
By Jennie R. Romer, Esq.

Single-use plastic bag reduction ordinances have become increasingly popular around the world. Soon New York City could join the other local New York jurisdictions that have adopted plastic bag reduction legislation: the Villages of East Hampton and Southampton, the City of Rye and the Village of Mamaroneck. The Clean Seas Coalition (CSC), a West Coast group that was the unifying force behind the push for plastic bag ordinances in California (including San Francisco’s newly expanded ordinance), recently formed an Atlantic division. CSC membership is made up of large national organizations, regional environmental groups, businesses, and private individuals.

Plastic bags are increasingly regulated because they have become an icon of waste, and for good reason. Plastic bags are so lightweight that even if they are properly disposed of they often end up as wind-blown litter, contributing to urban blight. Plastic bags are also uniquely responsible for a variety of problems including flooded storm drains, clogged municipal recycling facilities, and a host of environmental problems like sea turtle mortality (the bags resemble the jellyfish turtles eat). Even more importantly, plastic bags are given away for free, thus consumers give little thought about whether such bags are truly needed or how to dispose of them.

Fortunately, plastic bag pollution is an issue that people can do something about, either by simply refusing a disposable bag at checkout (and perhaps bringing a reusable bag), or by working on a local legislative campaign. Plastic bag ordinances generally include a ban or charge for single-use plastic check-out bags provided at the register, and they are effective. For example, Los Angeles County’s 2010 ordinance included a ban on plastic bags and a ten-cent charge for paper bags. One year after the ordinance went into effect covered stores reported a 95 percent reduction in single-use bag consumption (a total ban on plastic bags and a 30 percent reduction in paper bags).

Unfortunately, the plastics industry has fought hard against these ordinances, with multi-million dollar public relations campaigns. (See Plastic Bag Legislation on page 14)

Energy Efficiency In New York City:

By Michael Panfil, Esq.

Energy efficiency, until recently, has been little more than a buzzword for most. The term itself can refer to any number of meanings, but for general purposes, it means the process by which one creates a product, entity, or service that uses less energy than like alternatives. Take, for example, compact fluorescent lights (“CFLs”). By needing only a fraction of the electricity required by a standard incandescent light, CFLs are a similar product to standard offerings, differentiated by their comparatively efficient use of energy.

Energy efficiency stands for more than new light bulbs, however. Creating such efficiency is likely to become greatly important in almost every industry in the near future. Appliances with energy labeling, have become more energy efficient in recent years, meaning refrigerators, ovens, and dishwashers no longer consume the same amount of power as in years past. New buildings can be LEED certified, indicating the construction’s energy efficiency gains through window insulation, heat sensors, and thermal insulation. Existing homes and businesses can go through energy efficient retrofits, whereby less efficient technology — such as old HVAC systems — can be exchanged for newer, more efficient ones. Vehicles can reach double the fuel efficiency seen in standard offerings, with technology on the horizon promising even greater energy efficiency.

The Importance of Energy Efficiency

The increased attention upon energy efficiency can, at first brush, seem puzzling. Unlike other environmental causes, both sides of the aisle can largely be seen espousing favorable views (albeit it often in only the most generalized tones). Businesses, including large corporations, are also often seen as at least marginally supportive and interested. Financial institutions are also increasingly aware of energy efficiency projects, with a growing curiosity in potential avenues of investment.

One needs look no further than how energy efficiency necessarily works to understand why such interest exists. In essence, energy efficiency creates two aligned benefits—such as new job creation and energy sustainability—only further strengthen current interest. The resulting intersection between such varied groups, agendas, and stakeholders suggests it will likely be a crucial area of development in the near future.

(See Energy Efficiency on page 15)
New York City “Greener, Greater Buildings Plan” Takes Effect With Release Of Inaugural Local Law 84 Benchmarking Report

By Samuel Blaustein, Esq.

In August of 2012, New York City released its inaugural Local Law No. 84 Benchmarking Report. The Report represents the first tangible results following New York City’s adoption of four local laws comprising the “Greener, Greater Buildings Plan” (GGBP). Amongst other things, the Report concludes that large buildings in New York City could realize a significant reduction in energy use and greenhouse gas emissions by making certain cost-effective improvements.4

New York City Local Law No. 84 of 2009 applies (except Chapter 3) to buildings in the City of New York subject to the New York City Administrative Code by adding new Article 309. Local Law No. 84 requires (i) covered buildings to benchmark energy and water use; (ii) “to benchmark” with the meaning of Local Law 84 is to input the “total of energy use and water for a building for the previous calendar year and other descriptive information” into an online “benchmarking tool” developed by the United States Environmental Protection Agency and any other “interchangeable definition” designated by the New York City Department of Buildings.5

Amidst the bright lights and skyscrapers that dominate the New York City skyline, it is easy to forget that New York State policy is “to promote a more enjoyable harmony between man and his environment.” N.Y. Envtl. Conserv. Law § 8-0101 et seq. (State Environmental Quality Review Act or SEQRA). The City of New York has effectively adopted local laws in the interest of the public health.6 Similarly, the United States Supreme Court has determined that local laws designed to protect public health are entitled to deference.7

The foregoing notwithstanding, the existence of global warming and more specifically, the regulations aimed at curtailing it, have met with staunch resistance in many circumstances.8

Regardless of their harsh impact, “especially in New York City, there’s been a significant reduction in energy use and greenhouse gas emissions by making certain cost-effective improvements.”9

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Meet the New Chairs

NYCLA introduces members recently appointed to head-up Committees

Admiralty and Maritime Law Committee

David Y. Lob, who has been practicing for over 20 years, represents various marine insurer and transportation interests involving accidents, pollution, storage of people, places, and things within the U.S. and overseas. Sometimes he is called to respond to emergency casualties and in other instances he will be asked to analyze transportation or insurance documentation. Although he practices in Manhattan, he is often instructively handed over dispute anywhere in the country. Because many of his assignments involve admiralty and maritime jurisdiction, he usually practices in federal court. In addition to law, Lob had a brief career with the State National Guard and is a Surface Warfare Officer. He is co-chair of the New York State Bar Association’s Admiralty & Maritime Law Committee.

Appellate Courts Committee

Michael H. Zhu graduated cum laude from New York School of Law in 1994, and is a member of the New York Appellate Division, First Department (since 2014). Before joining Benesch Rosenthal, he was trial counsel in New York City Civil Court. He is a graduate of Princeton University, magna cum laude, and a member of the International and Comparative Law Journal. He has been a member of Michael H. Zhu, a boutique law firm that focuses on and specializes in assisting trial counsel and individuals in preparing substantive summary judgment motions, post-trial motions and appeals. In the 17 years since he has been in practice, he has briefed and argued over 300 appeals in the Supreme Court, Appellate Division, First Department, and the United States Court of Appeals for the Second Circuit. His areas of practice include appeals relating to labor law/construction accidents, premises liability, municipal liability, sexual assault/battery and nursing home liability, primary and excess insurance coverage and subrogation, and professional malpractice (legal, medical, architectural, engineering, brokerage malfeasance), as well as forms of complex civil litigation. He is elected to be a Co-Chair of the Appellate Courts Committee, along with David M. Cohn. He says, “Based on my training and experience, I believe that I can offer the committee, the Association and its members, a unique perspective on appellate practice.”

Bankruptcy Law Committee

James P. Pagano specializes in matters of bankruptcy and creditors’ rights, both in and out of court. After graduation from New York Law School in 1975, he became First Assistant Trustee General in the office of the Honorable Louis J. Le Lukowitz, thereafter, he was appointed as one of the firm’s partners at Fish & Williams, and after he worked under Professor Nathan B. Fogelson of New York Law School and Barst, Mukamal & Barst, where he served as co-chair of the Bankruptcy, Investors, Recyling Enterprises, Inc. v. City of New York, 158 Misc. 2d 1, 598 N.Y.S.2d 649, 652 (Sup. Ct. 1993) (upholding Local Law 40 of 1990 concerning regulation of waste transfer stations).9


Preliminary scientific opinion is that there is a discernible anthropogenic (i.e., human-induced) greenhouse effect. Moreover, in 1992, the first President George Bush signed the 1992 United Nations Framework Convention on Climate Change (UNFCC) concerning the reduction of greenhouse gas emissions. The Convention was a non-binding resolution, was ratified unanimously by the Senate. Massachusetts v. E.P.A., 549 U.S. 497, 509, 127 S. Ct. 1438, 1448, 167 L. Ed. 2d 428 (2007) (citing S. Doc. No. 102–38, Art. 2, p. 5, 107). However, in 2012, S. 380 was not passed. See S. 380 in N. (Not all of these efforts have been successful. Ushio Media, Inc. v. City of New York, 820 F.2d 349, 584 (2d Cir. 1989)) the New York City Local Law compelling private parties to display one public health advertisement for every four tobacco related advertisement held to be expressly preempted (federal law).13 See FN 11 in PA p. 3, 23.
December 2012 / The New York County Lawyer

MESSAGE FROM STEWART D. AARON
PRESIDENT OF THE NEW YORK COUNTY LAWYER’S ASSOCIATION

Dear Readers:

As the new year approaches, consider making a resolution to positively impact the community and the legal profession. We have devoted this issue of the New York County Lawyer to social responsibility to encourage discussions about how the legal profession can help make our society a better place for ourselves and others to work and live.

Get inspired with a special lineup of articles within this issue by fellow attorneys who have devoted much of their careers to helping improve the earth and society. On this day, let us think about how to help make a positive change with less garbage from Jennie Romer’s article about plastic bag laws. She is a thought-leader, pro bono consultant to cities and states looking to adopt plastic bag laws, and founder of plasticbaglaws.org, a resource for legislative bodies considering laws limiting the use of plastic bags.

Meanwhile, what can we do to protect the environment as we deal with the data explosion we all are experiencing in our everyday lives and in our legal practices? The scope of e-discovery is ever increasing, along with the capacities of our servers and computers. This inevitably can lead to data often being printed on thousands and thousands of pieces of paper—with the attendant waste of natural resources. Many of us have already gone paperless, but there is still much room for improvement both in the court systems, as well as in our law offices.

Global citizens, it is incumbent upon us to reduce the paper documents and the copies that we make every day. Next time before you hit “print,” consider whether you really need a hard copy of that document, or whether you just as easily can read it on your computer screen or other mobile device. Ask the judge in your document-intensive case whether you can submit voluminous exhibits on a CD or DVD, instead of in hard copy form. Flip to page 7 to read about the environmental impact of e-filing and waste reduction.

As you read through this issue, consider what you can do to preserve the planet and its resources for our grandchildren. Tweet me @NYCLAPres and share how you are making efforts to be more socially responsible. Best wishes for a happy holiday season and a successful year ahead.

Stewart D. Aaron
President
New York County Lawyers’ Association

Stewart D. Aaron
President

Sophia J Gianacoplos
Executive Director

Toni Valenti
Director of Marketing and Membership Development

Ariella Greenbaum
Editor

Senior Communications and Social Media Manager

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Bridge the Gap and Ethics Programs this December

Jeffrey Toobin Speaking About His New Book “The Oath” Rescheduled to January 9
The Author Event featuring Jeffrey Toobin, New Yorker staff writer, attorney, CNN analyst and author, speaking about his new book, The Oath: The Obama White House and the Supreme Court which was cancelled due to Hurricane Sandy is rescheduled for January 9, 2013. All paid attendees will receive a copy of the publication. Special thanks to NYCLA’s Law and Literature Committee for co-sponsoring this event.

Check our website for updates about rescheduling of classes cancelled due to the hurricane.

December Programs

New Jersey Bridge the Gap: A Program for Newly Admitted Attorneys
Consecutive Fridays, November 30 and December 7, 2012; 9 a.m.-5 p.m. 16 NJ MCLE Credits in 5 of 9 specified practice areas; (also NY; 3 Ethics; 6 Skills; 7 PP/LPM); transitional and non-transitional

1831 Tax Free Exchanges
Monday, December 3, 2012, 6-9 p.m. 3 MCLE Credits (Breakdown tbd); Transitional and non-transitional

Certified Guardian, Court Evaluator and Counsel for AIP Training: Certification Program Approved by Office of Court Administration Tuesday, December 4, 2012; 9 a.m.-5 p.m. 7 MCLE Credits: 1 Ethics; 2 Skills; 4 Professional Practice; Transitional and Non-transitional

Persuasive Speech: Incorporating the Techniques of a Broadway Actor into the Way You Practice Law Wednesday, December 5, 2012; 6-7:45 p.m. 2 MCLE Credits; 2 Skills; Transitional and Non-transitional (also NJ)

The LIBOR Scandal—What It Means For The Legal Community, Investors, Traders and Borrowers Thursday, December 6, 2012; 6-8:05 p.m. 2.5 MCLE Credits: 2 PP; 0.5 Ethics; Transitional and Non-transitional (also NJ)

Bridge the Gap 2: A Program for Newly Admitted Attorneys
Fridays, December 14 and Thursday, December 20, 2012; 9 a.m.-5 p.m. 16 MCLE Credits: 3 Ethics; 6 Skills; 7PP/LPM; Transitional and Non-transitional.

Video Replay: Breakfast with NYCLA: Ethical Issues in Intellectual Property Tuesday, December 18, 2012; 8:30-11:30 a.m. 3 MCLE Credits: 3 Ethics

NYCLA’s CLE Institute now an Accredited Provider in New Jersey New York County Lawyers’ Association’s CLE Institute is currently certified as an Accredited Provider of continuing legal education in the State New Jersey. Courses qualifying for CLE credit in New Jersey will be so designated on the NYCLA website. Be sure to consult www.nycla.org for program details and program locations.

Please note that Tuition Assistance is available for qualified attorneys for live programs offered by the CLE Institute. Check our website at www.nycla.org for more information and how to apply for Tuition Assistance. Check our website for course details, faculty, complete program descriptions and pricing.

Be sure to check our website for a complete listing of programs.

Don’t miss these ethics programs that will fulfill your bi-annual NY or NJ MCLE reporting requirements!
Visit www.nycla.org for more information.
Meet the New Chairs
(Continued from page 3)
ties in New York and New Jersey. She has handled a number of lawsuits involving contaminated properties in Louisiana, New Jersey, and Rhode Island. In August 2012, she was appointed to co-chair the new edition of The Clean Water Act: Basic Practice Series, published by the American Bar Association. She looks forward to working with the members of the Committee to identify new and interesting ways to engage on emerging issues in environmental and natural resources law through CLE events and other presentations.

Federal Courts Committee

Vincent Chang served as the Federal Courts Committee chair for three years as an associate at Hall Green LLP and became its chair this year. He serves on the Executive Committee of Directors of NYCLA and is the chair of the NYCLA Foundation. Chang serves on some of NYCLA’s representatives on the New York State Bar Association Nominating Committee and serves on the Legal Affairs Committee of the New York City Bar Association and the New York City Bar Association Judiciary Committee. Chang is a partner at Wellmuth Mahoney PLLC and has experience in both corporate and commercial litigation. He is a graduate of Harvard College and Harvard Law School and has served as a Special Assistant United States Attorney in New Jersey.

Jacqueline Wolff has spent over 20 years defending companies and individuals against violations of the Foreign Corrupt Practices Act (FCPA), healthcare fraud, securities fraud, Food, Drug & Cosmetic Act (FDCA) violations, tax crimes, corporate immigration crimes, and other regulatory-based violations. Wolff’s experience as both a prosecutor and defense lawyer has provided her with the depth and understanding to assist companies in designing compliance programs to address both the internal and global anti-corruption issues. She has designed FCPA compliance programs for companies in industries as diverse as health care, pharmaceuticals, sports, green technology and telecommunications. Wolff is regularly sought out by business publications and CLE sponsors to speak on cutting-edge, crash local immigration and FDCA issues. She has written extensively on various criminal defense topics and, in particular, on FCPA compliance programs. She looks forward to working with other attorneys on the Committee who are involved in completely different areas of International and Domestic Litigation, commercial and criminal, including FCPA and antifraud—and finding common ground upon which the Committee can opine in terms of current laws and policies.

Judicial Section

Hon. Joan Maddpen is a Justice of the New York State Supreme Court and presently assigned to an IAS Part in New York County where she presides over cases for inception to disposition. In addition to handling complex asbestos litigations, Madden also assigned to cases involving contracts, employment discrimination, legal malpractice, labor law, tort, environmental, and Artistic and Architectural Section proceedings. First elected to the bench in 1992, she served as a judge in Criminal Court for two years prior to being promoted to Supreme Court. In 1994 Judge Madden was assigned to Civil Court and since 1997, has been assigned to the Civil Term of Supreme Court. This coming year the Judicial Section will continue to discuss and explore issues which impact on the administration of justice in our civil and criminal courts including the continuing effects of budgetary constraints, and issues involving sex trafficking and the law of search and seizure.

Insurance Law

Norma Levy, a partner at Nelson Levine de Luca & Hamilton, represents insurance carriers in major class action litigations. A graduate of Yale Law School and former chair of the New York State Bar Association’s Antitrust Section, Levy is an experienced litigator who has represented clients in antitrust, trade regulation and unfair competition matters. As lead counsel in the investigation of potential bank fraud for the Securities and Exchange Corporation, she investigated major bank fraud concerns and led the team that brought suit against a former employee of one of the largest U.S. corporations. Her experience extends to significant insurance coverage litigation on issues related to employment coverage, professional liability, fidelity bond, title, and other substantive areas that give rise to insure- ance disputes, including securities, futures and derivatives, intellectual property, construction, civil rights, discrimination, real property and contract disputes.

LGBT Issues

Matthew Raso, a native New Yorker, graduated from New York Law School in 2008. Upon graduation, he was immediately invited to join Codispoti & Associates, PC. At Codispoti & Associates, Raso’s practice focused on civil litigation and transactional work related to business law, real estate, corporate law, landlord/tenant disputes, and real estate transactions. In 2011, he joined The Law Office of George Iannuzzi and his breadth of experience has expanded to include criminal defense and personal injury lawsuits. In his free time, Raso works with numerous organizations that seek to expand and protect civil rights of members of minority communities, including the LGBT community. In 2008 he joined NYCLA and became a member of NYCLA’s LGBT Issues Committee. In 2010 he became vice-chair of that Committee and was recently elevated to the position of co-chair. As co-chair, he is looking forward to working with the Committee to generate awareness of anti bullying legislation in New York. He is also working to create opportunities for LGBT Issue Committee members to participate in community outreach and lead workshops at schools to discuss relevant issues concerning the LGBT community.

Mandatory Committee

Dror Bikel is a trial lawyer and litigation specializer in the area of family law and questions relating to family business, equitable distribution, child and spousal support, and paternity. Bikel is a founding partner of the Manhattan based firm, Bikel & Mandarano, LLP. He lectures to lawyers and mental health professionals in the area of trial practice and family law. As winner of the New York Super Lawyers award, Bikel has been voted by his peers and legal journalists as one of the top 5 percent family law attorneys in New York State. Bikel graduated from the Benjamin N. Cardozo School of Law where he served as a member of Family Law Advisory Board. Bikel is excited about his new position as Co-Chair, and hopes to help family law practitioners become a meaningful teaching and information sharing platform to practitioners in this area. He also plans to work closely with the Court Judges and Committee members on issues important to the matrimonial bar.

Multilingual Lawyering

Dawn Maruna is a fourth generation multilingual Cotton Wollan & Greengrass, where her focus concerns commercial, insurance, and reinsurance litigation and arbitration. She graduated from the College of the Holy Cross in 2002 with a B.A., cum laude, in English and Spanish and received her J.D. from St. John’s University School of Law in 2005, receiving the Silver Pro Bono Service Award at graduation for her work as founder and co-chair of the Multilingual Legal Advocates student group. Since its formation in early 2007, the group has helped multilingual law students identify pro bono and paid volunteer opportunities with private and public interest entities in need of interpretation and translation assistance and organized panel discussions and clinics concerning professional development opportunities for multilingual law students and attorneys. Last year, she founded Multilingual Lawyering Committee which fosters the professional development interests of NYCLA’s multilingual lawyers and students and helps them, as well as the rest of NYCLA’s legal community, address the needs of New York City’s linguistically-diverse legal clientele.

Real Property Section

David A. Goldstein, the managing member of Goldstein Hall PLLC, has over 20 years of experience in the legal field, with expertise in affordable housing development, real estate finance, government affairs, general corporate/business law, and litigation. In particular, Goldstein has extensive experience negotiating joint ventures between not-for-profits and for-profit developers, as well as structuring complex affordable housing transactions. Many of these affordable housing transactions involve financing by federal, state, and local agencies, such as mortgage insurance, state and local tax exemptions, and low-income housing tax credits. Additionally, Goldstein has experience representing nonprofit community cooperatives, HDFC co-ops and tenant associations in litigation and general corporate issues. As co-chair, Goldstein is interested in providing practical and topical programming along with issues concerning real estate development.
By Michael C. Pupe, Esq.

"What should New York do to prevent misidentification of a defendant from leading to wrongful convictions?"

Michael Mercer was walking in Harlem late one afternoon when a young woman approached him. The woman began shouting that Mr. Mercer was the man who had brutally attacked her two months prior. The crowd quickly circled and began beating him, believing the woman's accusation. The police arrived and arrested Mr. Mercer. Based largely on the victim's adamant eyewitness identification at trial, Mr. Mercer was convicted of first-degree rape, sodomy, and robbery. Michael Mercer became prisoner No. 92A7361.

His pleas of innocence were finally realized ten years later. On May 19, 2003, based on reexamination of DNA evidence, and on motion by Manhattan District Attorney Robert M. Morgenthau, Mr. Mercer was released an innocent man. Returning home, Mr. Mercer was left to grapple with the psychological devastation and trauma from ten years of wrongful incarceration. Additionally, the victim was devastated by her mistaken identification of Mr. Mercer, who was innocent of the alleged crime.

While there has been no reexamination to determine who was responsible for over a decade, and society was left with a judicial system that failed to protect the innocent.

Mr. Mercer is one of the 24 people in New York who have been exonerated through reexamination of DNA evidence. Yet this number is merely the tip of the iceberg. DNA matches in New York City have accounted for over 30 percent of cases, which conservatively leaves New York with hundreds of wrongly convicted citizens. Simply put, this is a catastrophic failure of the criminal justice system.

New York places third highest in the United States for its number of wrongful convictions.

Evidence suggests that the single leading factor of wrongful convictions is mistaken eyewitness identifications. As Justice Marshall noted in his dissent in Manson v. Brathwaite, there is an "unusual threat to the truth-seeking process posed by the frequent unreliability of eyewitness identifications testimony." Eyewitness identifications are the leading cause of wrongful convictions. Perpetrators, on the other hand, are capable of faking eyewitness identifications and providing clues to a witness during the identification process.

New York must reform pretrial identification procedures to make certain identifications themselves are as reliable as possible. Further, it is essential for New York to broaden in-court procedures to protect the innocent when identifications occur without state involvement.

Increase Eyewitness Accuracy

The most important and meaningful advancement to reduce the number of wrongly incarcerated individuals is to disseminate rules and implement practices that enhance accuracy of eyewitness identifications.

New York must implement statewide mandatory witness identification procedures.

Eyewitness identifications, similar to other forms of evidence, must be handled carefully to ensure the process for producing the evidence does not distort the already fragile evidence. A wealth of research in the past decade on eyewitness identification protections can ensure identification evidence is as accurate as possible. Pulling from this research, New York must implement mandatory witness identification procedures to protect the innocent.

New York must demand cautionary instructions be provided to all witnesses before conducting such procedures. Imagine yourself as a witness to a robbery: frightened, anxious, and trusting a police officer's guidance to help you navigate the system.

In this environment, we must ensure witnesses have a clear understanding that the suspect may not be in the lineup and that the police will continue to investigate the crime regardless of whether the witness makes an identification at that time. Without these simple pre-identification advisories, a witness' anxiety and desire to make the "right choice" may overshadow any doubt the witness may have.

The identification order must be sequential. Thus, rather than the witness viewing all individuals at the same time, the police should allow each of the fillers, as well as the suspect, to be viewed individually.

Evidence suggests that this helps ensure the witness' accuracy. The police must be as sure as possible of the individual who looks closest to the perpetrator.

An administrator that doesn't know the identity of the suspect must conduct the witness identification procedure. This process, called double blind administration, makes certain that the police officer conducting the procedure does not lead a witness to make an incorrect identification. It also ensures the witness' confidence in their identification is not artificially inflated by feedback from the administration.

It is important for police officers providing clues to a witness during the identification process to occur either intentionally or unintentionally. Either way, an administrator who doesn't know the suspect's identity is incapable of inappropriately leading the witness.

Finally, it is time for New York to require video recording and documentation of the entire identification procedure. Video recording from the witness' initial description of the suspect through the witness' identification statement, allows judges to review the process more accurately during a Wade hearing. Additionally, if the evidence is admitted, the jury can use video recordings to appropriately weigh the strength of the identification.

Mandating eyewitness identification procedures will help reduce the number of wrongful identifications occurring and increase confidence when identifications are made within these protections.

However, these procedures only impact state court eyewitness identifications. More immediate action is necessary, such as the one against Mr. Mercer, occur outside the presence of any state court. Thus, it is essential to also broaden in-court protections.

Broaden In-Court Protections

Preventing misidentification of a defendant from leading to a wrongful conviction must also occur through increasing courtroom access to both factual specifics of identification as well as broadening the knowledge available to all parties regarding the limitations of such evidence.

New York, through the Court of Appeals decision in People v. Santiago, has taken a step in the right direction in holding that the exclusion of expert testimony on eyewitness identification is inappropriate when little corroborating evidence exists against a defendant beyond this eyewitness identification. However, New York should fully implement this rule by demanding expert testimony be allowed in all cases in which eyewitness evidence is presented to the jury.

When eyewitness identification is made, whether state or federal, or a witness' Confidence Statement should be obtained from the witness. This statement should only require the witness to independently rank their level of confidence in the defendant's innocence, but also ask open-ended questions about the basis of their level of confidence. Such information can have a number of legally significant impacts beyond use by defense counsel. The statement could assist police in determining if they should continue to work a case. Prosecutors could also use it to help evaluate the case and determine whether to call a witness to testify. Finally, presenting the information would help assist jurors in making an accurate assessment of the eyewitness identification.

New York must require timely jury instructions on every case where identifications are presented. While many states have resources in developing jury instructions on the issues surrounding eyewitness identifications, New York should strengthen these instructions by demanding that they are provided in every identification case. Further, instructions should be provided immediately before eyewitness testimony. Allowing timely instructions will strengthen the jury's ability to understand the complexities of witness identifications and would assist them in evaluating the strength of the evidence as it is presented.

More than any other issue, a wrongful conviction constitutes a catastrophic failure that all sides of our justice system can rally behind. State police chiefs, district attorneys, defense attorneys, and the judiciary have all proposed reforms. However, New York has taken little action. This failure most obviously impacts the individuals spending years incarcerated for crimes they did not commit. Additionally, a wrongful conviction destroys families, leaves witnesses to grapple with the tremendous guilt of sending an innocent person to prison, and keeps the actual perpetrators at-large. According to law enforcement data gathered by the Innocence Project, seven rapes, five murders, two assaults, and one robbery were committed in New York by the actual perpetrators of crimes while these 24 people were wrongfully incarcerated.

It is time for New York to become leaders in protecting the innocent from wrongful convictions. Some say wrongful convictions are inevitable. While this may be true, we must at least be able to inform Michael Mercer, and the many others who have felt the worst of injustice, that our system has done everything reasonably possible to ensure the accuracy of convictions.
By Genan F. Zilkha, Esq.

A few months ago I was working on a situation on which the statute of limitations was due to expire. I raced down to the clerk’s office at 4:30 p.m. to file a complaint, and was turned away. The court had switched to e-filing for contract cases weeks before. I was relieved, as this provided me with additional time to work on, and file my complaint, but it also got me thinking about the effect of e-filing on the environment.

Lawyers use a lot of paper. In fact, the average lawyer uses between 20,000 to 100,000 sheets of copier paper per year. The production of this paper causes the release of 4.5 tons of carbon dioxide.1 Looking at my own office, I realized that, in my day to day life, I go through reams of paper. A lot of lawyers, myself included, will print memoranda, pleadings and discovery requests and responses out when they receive them, or before sending them out. Personally, I find it easier to review them that way, catching mistakes before a documents goes out to a client, the court and opposing counsel.3

The environmental impact of e-filing have been cited as a reason for its implementation.2 Green Justice, an “Environmental Action Plan For The New York Unified Court System” published in 2008, e-filing was put forth as a means of reducing paper, as well as impacting the environment in other ways. The report stated that the four million cases initiated in New York Courts resulted in filing of 100 million pieces of paper. This number does not include multiple copies that must be served on opposing parties. The environmental impact goes beyond the paper generated. Even going to the court to file these papers negatively affects the environment. The environmental effects of non-e-filing are especially devastating and much of this paper eventually ends up in the trash.1

The environmental impact of e-filing might be undermined by certain requirements by both judges and the federal court system. The Southern District still requires that cases are initiated and served “in the traditional manner on paper” meaning that all complaints have to be printed, and the actual paper copies need to be filed with the clerk’s office. In addition to this, many judges in both the federal and state court systems still require receipt of a paper copy of e-filed papers.5

Although it might be difficult to get lawyers and judges to change their ways in regards to paper usage, hopefully e-filing might make a dent in the amount of paper, and the environmental impact of manufacturing and delivering paper.

Genan F Zilkha, Esq., a NYCLA, Art, Cyberspace, and Women’s Rights Committee, and Young Lawyers’ Section member, is an attorney practicing in New York. She focuses her practice on counseling individuals and small businesses in their legal needs. She is a graduate of Fordham Law and was previously associated with Lawrence W. Rader, Esq.

The Three Rs: Reducing Your Environmental Impact

By Neil A. Feldscher, Esq.

Corporate social responsibility, sustainability, and environmental impact reduction. One need only walk into a coffee shop, browse the Internet to purchase goods, or review the tags at a clothing store to understand the prevalence of the environmental sustainability movement in today’s society. A larger segment of recent law school graduates have grown up with these new beliefs and will be leaving school with the expectations of environmental responsibility within their future employers. Perhaps most importantly, it is no longer only large European corporations that are ISO 14001 (i.e., environmental management system) certified or have corporate social responsibility programs and goals. Companies worldwide are now embracing and incorporating CSR and sustainability into their corporate values. Many of these companies, especially those that are ISO-certified, consider the environmental impact reduction programs of vendors at time of procurement. Even professional service procurement is no longer immune from this consideration. Well prepared firms should be prepared by having a CSR/sustainability program and understanding the benefits and results of their own program.

Even urban professional service type companies can have an environmental impact. For the typical New York City law firm, the largest potential means to reduce impact to the environment is through a program to reduce, reuse, and recycle (“RR&R”). While New York City requires that owners/operators of commercial multi-tenant buildings establish a recycling program, for office environments these requirements essentially only require the separation of many paper (and corrugated cardboard) products from the general waste stream (NOTE that for firms that operate a cafeteria there are additional requirements to separate certain types of food waste, and metal cans/aluminum foil products/glass bottles and jars/plastic bottles and jugs). Commingling of some of these waste streams is permissible in NYC. These city requirements represent a minimalistic type program that misses most of the opportunities for firms to have a measurable and meaningful impact. A well designed program that incorporates plans for reduction and reuse with recycling can provide marketing opportunities for firms, is socially responsible, and can reduce a firm’s overhead costs.

Reduce

A more fundamental element than recycling of generated waste is to reduce the amount of waste generated, therefore eliminating or limiting the need for recycling. There are dual cost-savings from reduction; a decrease in the purchase of consumable products provides a cost savings and the subsequent reduction in waste reduces recycling/disposal costs.

Some of the most common avenues for reduction include:

- Ensure that all printers are set by default to print on both sides.
- Do not unnecessarily print emails or computer files. For firms document management software allows for the creation of an “electronic redweld file,” thereby eliminating the need to print for purposes of filing.
- Consider the use of tablet and notebook computers for taking notes. Note-taking software provides the advantages of allowing for full text searching, keyword- word establishment, and for the automatic copying of notes between machines, locations, and persons. These notes can then be filtered by the document management software for the creation of an “electronic redweld file,” thereby eliminating the need to print for purposes of filing.
- Where paper is utilized for note taking, both sides of the paper should be utilized or the pad should be reused in order to utilize the back side of the pages.
- Firms that have their own cafeterias or pantries should consider the replace- ment of single-use condiments (e.g., sugar, milk, cream, etc.) with bulk products.

(See Three Rs on page 15)
Federal Courts Committee Presents Weinfeld Award

The NYCLA Edward Weinfeld Award for Distinguished Contributions to the Administration of Justice was presented to Hon. Sidney H. Stein of the United States District Court for the Southern District of New York by Judge Ralph K. Winter, United States Court of Appeals for the Second Circuit at the Federal Courts Luncheon hosted by the Federal Courts Committee on October 24.

Judge Stein (center) is congratulated by Stewart Aaron (left), NYCLA President; Jai Chandrasekhar (second from left), luncheon chair; Judge Winter (second from right); and Vincent Chang (right), chair of the Committee.

Attendees enjoy lunch at the Home of Law.

NYCLA Pro Bono Volunteers Honored at Reception

On October 25, lawyers from New York City were honored at the Celebrate Pro Bono reception held by the New York State Court’s Access to Justice Program for their dedication to serving the New York community.

NYCLA’s President, Stewart Aaron, presents awards to NYCLA pro bono volunteers.

Award recipients pictured back row, left to right: Tat Wong, Neely Moked, Locksley Wade, along with NYCLA Past Presidents Stewart Aaron, and Lois Davis, Director of NYCLA Pro Bono Programs. Front row: award recipient Daniel Migden.

Network of Bar Leaders Breakfast

On October 26, at a Legislative Breakfast held at NYCLA, New York State Senator Diane J. Savino (left); New York City Council Member Daniel R. Garodnick (second from left); New York City Council Member Julissa Ferreras (second from right); and Assembly member Guillermo Linares (right), spoke about a wide range of topics, from the Occupy Wall Street movement, the controversial NYC soda ban, regulation of RX drugs, and legalization of marijuana, to food labeling and other issues that affect lawyers, their clients and NY businesses. The event was held by the Network of Bar Leaders, a coalition of 46 member bar associations, citywide and statewide specialty groups, specialty bar associations dedicated to every field of practice, and ethnic and religious bar associations.
UPCOMING EVENTS

All events, unless otherwise noted, will be held at NYCLA Home of Law, 14 Vesey Street. Visit the Association’s website, nycla.org for more details, schedule changes and additions, and to R.S.V.P. for events, which are subject to change.

December

98th Annual Dinner: Celebrating LGBT Equality
Tuesday, December 11 - Reception-6:30 p.m., Dinner-7:30 p.m.; Waldorf-Astoria
Keynote speaker: Eric Schneiderman, New York State Attorney General.

 January

Speed networking
Thursday, January 24 – 6:30 p.m.

Mock Interview Program
Wednesday, January 30 - 6-8 p.m.
Sponsored by the Young Lawyers’ Section
Experience a mock interview with an experienced legal professional and gain insight into how to prepare for interviews. Open to first-year New York Law School students who are NYCLA members.

Discussion Series: Advice from the Bench: Practice Tips for Young Lawyers
Thursday, January 31 - 7 p.m.
Sponsored by the Young Lawyers’ Section and the Federal Courts and Supreme Court Committees

Board Nominations

The NYCLA Committee on Nominations is accepting nominations for the positions of Vice President, Treasurer and Secretary of the Association and for members of the Board of Directors. These terms would begin in May 2013. The Committee welcomes self-nominations or nominations of those you think could play a leadership role at NYCLA. Please submit a letter stating your or the nominee’s reasons for wishing to serve as either an officer or director, along with a resume. Materials should be submitted to Marilyn J. Flood, Counsel to NYCLA, email mflood@nycla.org, by December 27, 2012.
The NYCLA Library has great research and reference depth. That said, Environmental Law has not been a focus of collection development for the library for some time.

Being somewhat unfamiliar with the subject I would first gather pathfinders or research guides prepared by other law libraries that have Environmental Law as an area of focus. These subject specific bibliographies save someone learning a new area of law a lot of time. A simple Google search turned up many resources including the following:

International Environmental Law Pathfinders
• http://www.law.georgetown.edu/library/research/guides/InternationalEnvironmentalLaw.cfm

New York Environmental Research
• http://libraryguides.law.pace.edu/new_york_environmental_law

Specialized Environmental Research
• http://libraryguides.law.pace.edu/hydraulicfracking
• http://libraryguides.law.pace.edu/energyandtheenvironment

The NYCLA Library has a full complement of primary source materials in environmental law through our Westlaw subscription, for example:

• Westlaw Secondary
• Federal Environmental Regulation of Real Estate Law Digest (FEDEN-VDIG)
• Law of Distressed Real Estate (LAW-DRE)
• Real Estate Law Digest, Fourth Edition (RELAWDIGI)
• Defense Environment Alert (DEFEN-VALT)
• Federal Environmental Law-E.P.A. Decisions (FENV-EPA)
• U.S. Environmental Protection Agency Title V Final Orders (FENV-EPA-AIR)
• Corporate Compliance Series: Environmental (CORPC-ENV)
• Environmental Obligations in Bankruptcy (BKRENVOB)
• Handling the Land Use Case Land Use Law, Practice & Forms (LAN DUSELAW)
• Law of Water Rights and Resources (LWATRR)
• Law of Wetlands Regulation (LWETR)
• Legal Compliance Checkups: Business Clients (LCOMPLC)

In the NYCLA Lexis subscription patrons have access to all Federal and State primary source items and the ability to browse numerous Matthew Bender secondary source titles, including:

• Environmental Impact Review in New York
• Environmental Law and Business Transactions
• Environmental Law Practice Guide

Environmental Law is very dynamic as statutory, judicial and administrative regulations and determinations are in constant flux. Blawgs are one way to keep informed about the cutting edge of this area of law.

Found thru ABA Blog index (http://www.abajournal.com/blawgs/by_topic/)
• Environmental Crimes Blog

This blawg explores all aspects of environmental criminal law.
• Environmental Law and Business “Tracks changes in environmental law and their impact on business.”
• Environmental Law Prof Blog Posts cover policy, regulation and enforcement issues concerning environmental law, climate change, oil wells, Caribbean reefs and waste management.
• Environmental Legal Blogs “Developments in environmental law.”

Other sources of current awareness, which can be set up as email alerts, include:

• Westlaw Journal Environmental (WJENV)
• Westlaw Journal Toxic Torts (WJTORT)
• Westlaw Journal Asbestos (WJASB)

Recent book acquisitions:

Digital Training Center CLE Programs

Unless otherwise noted, courses are free and open to the public. Register at nycla.org. Questions? Contact Irina Chopinova at ichopinov@nycla.org or 212-267-6646 x203.

December
Westlaw: Advanced
December 4 – 10-11 a.m.
1 MCLE Credit: 1 Skills; Transitional
1 MCLE Credit: 1 Skills; Transitional
Lexis: 1
Lexis: Litigation
December 5 – 10:30 a.m. – 11:30 p.m.
1 MCLE Credit: 1 Skills; Transitional
Lexis: Expert Witness

Lexis: Factual Discovery
January 9 – 12:15 p.m.
1 MCLE Credit: 1 Skills; Transitional
Lexis: Company and Financial Research
January 9 – 1:30 - 2:30 p.m.
1 MCLE Credit: 1 Skills; Transitional

Westlaw: Basic
December 18 – 1:30 - 2:30 p.m.
1 MCLE Credit: 1 Skills; Transitional
Westlaw: Statutes and Regulations
December 18 – 3 – 4 p.m.
1 MCLE Credit: 1 Skills; Transitional
U.S. Bankruptcy Court Electronic Case Filing System
December 19 – 10 a.m.-12:30 p.m.
2.5 MCLE Credits: 2.5 Skills; Transitional (Also NJ)
Member: $65 Non-member: $85 Non-legal Staff: $35

January
Lexis: II
January 9 – 10:30 – 11:30 a.m.
1 MCLE Credit: 1 Skills; Transitional

Using Bloomberglaw.com for Litigation
January 24 - 10:10-10:50 a.m.
1 MCLE Credit: 1 Skills; Transitional (Also NJ)

Using Bloomberglaw.com for a Corporate Transactional Practice
January 24 – 11:05 - 11:55 a.m.
1 MCLE Credit: 1 Skills; Transitional (Also NJ)
Westlaw: Intermediate
January 29 - 1:30 - 2:30 p.m.
1 MCLE Credit: 1 Skills; Transitional
Westlaw: New York Materials
January 29 – 3 – 4 p.m.
1 MCLE Credit: 1 Skills; Transitional
What’s Really in Our Meat?

By Jessica Zafonte, Esq.

The discovery of the antibiotic penicillin in 1928 led to the lifesaving use of this drug and those similar to it. But as the use of antibiotics becomes more widespread, the number of antibiotic resistant, and thus incurable disease strains grow. Antibiotic resistant infections now cost the U.S. health care system $50 billion per year and infections once routinely treated with antibiotics are now requiring hospitalization and causing thousands of deaths annually.

Particularly problematic is the use of antibiotics in animal agriculture, which comprises over 80 percent of the antibiotics used in this country. For this use in our food system is almost entirely unregulated. The use of antibiotics in food animals is usually non-therapeutic, with most antibiotics administered to food animals to prevent disease and increase weight gain, rather than to treat infections. With the shift to the factory farm model of food production, animals are kept in severely overcrowded and filthy living conditions, where the stress, unsanitary environment, and improper nutrition will inevitably cause them to grow sick and die were antibiotics not consistently put into their feed. Antibiotics also allow animals to be manhandled to gain weight rapidly and thus slaughtered earlier. Apart from the ethical issues this scenario raises is the human health concern that the overuse of these drugs in the food system will lead to a growth in antibiotic resistant bacteria strains that can be transferred to the human population via food and environmental routes.

Yet despite these risks, there is very little regulation of antibiotic use in animal agriculture. The regulation falls under the fractured purview of several governmental entities. The U.S. Food and Drug Administration (FDA) is tasked with the responsibility of regulating the drugs themselves. The Agricultural Research Service of the U.S. Department of Agriculture (USDA) studies animal antibiotic use and publishes guidelines to reduce food-related health risks, while the Centers for Disease Control creates educational programs for antibiotic use in farm animals and funds state and local educational programs on this topic. State departments of agriculture are tasked with monitoring antibiotic use in farm animals, but there is no requirement that this data be reported to the federal government and no specific standards by which the states must abide. According to a physician who formerly worked for the USDA, “[there’s nobody in charge … and when no one’s in charge, it doesn’t get done].”

The agriculture industry is a powerful lobby, adamant on fighting regulation. Currently, the industry is not required to reveal how they use antibiotics in their animals or in what quantities, and many drugs are sold through feed suppliers with no regulation. When this data is disclosed, the industry underreports its antibiotic use by at least 40 percent, according to the Union of Concerned Scientists. This framework not only allows for the abuse and misuse of these drugs, it also hinders scientists from maintaining data that could be used to definitively prove harm to the population.

/world

Is your firm’s website mobile-friendly?

By Fred Cohen, J.D.

If you walk into any coffee shop in New York City, you’ll undoubtedly encounter patrons using a wide variety of smart phones and tablets. If you take a closer look, you’ll find that some are surfing the web, others are doing work and some may even be video chatting—all from their mobile devices. Given this undeniable ubiquity of mobile technology, it’s no surprise that savvy businesses and law firms alike recognize that their online marketing efforts must also accommodate the smaller screens of Droids and iPhones.

With your firm’s website serving as the focal point of your online marketing campaign, it’s essential that you assess just how effective your site is on a mobile device. Take a few minutes and try visiting your firm’s site from a smartphone. If you have access to both an Apple product like an iPhone (or even iPod touch) and another mobile platform like an Android, try them both. As you open your site, take note of just how long it takes to load. In many cases, sites have large graphics which may be quick to load on a PC with high-speed Internet access but can be problematic on a slower mobile network. Once the site opens, is the text easy to read? Do you have to scroll all over the place to try to find key components like contact information? If so, it’s probably time for you to develop a mobile site.

When developing your mobile site, consider the following best practices:

• Your mobile site should not contain the same graphics as your regular website. Instead the graphics should be created specifically for your mobile site—they should be much smaller in size and free of Flash animation.
• Create a navigation menu and page structure that visitors can easily see without zooming in and out.
• Whenever possible, you should have one-touch buttons which allow for easy navigation or action. These might include a click-to-dial button, share button (allowing visitors to easily email your site’s link or post to social media platforms) and a home button so they can easily get back to the starting point.
• When a user types in your domain name on a smartphone or tablet, he or she should automatically be taken to your mobile site. The user should not have to first arrive at your main site and then click a link to be taken to your mobile-friendly site.

There are many developers who will create a mobile site for your firm based on your main site. For the most part, their services are reasonably priced but often, since they are on a different platform from your main site, you may have to maintain two sets of content; one for your standard site and one for your mobile site. If the web developer who creates your main site is available, try first consulting them concerning a mobile site.

Fred J. Cohen, J.D., is the founder and President of Amicus Creative Media, an attorney web design and marketing company (amicuscreative.com) and NYCLA member benefit partner. He can be contacted at 877-269-0076.
Involving the Public in Pesticide Regulation

By Phillip Azachi, Esq.

The United States Environmental Protection Agency (EPA) reached a milestone in pesticide regulation last year. A September 2008 victory was only made possible through the long-term process of overhauling registration and the toll it took on EPA employees. The EPA turned to public participation in its continued regulation of pesticides.

Scotch-Matic, a company of pesticides for commercial lawn and garden uses, illegally applied insecticides to bird food products that are toxic to birds.1Scotts distributed unregistered pesticides, falsified pesticide registration documents, distributed the products with misleading and unapproved labels in violation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). It was sentenced to pay a $4 million dollar fine for 11 criminal violations of FIFRA, the largest criminal penalty under the act to date. Scotts further agreed to pay more than $6 million in civil penalties and spend $2 million on environmental projects to resolve civil pesticide violations, the largest civil settlement under FIFRA to date.

The EPA regulates the pesticide industry according to the mandates of three major federal laws. FIFRA requires EPA to review and register pesticides for specified uses. The Federal Food, Drug, and Cosmetic Act (FFDCA) mandates the EPA to set minimum standards for the quality and purity of pesticides used in or on foods or animal feed. The Food Quality Protection Act of 1996 (FQPA) set the federal FIFRA's safety standard for new and old pesticides and creates a uniform requirement regarding seized and unregistered pesticides. A person or company must register with the EPA before selling or distributing a pesticide in the United States. In applying the application, the EPA must ensure that the pesticide can be used with a reasonable certainty of no harm to the health and welfare of man, and without unreasonable risks to the environment based on the instruction label. To make such determinations, the EPA requires more than 100 different scientific studies and tests from applicants. Rigorous scientific studies are also necessary to determine tolerances for the amount of the pesticide that can legally remain in or on foods.

The EPA must constantly update the registration system to keep pesticide tolerances levels in light of new data. And Congress has imposed stringent time frames for completing such reviews. The 1988 amendments to FIFRA authorized the EPA to conduct the pesticide re-registration program, a comprehensive review to assess new information on the health and ecological effects of pesticides first registered before November 1, 1984. Approximately 1,150 pesticide active ingredients organized into 613 "cases" or related groups were subject to re-registration. FQPA requires the EPA to re-assess within 10 years the 9,721 existing tolerances and tolerance exemptions to ensure that they meet the new “reasonable certainty of no harm.” FQPA further requires the EPA to periodically review every pesticide registration every 15 years.

So far, the EPA has had major breakthroughs in its reviews. With respect to Glyphosate, the EPA completed the last of 384 Re-registration Eligibility Decisions (REDs) on August 3, 2006. The EPA completed over 99 percent of the tolerance reassessment decisions.3 The remaining 84 tolerance reassessment decisions for five pesticides were completed in September 2007.4 The EPA commenced their first 15 year review in 2006.

As the agency turns intention to completing the 1st year review, the EPA is implementing a public participation process related to pesticide registration. The public participation process provided options for conducting a six-phase process, the modified four-phase procedure of setting low-risk process depending on the initial risk assessments and complexity of issues. The six-phase process generally arises in more complicated cases than the four-phase process and the streamlined process. In either process, the EPA consults with public comments, risk assessments, risk characterization, and preliminary risk reduction measures.

The success of public participation in pesticide regulation turns on the availability of information. The EPA publishes a Federal Register (FR) notice announcing the availability of risk assessments and related documents from the public docket and EPA’s website before opening the comment period. The public is also informed through searchable databases of chemicals, registrations for commercial and consumer lawn and garden uses, and health and safety precautions on the EPA website.

The increased access to information and public participation is a major step forward as pesticides are sometimes too important to play important role in agricultural practices and urban living. According to Crop Life America, the primary trade association of the pesticide industry, the world-wide pesticide market was estimated at $38.5 billion in 2011 with the U.S. representing 32 percent of the market.5 In 2010, U.S. manufacturers produce over 1.2 billion pounds of synthetic organic pesticides annually, of which 85 percent are sold in the United States alone.6

You go through your mail and find an invoice from NYCLA. You check your email and there’s another. No, we’re not stalking you; we just want to keep you engaged as a NYCLA member for another year—to help you keep learning, stay competitive, expand your professional network, and demonstrate and elevate your professional value and credibility. And we’d like to hear what you want to get out of your NYCLA membership in 2013—here are our suggestions.

1. Take advantage of discountedCLEs to help expand your skill set, develop professionally, and learn about today’s hot topics

2. Attend a networking program or special event where you can meet industry leaders and professionals inside and outside your practice area

3. Go online through NYCLA’s Library to access electronic research for quick access to the materials you need most efficiently do your work

4. Go shopping or book a trip, and take advantage of our discounts at clothing and electronic stores and car rental companies

5. 6. Join a local gym such as Equinox Fitness Clubs, New York Sports Clubs, or Crunch using your NYCLA member discount and get a few work-outs in

9. Affect a networking program or special event where you can meet industry leaders and professionals inside and outside your practice area

10. Go online through NYCLA’s Library to access electronic research for quick access to the materials you need most efficiently do your work

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Why Social Disclosure?

By Tom Chernaik

Social disclosures are used to include or append legal information, disclaimers or disclaimers to individual social media communications. Marketing and advertising considerations often require that additional legal information or context are included with traditional print, broadcast and digital communications. When those messages are shared in social channels, however, lack of characters in short-form messages is no excuse for not including this information to consumers.

The Federal Trade Commission (FTC) updated its guidelines for Testimonials and Endorsements in late 2009, expanding them to include social and digital channels and the commission is currently reviewing their Dot-Com Disclosures that were last updated in 2000. In addition, state attorney generals are watching social contexts and promotions closely, ensuring that regulations are shared clearly within marketer programs.

Within regulated industries, the Securities and Exchange Commission (SEC) and Financial Industry Regulatory Authority (FINRA) have both issued guidance for the financial services industry and their counterparts in the pharmaceutical and medical devices industries have been waiting for the Food and Drug Administration (FDA) to issue updated guidance.

Regardless of your industry focus, if you are engaging in business activities on social media channels you want to be aware of legal requirements and liabilities. With new social channels, apps and tools being developed on a daily (if not hourly) basis, you need to consider the implications of proposed programs holistically, so that you are prepared for the inevitable change that takes place.

Do you see a lot of lawyers interested in social media disclosure? Should they be more concerned? What are the emerging regulatory issues or challenges?

We see increasing discourse on social media disclosure in legal communities. As mentioned above, concern has led some to overly rely on social media activities of the companies with which or in which they work. Still others are unaware of, or do not fully understand these issues.

The good news is that the regulatory issues are becoming clearer. In early June, the FTC held a day-long workshop on the topic and is expected to issue additional guidance for Dot-Com Disclosures later this year. That document was last updated in 2000, when Mark Zuckerberg was a sophomore in high school and before Facebook, Twitter or Pinterest were even an idea.

In advance of the FTC guidance, the Word of Mouth Marketing Association (WOMMA) issued an updated draft of their Social Media Disclosure Guidelines this Summer. (Disclosure: I am Co-Chair of the Members Ethics Advisory Panel of the Word of Mouth Marketing Association (WOMMA) and a frequent speaker at events on social media ethics and disclosure.)

The obvious challenge is the limitation of space in sort messaging platforms that most social and mobile platforms are based upon. Both from the perspective of communicating a disclosure and to ensure that consumers can understand the context of disclosure information, it can be difficult to make meaningful disclosures in 140, or fewer, characters. Furthermore, social communications are often syndicated between platforms (Twitter -> Facebook or Pinterest -> Twitter/Facebook). The WOMMA Guide is meant to discuss and address many issues as they relate to Social Media Disclosures.

Who should be concerned?

Without minimizing the distress of regulated industries as they struggle to develop compliant social media programs, let’s focus on consumer brands whose social media presence is most visible to consumers.

The unprecedented growth of social media has motivated brands to leverage the power of Facebook, Twitter, Pinterest and other networks in order to listen to and engage consumers, gain insights about their products and services, and ultimately drive traffic and revenue. Increasingly, sponsored content and marketing messages are more seamlessly integrated with advocate pages and profiles, videos, Tweets, blog posts and other content on the social web.

What are the risks?

Regulators are serious about ensuring that advertising is not deceptive and that sponsorship or other relationships between brands and their advocates are clearly disclosed. To date, the FTC has weighed in on these issues with regard to marketing campaigns including Ann Taylor Loft, Reverb Communications, Legacy Learning Systems and Hyundai.

Most recently, on June 20, the Advertising Standards Authority (ASA) in the UK ruled against Nike and banned a campaign it was running leading up to the Olympic Games. Tweets from sponsored athletes about the brand because they lacked the required disclosures. The ASA followed that decision with another action banning Tom & Guy, a chain of UK hair salons, concerning two from Gemma Collins, one of the stars of a popular UK reality series.

Your reputation is probably the most important reason to properly disclose. There is a growing sense of mistrust by consumers of digital and social content. Being transparent can go a long way to establishing yourself as credible. You can earn more trust with your customers and brand advocates by being transparent.

What are the common headaches around this sort of regulatory compliance?

There are three sources of headaches: understanding of the appropriate regulations and guidelines; developing a social media policy aligned with business objectives; and assuring adherence to that policy.

Depending on industry sector, US companies may need to address the requirements of the Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC), the Financial Industries Regulatory Authority (FINRA) and/or the Food and Drug Administration (FDA). While the policies of each agency continue to evolve, sufficient guidance has been provided for companies to develop compliant processes for social media communications. Many companies see the regulations as reasons to significantly limit their social media activities. While marketers are beginning to realize social media as an effective means to build customer relationships, increase awareness for their brands and boost sales, a lack of clarity on how to implement compliant social media programs often holds companies back or exposes them to unnecessary risk or liability. The companies that don’t resolve these conflicts are facing competitive disadvantages that will become more significant in the near future.

Monitoring and enforcement of social media compliance policies can be seen as a significant administrative burden. Ad hoc solutions, manual review and human resources are not scalable and become unmanageable in programs of even modest size. Integration into existing workflow processes is becoming easier with the availability of purpose-built disclosure and compliance tools.

Relief from the headaches of conducting compliant social media programs is within the means of those companies that choose to apply them. More significantly, the benefits of addressing compliance needs appropriately far outweigh the alternatives and companies can reap the full benefits of transparent social media marketing, keeping the trust of their customers and better monitoring, optimizing and measuring the performance of their social efforts.

Where do I get more information?

• FTC Dot-Com Disclosures (currently updating) – http://business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising
• WOMMA – Ethics – http://womma.org/ethics/code/
• Disclosure – http://womma.org/ethics/disclosure/
• http://www.of.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-complete/handpicked_media/lq-and-a/
• CMPLY – http://cmp.ly www.twitter.com/cmply

Tom Chernaik is CEO of CMPLY. The company’s unique disclosure, social media monitoring and measurement solutions are built on a foundation of Tom’s experience and insights in marketing, law, social media and entrepreneurship. Tom is Co-Chair of the Members Ethics Advisory Panel of the Word of Mouth Marketing Association (WOMMA) and a frequent speaker at events on social media ethics and disclosure.
What's in our Meat?

(Continued from page 11)

public health. Access to records from farms and feed mills are not easily accessible by regulators and there is currently no real pro-

tected by law. Although some livestock or pet owners may have the right to inquire about the medications their animals are on, the feds do not

involvement in the drug’s use.16 In June 2010, the agency released a draft rule that added the concept of “judicious use,” defined as the avoidance of any uses not necessary or desirable for animal health, thus requiring antibiotics not used for growth promotion and other production purposes.17 The FDA was recently accepting public comments on a proposed phase out the use of certain antibiotics to stimulate animal growth and create requirements for obtaining prescriptions for specific antibiotics.18 However, the FDA notes that it is pursuing a “voluntary approach” as it cannot afford formal proceedings and wants pharmaceutical companies to design phase out the use of 200 antibiotics that will be for human use only.19

Ultimately, nothing came of the FDA’s recommendation. Despite urging by the World Health Organization that a prescription be required for all antibiotics given to food animals and that countries begin phasing out the use of antibiotics to promote growth if these antibiotics are also used for human treatment.20 The FDA’s lack of effective action in this arena has not gone without criticism. In June, the Southern District of New York issued an order compelling the agency to “reverse [its] migration” by the Natural Resources Defense Council that requires the FDA to reissue a notice of withdrawal of approval for the non-therapeutic use of penicillin and tetracycline in animals raised for food.21 The opinion criticized the FDA, stating “[f]or over thirty years, the Agency has been confronted with evidence of the human health risks associated with the widespread subtherapeuti-

Bold text indicates article title or reference to book/journal/article. Underline indicates a web page/URL. Italicized text is a hyperlink to a specific page on the web. All text is read naturally as if you were reading the document.
Energy Efficiency
(Continued From Page 1)
Energy Efficiency in New York City Buildings

New York City promotes and regulates energy efficiency projects through a number of laws and initiatives. One of the largest is the Greater Greener Buildings Plan (GGBP), as named suggests, New York City has primarily focused its energy efficiency efforts in the building sector. This focus is not by accident – New York City has almost a million buildings, with translates into an enormous energy demand. Though the energy efficiency created by the GGBP, greenhouse gas emissions will reduce by roughly five percent, with an estimated $7 billion dollars saved in energy costs.

The GGBP is made up of four laws: LL84 (Benchmarking), LL85 (NYC Energy Conservation Code), LL87 (Energy Audits and Retro-commissioning), and LL88 (Lighting Upgrades and Sub-metering).

LL84 (Benchmarking) marking tool (which is free online, known as ‘portfolio manager’). LL88’s mandate is to require sub-metering in large non-residential buildings by 2025. Currently, many buildings use a single meter to determine their energy consumption. A large office building on a single meter therefore currently receives one electricity bill from the utility company, and divides, on a pro rata share, the cost amongst building tenants. One tenant, using a large amount of energy would be billed at the same rate as another tenant using very little. Such a system creates, in effect, a tragedy of the commons, with little incentive for individuals tenants to try to use energy efficiently. Sub-metering resolves this problem by tailoring energy bills to their own energy consumption. Rather than receiving a single energy bill for all tenants, sub-metering allows for individualized energy bills for each tenant. In turn, tenants can adjust energy consumption by using energy more efficiently, with resulting energy reductions reducing electricity bills.

New York City, through the GGBP and other efforts, is exhibiting an increased focus in energy efficiency, particularly in respect to buildings. For more information, visit the government’s GGBP and PlanNYC websites.

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Reuse
After reduction of waste generation, reuse ensures that where possible reusable materials are utilized rather than disposables, materials are fully utilized prior to disposal/recycling, and that recycled materials are purchased and used rather than virgin materials. Reuse can be achieved through:

• Use of recycled paper, towel, towels, or other materials.
• Consider the donation or sale of office furniture or equipment that is no longer needed.

ed but still has remaining life. Note that NYC WasteMatch is a citywide reusable materials exchange program which helps match products that have remaining life with users in need of similar products.

• Provide mugs, glasses, water bottles and beverage containers that are reusable, such as those available at dccnyec.hivemkt.com.

Recycle
Despite a firm’s best effort at reducing and reusing, some waste will still be generated. While New York City may have only certain requirements for recycling, firms can discuss with their building management the option of increasing the types of waste streams collected for recycling. Firms without cafeterias can still implement recycling of metal cans, aluminum foil products, and glass and plastic containers.

Another area in which firms have impact is the promotion of recycling. One way to increase personnel recycling is to provide separate containers for collection at each employee’s workstation. Where centralized collection of recycling is utilized instead of local workstation collection, employees should be provided a tray or other means of collecting their recycling and transporting to a central location. Centralized locations should be of adequate frequency and location so as to allow for easy disposal.

Every business, even office type environments such as law firms, has the potential to impact the environment. Reduction of these impacts is an important element of corporate social responsibility but may also be considered by clients in the selection of professional services. While some recycling is required by regulation, a more significant impact, including the potential for cost savings, can be obtained by including waste reduction and reuse with the recycling program. Every firm, regardless of their size, can easily reduce their environmental impact.

The Three R’s (Continued From Page 7)
• Consider the replacement of paper towels in the restrooms with high efficiency blade-type hand dryers.
• Provide chilled and/or filtered NYC tap water for drinking rather than disposable bottles. This can include retrofitting water fountains to include water bottle filling taps.

The Committee on Professional Ethics accepts both written and telephone inquiries on ethics matters and provides advisory opinions. For additional information, call the members listed below.

December 1-15
Sarah D. McShea
212-679-9090

December 16-31
Jim Kobiak
212-837-6757

January 1-15
David Weissberg
212-837-6880

January 16-31
Phil Schaeffer
212-819-8740

Ethics Hotline

Questions to the Hotline are limited to an inquiring attorney’s prospective conduct. The hotline does not answer questions regarding past conduct, the conduct of other attorneys, questions that are being litigated or before a disciplinary committee or ethics committee, or questions of law. This notation shall not be construed to contain all Hotline guidelines. For a full discussion of Ethics Hotline guidelines, please see Ethics Hotline, Guidelines on NYCALA’s Ethics Hotline,” published in the September 2006 issue of New York County Lawyer.

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Please Note: Assignments are subject to change.

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