based on a bogus claim of life-threatening illness. Once he sees the papers, the truth is revealed, and the couple's life together is shattered. Ignorance is bliss.

GARY TIEDEMANN gave a brilliant performance as the loving husband whose life collapses from under him. **GARY TIEDEMANN** gave up a career owning his landscape gardening business in Naples, Florida, to pursue a career in acting, and his performance as the husband was a tour de force. **SARAH GITENSTEIN, MARY HOLIS INBODEN, and EVAN LINDER** gave extraordinary performances. The show stands a good chance of being revived Off-Broadway in New York. Its writer, **JAMES ASMUS**, is a successful screenplay writer in Los Angeles.

2. ***WHEN LAST WE FLEW*** by **HARRISON DAVID RIVERS**, describes the coming of age, in two side-by-side stories, of two black teenagers, Paul and Natalie, both of whom are raised by single mothers in Kansas. Paul wrestles with issues of sexual preference as he hides himself in a bathroom. Natalie, with a brilliant mind, is treated as a curiosity at her bigoted Roman Catholic High School, when she challenges everything and everyone, refusing to accept the tripe status quo served to her by adults. Expelled by her high school for her clinging to truth, she realizes her voice and knows that she is on her way to becoming an activist. ***WHEN LAST WE FLEW*** is a glorious play about the theme of self-realization. **COLETTE ROBERT's** crisp and outstanding direction of ***WHEN LAST WE FLEW*** kept the play going seamlessly, interweaving Rivers' two stories beautifully. This show deserves an extended stint on Broadway.

3. ***THE HURRICANE KATRINA COME-***

Continued On Page 13

Violinist Alexander Markov

Gary Tiedemann

Culture Corner

Continued From Page 12

DY FESTIVAL was a dramatic play based on true events of the devastation brought by Hurricane Katrina. Characters who experienced the horror and displacement of the Hurricane tell their stories brought to life by wonderful performances. The ensemble cast was excellent, with great performances by **MAUREEN SILLIMAN, PHILIP HOFFMAN**, and **LIZAN MITCHELL**. At the conclusion of performances, the cast encouraged and collected financial contributions for **HANDS ON NEW ORLEANS** [see, www.handsonneworleans.org].

4. **LOST AND FOUND** by **JOHN POLLONO** was an absorbing, well-acted play by a talented ensemble, including **GERALDINE LIBRANDI** and **DANA DOMENICK**, regarding a dysfunctional, fighting family that soon learns to discover love and acceptance when a son given up for adoption by the main female protagonist, Eva Broncato, comes back with his boyfriend to learn about his natural mother.

5. **JURASSIC PARQ: THE BROADWAY MUSICAL** was a fun-filled, laugh-out-loud musical venture, with memorable show tunes, regarding the evolutionary stages of a pack of dinosaurs. The show was hilarious, with great energy by a wonderful ensemble of actors. I hope it gets staged elsewhere. The show is not for children because of the raciness of the lyrics. One of the best performances was by **BRANDON ESPINOZA** as the Mime-a-saurus. He captivated the audience with his gestures and movements, although he barely uttered a word.

6. **POPE! AN EPIC MUSICAL** was winsome and clever. **RYAN NELSON** was engaging as the innocent Pope, whose downfall was plotted by an evil and overly ambitious Archbishop, delightfully played by **SCOTT HART**. Egyptian-born actor **JONATHAN ROUFAEAL**, playing a Latino, brought down the house of the Lucille Lortel Theater in Greenwich Village with a rollicking rendition of "What would Jesus Do."

POPE! AN EPIC MUSICAL was a family affair. The books and lyrics were by **JUSTIN MORAN**, whose father, **GREG MORAN**, directed the show. **ADAM PODD** did the orchestration and musical Direction, and his twin brother, **MATT PODD**, was in "**That Swingin' POPE! Band.**"

7. **MICHA WERTHEIM** in **AMSTERDAM ABORTION SURVIVOR** was a one-man show that was very clever and funny. **MICHA WERTHEIM** did not care whether he offended, in his humor, and, in the final result, his boldness was amusing and very funny

8. Another funny one-man show was **SOUTH PATHETIC**. The one man show by actor-comedian Jim David describes the experiences and ordeals of an unemployed actor who travels to Thermal City, North Carolina to stage a revival of Tennessee Williams' "A Streetcar Named Desire." **Jim David** plays a multitude of characters to hilarious effect. Recounting the pathetic actress playing the lead role of Blanche DuBois, who at one rehearsal, attempted the line: "They told me to take a street-car named [long pause] -- *LINE!!!*"

9. A play that did not make the Fringe Encore series but was moving was **RUNNING**, a world premiere by **ARLENE HUTTON**. The play has two actors, played by real husband and wife **SETH BARRISH** and **LEE BROCK**, who are noted acting teachers of the Barrow Group in Manhattan. Both **SETH BARRISH** and **LEE BROCK** gave wonderful, nuanced performances. The play is about a female, whose hotel reservation got bungled and cancelled, only to spend the night at the home of her friend, who is in London on a visit, but is hosted for the evening by her friend's husband, who plans to run his first marathon race the next day. Both performances are excellent**. LEE BROCK**, in particular, gives an astonishing, breathtaking performance. She demonstrates that less is, indeed, more, in one effective scene, when she holds back tears, rather than weeping.

10. A musical that did not make the Encore series, but that I saw during **FRINGENYC 2010** was **SAMANTHA BOYD's *RETURN TO THE ONION CELLAR*** was for me the best musical. Miss Boyd is a genius, with a terrific story and a powerful score. The musical needs a little tweaking for it to develop further, but **SAMANTHA BOYD** has all of the essentials. ***RETURN TO THE ONION CELLAR*** describes the repression of emotion in an unidentified totalitarian state, where audiences go to the rock nightclub to step up to the microphone and perform a song while peeling an onion to get in touch with their emotions. The possession of onions and onion peelers are barred, under criminal penalty.

Of the performances in ***RETURN TO THE ONION CELLAR***, **SOPHIE MAEROWITZ** was brilliant. **SOPHIE MAEROWITZ** has a marvelous voice, well suited for a Gothic-like rocker! I was astounded by the collection of super-quality, dynamite voices in the chorus, any of whom had the vocal power and energy to be a lead actor in this lively musical, especially **AMY REISS.**

One suggestion for **SAMANTHA BOYD**; A rock singer that impressed me tremendously during the Fringe Encore series was **SCOOP SLONE**, a member of Actors Equity Association, who acted and sang in a lead role in **VIVA LOS BASTARDITOS** at the **Fringe Encore series**. If I were Ms. Boyd, I would recruit **SCOOP SLONE**, a singer with high voltage intensity, and pair him with the brilliant **SOPHIE MAEROWITZ** to create a true rock musical in ***RETURN TO THE ONION CELLAR***.

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

You've Come a Long Way -- But You Still Have a Thing or Two to Learn About Venue - Part III

Imagine this simple fact pattern. Peter Plaintiff lives in Queens County, the Defendant, Dan Defendant resides in Queens County and the Plaintiff's counsel has an office in Bronx County. In addition, it should be noted that all of the Defendant's witnesses reside in Queens County and the Plaintiff is the Plaintiff's sole witness. For the convenience of Plaintiff's attorneys, the action is brought to the Supreme Court; Bronx County. At this point we note that the Defendant's attorney wants to have the case tried in the Supreme Court; Queens County. What should the Defendant's attorney do and when should he do it?

Before answering this question, we should digress briefly and recall some rules which govern the issue of venue. They are straight forward and are noted as follows:

Actions against a municipality - the location of the County except the City of New York where venue is the County within the City of New York in which the cause of action arose (CPLR §504). The same rule applies to Public Authorities (CPLR §505)

Actions affection title to real property - County where the property is situated (CPLR §507).

Action to uncover a chattel - County in which any part of the subject of the action is situated at the time of the commencement of the action (CPLR §508).

Venue based upon resident (CPLR §503) which is the subject of this article.

Now, back to the question as to what the Defendant should do. It is simple. All that the Defendant need do is serve Plaintiff with a written demand that the action be tried in a County which Defendant specifies as proper. Here is a sample of such a demand.

(Caption)
SIR:

PLEASE TAKE NOTICE that the defendant herein hereby demands that the place of trial of the above-entitled action be changed from the County of Bronx, to the County of Queens on the ground that none of the parties resided within the said County of Bronx at the time of the commencement of this action and the defendant at the time of the commencement of this action resided in the said County of Queens.

Dated: Jamaica, New York
May 3, 2010

Yours, etc.

Paul S. Goldstein
Attorney for Defendant

TO:

This notice may be served with the answer - or before the answer is submitted (CPLR §511). What happens next is critical. Unless the Plaintiff consents to the request for change of venue, within five (5) days after such service by the Defendant, the Defendant "...may move to change the place of trial within fifteen (15) days after service of the demand..." (CPLR §511(b)). This motion should be made returnable in the county specified in Defendant's demand for a change of venue. The question of what to do and when to do it have been addressed, but there is more.

What can the Plaintiff do if he believes that the venue is correct? Within five (5) days of receipt of the Defendant's demand for a change of venue, the Plaintiff, to raise an objection to the demand for a change of venue, MUST serve an affidavit showing either that the county specified by the Defendant is improper or that the county designated by the Plaintiff is proper. If the Plaintiff serves a response to the demand for a change in a timely fashion, where should the Defendant then make his motion? If the Plaintiff did not respond to the Demand for a Change of Venue, the Defendant can make the motion in the county specified by the Defendant. If the Plaintiff did respond, then the Defendant must make the motion for a change of venue in the county designated by the Plaintiff (CPLR §511(b)). See the Second Department 2006 decision of United Jewish Appeal etc. v. Young Men's and Women's Hebrew Association, Inc. Etc. 817 N.Y.S. 2d 352, 30 A.D. 3rd 504 (2nd Dept., 2006).

The motion for a change of venue is simple and straight forward. The following is a suggested form for such motion:

(Caption)
SIR:

PLEASE TAKE NOTICE that upon the affirmation of _____ dated _____, 2010 and upon (list supporting papers), the defendant will move this court at an IAS Part _____ at the court house located at 88-11 Sutphin Blvd., Jamaica, New York, on _____(dated) at 9:30, o'clock in the forenoon, or as soon thereafter as counsel may be heard for an order transferring venue of this action from Bronx County to Queens County as of right pursuant to CPLR §510(1) and §511(b).

It is obvious that the rights and remedies as to the issue of venue are fully spelled out in Article 5 of the CPLR. As a practical matter, the first thing that Defendant's counsel should do upon receipt of a complaint is to verify the correctness of the venue selected by the Plaintiff. If counsel for the Defendant is not satisfied with the venue selected by the Plaintiff and believes it to be incorrect, counsel should PROMPTLY move for a change of venue relying upon Article 5 of the CPLR.

*Editor's Note: Paul S. Goldstein is a Past President (94-95) of the Queens County Bar Association and in private practice.

Court Notes

Continued From Page 10

Gary Ajello, admitted as Gary Ajello, a disbarred attorney
(April 20, 2010)
At A Recent Meeting Of The Grievance Committee For The Second, Eleventh And Thirteenth Judicial Districts, The Committee Voted To Sanction Attorneys For The Following Conduct:

Failing to timely re-register as an attorney with the New York State Office of Court Administration (7)

Pattern of neglecting clients' matters; failing to satisfy an outstanding judgment, as well as an arbitrator's award, obtained by former clients; failing to refund an unearned fee; failing to timely cooperate with the Grievance Committee; making inconsistent statements to the Grievance Committee in response to the foregoing; and conduct reflecting adversely on fitness to practice law

Conflicts of interest and failing to represent a client or clients zealously as a result of the foregoing, as well as conduct reflecting adversely on fitness to practice law

Aiding a non-lawyer in the unauthorized practice of law; failing to maintain escrow funds and/or escrow records, as required; and failing to zealously represent a client

Neglecting a client's legal matter and failing to supervise other attorneys to whom the matter was transferred [as required by Disciplinary Rule 1-104(C) of the Lawyers Code of Professional Responsibility (now Rules of Professional Conduct (RPC) rule 5.1(c))]

Neglecting a client's legal matter and failing to communicate with the client (3)

Failing to transfer a file to substitute counsel after being requested by the client to do so and lacking candor before the Grievance Committee

Continuing to pursue a client's matter after being asked, by the client, to 'cease and desist'

Failing to timely respond to communications from a Court

Failing to ensure that corresponding funds were deposited and available prior to issuing an escrow check; failing to maintain a contemporaneous ledger or similar record of deposits into, and withdrawals from, an escrow account; and failing to properly denominate an escrow account in accordance with Disciplinary Rule 9-102(B)(2) of the Lawyers code of Professional Responsibility [now RPC rule 1.15(b)(2)]

Failing to timely cooperate with the Grievance Committee; failing to notify the Office of Court Administration of a change of business address within 30 days of such change; failing to advise a client, in writing, of said change of address; and failing to attempt to resolve a fee dispute with a client in an amicable manner

Neglecting three legal matters; failing to comply with a client's reasonable requests for information; delaying withdrawal as attorney of record after being discharged by a client; and failing to promptly deliver to a client all papers and property to which the client was entitled

Failing to communicate with a client and/or referring counsel regarding the status of a matter and/or commensurate settlement proceeds; failing to promptly pay or deliver to a client funds to which the client was entitled; and failing to timely cooperate with the Grievance Committee

Using confidential information provided by a client to the client's disadvantage; accepting employment when the lawyer's judgment would be affected by his/her own business interests; and engaging in a conflict of interest by suing a client in a matter unrelated to the lawyer's employment but invoking confidences of the client obtained in the course of said employment

Failing to act with reasonable diligence in representing a client; neglecting the client's legal matter; failing to communicate with the client; and failing to alert the Grievance Committee to a change in material facts, allowing the false impression that the lawyer was endeavoring to complete the client's matter, when, in reality, the lawyer had ceased working on the matter and did not intend to complete it

Neglecting legal matters; taking unearned legal fees; failing to communicate with clients; failing to keep clients reasonably informed of the status of their matters; failing to promptly comply with clients' requests for information; failing to seek a client's lawful objectives; failing to carry out a contract of employment; prejudicing and/or damaging a client during the course of the professional relationship; failing to provide clients with a Letter of Engagement where the fee was $3,000 or above, in violation of 22 NYCRR §1215.1; and engaging in deceit and misrepresentation with respect to a client and the Grievance Committee

Engaging in a pattern of neglecting uncontested divorces after receiving full payment

Failing to return a party's down payment, with interest, despite a Court order and engaging in conduct prejudicial to the administration of justice, which reflects on the attorney's fitness as a lawyer, by reason of the foregoing

Engaging in multiple conflicts of interest by representing both the lender and purchaser in a real estate transaction and failing to disclose to the parties the lawyer's interest in the title company used

Neglecting a legal matter; failing to reduce to writing the lawyer's decision to withdraw from representation; failing to communicate with the client; failing to cooperate with the Grievance Committee; and engaging in conduct prejudicial to the administration of justice, which reflects adversely on the attorney's fitness as a lawyer, by reason of the foregoing

Failing to maintain a contemporaneous ledger for the attorney's escrow account and failing to monitor said account

Failing to make an appropriate motion to withdraw from a litigated matter

Failing to expeditiously complete a contract of employment and failing to keep the client adequately informed about the status of the matter

Failing to timely process an uncontested divorce; failing to properly monitor the status of the matter; and failing to effectively and honestly communicate with the client

This edition of COURT NOTES was compiled by Diana J. Szochet, Assistant Counsel to the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts and Immediate Past President of the Brooklyn Bar Association. The material contained herein is reprinted with permission of the Brooklyn Bar Association.

Books At The Bar

Continued From Page 6

al harassment, embezzlement, and the vagaries and varieties of legal education."

The history leads the protagonist, law librarian Tom Jones, Jr., to adventures in Boston, Concord, Massachusetts, New York City, and Mt. Desert Island, Maine. Not since Louis Auchinloss has the academic world of law been under such an intense microscope. The book is indexed by chapter, and readers, at their peril, can skip Tom's marital problems and go right to such topics as Antisemitism, Cataloguing Mishaps, Faculty Meetings, Law School Inspections, Professors, Tenure for Law Librarians, Women, and other choice topics.

Law Emeritus Librarian **EDWARD J. BANDER**, a World War II veteran, has worked in the law libraries of Harvard, New York University, and Suffolk Law Schools and has poured his fifty years of law librarianship into this work of fiction.

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

[1]The foregoing review by Edward Bander of Russell Murphy's excellent and eloquent work is with the permission of Edward Bander and first appeared in *DICTA*, the law school newspaper for Suffolk University School of Law.

Federal Government Launches Pro Bono Initiative in New York

QVLP Executive Director Mark Weliky and Foreclosure Prevention Coordinator Corry McFarland with Professor Tribe.

This past June the Queens County Bar Association Volunteer Lawyers Project (QVLP) was one of twelve legal service programs who participated in the kickoff of the Federal Government Pro Bono Program in New York. The keynote speaker for the event was Senior Counselor for Access to Justice for the Obama Administration, Professor Laurence Tribe.

Tribe, a renowned Harvard Law School professor and constitutional law scholar, said he taught several students who have gone on to high-profile careers in the law, including President Barack Obama, Chief Justice John Roberts and Supreme Court Justice Elena Kagan. But Professor Tribe said his work on indigent defense issues was "truly significant" and described it as both meaningful and rewarding. "Law needs to be accessible to people in their communities, where they live and work and not just at courthouses and detention facilities," Tribe said in his remarks. This initiative urges Federal Government lawyers to donate their services to pro bono programs in communities in New York such as the Queens Volunteer Lawyers Project.