They Endorsed Me For What?

By Alison L. Jacobs, Esq.

LinkedIn endorsements are often a mystery these days. Take any group of legal professionals and surely a few have received an endorsement for a skill they don’t have, an area of law they don’t practice in, or from someone they don’t even know. Some accept the virtual pat on the back and never think about it again; others ignore it, writing it off as a fluke. But what’s the best move?

Well, there’s no clear answer. Like virtually all other promotional content attorneys put out into the world, there are rules that govern what an attorney may ethically put on his or her social media profile. But as with almost any rule that was written years ago, it is struggling to stay abreast with the current technology.

With more than 250 million registered users, LinkedIn is the world’s largest professional social networking website. Users create their own profiles and can include information about their education, work experience, and skill sets. There are certain sections of one’s LinkedIn profile that have had legal ethicists opining, specifically the “Specialty” section and the “Skills and Expertise” section. These two profile components have been addressed by New York and Florida State bar ethics opinions, among others, and provide some guidance on the issue of endorsements and LinkedIn.

They call it the “senior tsunami.” It is no secret that the U.S. population is getting older and will continue to do so in increasing numbers. According to one study, the number of adults over 65 in the U.S. will double in 25 years, from approximately 35 million to 70 million, and the portion of older adults will rise from 13 percent to 20 percent of the population. And the legal profession is aging along with it. Though studies remain sparse, the statistics from one state (Michigan) showed that the number of lawyers turning 65 each year remained static between 1995 and 2005, but by 2009 (as the Baby Boomers hit retirement age in full force) had nearly doubled, and had continued to increase thereafter. This demographic trend is unlikely to abate, given (a) the steady increase between 1970 and 2005 in number of lawyers admitted to practice; (b) continued improvements in health care and life expectancy that have expanded lawyers’ working lives; (c) the strong desire of senior lawyers to continue to contribute to their firms and to society as a whole; and (d) economic necessity, “which will compel lawyers to continue working because their pensions or savings are insufficient to support themselves and their families.”

But it is not just the number of aging lawyers that will continue to grow, but the percentage. According to a report issued by the New York City Bar Association in November, law school applications have fallen in each of the past three years, dropping in 2013 by more than 38 percent compared to 2010. “Across New York’s 15 law schools, 1L class sizes are down nearly 20 percent from 2008.” Combined with the drop in law school graduates able to find full-time jobs and the concomitant drop in starting salaries, this inevitably means fewer lawyers coming into the profession over the next several years, and the public being served by an increasingly older lawyer population.

Even before the National Organization of Bar Counsel and Association of Professional Responsibility came out with their groundbreaking report on aging lawyers in May 2007, the profession had begun to turn its attention to the issue of aging. By now, the concern is ubiquitous. At a recent meeting of the Coordinating Council of American Bar Association’s Center for Professional Responsibility (CPR), virtually every CPR Committee was addressing issues relating to senior lawyers, and the CPR itself had assigned a staff attorney to

Aging Lawyers and Professionalism

By Ronald C. Minkoff, Esq.

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The NYCLA Task Force on Judicial Budget Cuts held a day-long public hearing on December 2 to receive testimony about the continuing impact of judicial budget cuts on the administration of justice.

SDNY Chief Judge Hon. Loretta A. Preska (second from left) speaks about the impact of budget cuts on court operations and the administration of justice on the federal courts on a panel with SDNY District Executive Edward Friedland (far left), U.S. Court of Appeals for the Second Circuit Chief Judge Hon. Robert Katzmann (second from right), and SDNY U.S. Attorney Preet Bharara (far right).

SDNY Past President and Partner at Hughes Hubbard & Reed, James B. Kobak, Jr. (far right), speaks about how budget cuts on the federal courts are impacting bankruptcy, business, and consumers.

Task Force on Judicial Budget Cuts members listen to testimony. Left to right: Michael J. McNamara, NYCLA Executive Director and Partner at Seward & Kissel, LLP; Michael Miller, NYCLA Past President and Task Force on Judicial Budget Cuts Co-Chair; and Vincent T. Chang, NYCLA Director and Partner at Wollmuth Maher & Deutch LLP.

Presenters cover how budget cuts on the federal courts are impacting court operations, criminal defense, and public safety. Left to right: U.S. Attorney for the Eastern District of NY (EDNY) Loretta Lynch, EDNY Chief U.S. Probation Officer, US Probation Department, Eileen Kelly; and EDNY Chief Judge, Hon. Carol Bagley Amon.


Distinguished panelists, including state court administrators as well as the Chief Judges of the Second Circuit Court of Appeals, the Eastern District of New York (EDNY) and the Southern District of New York (SDNY), and the U.S. Attorneys of the EDNY and SDNY “testified” before representatives of the NYCLA Task Force regarding the devastating impact of budget cuts on the courts. Each panel discussed the effect of budget cuts, including the following:

- Lost employees in each clerk’s office;
- Reduced court hours, closure of child-care centers, delays, and long lines in Family Court and Civil Court;
- Reduced ability of the Federal Defenders to accept cases or to investigate because of reduced staff;
- Reduced staffing and hours of court security and the effect on public safety;
- Reduced probation staff, who are less able to monitor offenders in the community or to implement searches for contraband such as drugs, firearms, or child pornography;
- Furloughs and reduced hours for court staff, and the hiring freeze, which prevents U.S. Attorneys’ offices from replacing Assistant U.S. Attorneys who leave the office;
- Virtually no training for probation officers and Assistant U.S. Attorneys.

Panel 1: Impact of Budget Cuts on the State Courts—Office of Court Administration

The presenters were Hon. Lawrence Marks, First Deputy Chief Administrative Judge of the State of New York, and Ronald Younkins, Executive Director for the New York State Office of Court Administration (OCA), who testified that courts face flat budgets, despite escalating mandatory costs, as a result of non-judicial employees’ contracts, judges’ salaries and other accruing costs. As the largest budgetary component, payroll has suffered deep cuts, resulting in a reduction of 2,000 employees in the State system during the last three or four years.

While this was initially manageable, the system is approaching its breaking point. The courts have shifted employees from the backrooms to the courtrooms. Supervisors have been shifted to the front desk. Training has been cut. There are delays in trials, entries of judgment, and decisions on motions. The Law Department has been depleted. While the courts previously relied on attrition to reduce costs, such reductions are no longer sufficient, requiring OCA to request an increased budget this year.

Younkins stated that the 2013 budget was less than in 2009, even though costs have increased since that time. OCA has asked for minimal (2.5 percent) increases in a $1.8 billion budget. The budget is based on no further attrition and adding a few critical positions and would also permit later courthouse closings in some courts, a matter that has concerned the bar.

OCA’s budget also requests $5 million for 20 additional Family Court Judges. Over the last 20 years, volume in the Family Court has increased 90 percent with only an 8.8 percent increase in judge-ship, including no new judgeships in New York City.

Panel 2: Impact of State Court Budget Cuts on Children, Families and the Public

Michael McNamara introduced Panel 2, which included Briana Denney, Co-Chair of NYCLA’s Matrimonial Law Section; Dora Galactos, Executive Director of the Feerick Center for Social Justice, Fordham University School of Law; Stephanie Gen- dell, Associate Executive Director for Pol- licy and Government Relations, Citizens’ Committee for Children of New York; Janet Ray Kalson, an attorney with Him- melstein, McConnell, Gribben, Donahue & Joseph; and Susan B. Lindenauer, the Co-Chair of the New York State Bar Asso- ciation Task Force on the Family Court.

Task Force on Judicial Budget Cuts
Message from the NYCLA Foundation

Is the Practice of Law a Higher Calling?

Do you agree that the law is a higher calling? Please write to me to let me know your opinion. What can NYCLA do to help improve professionalism? Programs we have coming up in this area include:

• Continuing Legal education courses,
• Blowing the Whistle: Perspectives From Both Sides, on Wednesday, February 5 at 6:30 p.m. co-sponsored by NYCLAs Young Lawyers’ Section and Puerto Rican Bar Association. Faculty includes Carmen Segarra (a current whistle blower) and Linda J. Stengle of Stengle Law offering the Plaintiff perspective, along with Michael Tilakos and Mauro Wolfe from Duane Morris LLP offering the Defense perspective.
• Investor Protection of Dodd-Frank Act and Enhanced Professionalism, CLE course featuring Norman Arnoff, on Thursday, February 13 at 6 p.m.

These programs are just two examples of the projects that the NYCLA Foundation helps foster. Your dues do not cover all the costs of the programs and services that make us proud to be NYCLA members. We depend on your contributions to support the work that we do to benefit both the profession and the public. Consider making a gift to help NYCLA continue to provide these meaningful member activities. Please go to www.nycla.org and choose “Support NYCLA” from the pull-down menu.

—Lewis F. Tesser, President NYCLA Foundation

Rule 3.3 and False Evidence: Practice Pointers from Bar Opinions

By Whitney Elliott, Esq.

New York lawyers now know that Rule 3.3 of the New York Rules of Professional Conduct requires them to remedy the effects of a client’s use of false evidence. Thus, when a lawyer faces a Rule 3.3 problem, the stakes can be high. Disclosing a client’s use of false evidence can harm the client. But not disclosing the false evidence—or otherwise remedying its effects—can violate Rule 3.3, and can cause a tribunal and opposing party to rely on the false evidence. To further complicate things, a lawyer must also know that if he or she discloses a client’s use of false evidence when Rule 3.3 does not require doing so, the lawyer both acts unethically, and risks harming a client. For all these reasons, understanding Rule 3.3 matters.

Since Rule 3.3 took effect in April 2009, at least four ethics opinions have elaborated on different aspects of the rule: NYCLA Ethics Opinion 741 (Mar. 1, 2010); New York State Bar Opinion 837 (Mar. 16, 2010); New York State Bar Opinion 963 (Mar. 19, 2013); and New York City Bar Opinion 1063 (Feb. 18, 2014). This article highlights features of those opinions that lawyers should keep in mind when dealing with ethical questions under Rule 3.3.

Limits on the Reach of Rule 3.3

N.Y. State Bar Op. 963 identified a set of facts that did not trigger Rule 3.3, even though it involved a client—on at least one prospective client—using false evidence. A client contacted a legal service organization for representation in a pending administrative law matter. The client met with a staff member from the office, and signed a release permitting the office to review the administrative record in the case. An attorney from the office then submitted the release to the tribunal and reviewed the record. The attorney later learned that the client had presented false information to the tribunal: the name and address the client provided differed from the name and address the client had on file with the New York State Sex Offender Registry and the Department of Corrections and Community Supervision. With this information, the lawyer also knew that the client had committed a separate crime, since it is a felony for a sex offender to not report a change of address. The client then missed two appointments with the office and stopped returning phone calls. The office then decided not to represent the client going forward. No lawyer from the office ever entered an appearance before the tribunal.

Under these circumstances, the lawyer asked whether Rule 3.3 required disclosing the client’s conduct to the tribunal. After going through the text of Rules 3.3(a)(1), (a)(2), and (a)(3), the opinion concluded that no provision required disclosure.

The opinion noted that Rule 3.3(a)(1) applied only to false statements of fact and law made to a tribunal “by a lawyer.” Because the lawyer in this case had not made or even presented the false statement—the client had done so before contacting the lawyer—Rule 3.3(a)(1) did not apply.

The opinion then looked at Rule 3.3(a)(3). That provision states that a lawyer may not “offer or use evidence that the lawyer knows to be false.” The opinion reasoned that because the lawyer did not and would not represent the client before the tribunal, the lawyer did not “offor or use” the false evidence. In addition to this textual explanation, the opinion offered a com monotone, practical one, by noting that it “would not make sense to require a lawyer to take reasonable remedial measures regarding proceedings before a tribunal in which the lawyer has never appeared on behalf of a client.”

The opinion also discussed Rule 3.3(b), which requires a lawyer to disclose a cli-ent’s criminal or fraudulent conduct that

—See Rule 3.3 on page 4—

Message from Barbara Moses

President of NYCLA

Dear Readers: The New York legal landscape is constantly evolving. Not only does the substantive law change; so do the rules and regulations governing the way that lawyers practice law. Some of these rules and regulations are enacted based on a broad consensus of the bench and bar. Others are more controversial. NYCLA looks at a wide variety of long-standing, newly-enacted and proposed rules governing our profession, recommends changes when appropriate, and works closely with the judges and administrative bodies responsible for the rules to make sure that the concerns of our members are heard.

NYCLA’s Task Force on Meeting the Challenges of Pro Bono, chaired by past President Catherine Christian, is identifying the most significant problems likely to be faced by bar applicants when the rule becomes effective next year; researching the ways in which law schools, law firms, public interest organizations, and bar associations are planning to meet the challenge; and identifying best practices across a wide spectrum of the legal profession. NYCLA’s Task Force will also recommend changes to the rule and/or to its enabling regulations as necessary to remove unnecessary barriers to compliance. Meanwhile, NYCLA is taking steps to ensure that its own pro bono programs—to the extent permitted under existing student practice rules—are open to law student and law graduate members who are interested in serving the public and satisfying their pro-admission pro bono requirement.

More recently, NYCLA formed a working group, led by NYCLA Board of Directors member Megan Davis, to take a careful look at an even newer set of rules, which require New York attorneys to report their pro bono hours, as well as contributions made to pro bono organizations, on their biennial disclosure forms. As originally enacted, these rules would also have permitted the press and the public, on request, to obtain information concerning the pro bono hours and charitable contributions of individual attorneys. Due to a change to the law, the rules have been ‘suspended’ until 2015. Long before that deadline, NYCLA’s working group will have completed its analysis and the Association will work toward a set of rules that appropriately encourages voluntary pro bono work by New York lawyers without coercion, and without unnecessarily intruding into the intimate financial decisions made by those lawyers and their families as they strive to balance their professional and personal obligations. NYCLA is also significantly involved in the local legal landscape. In New York City, where City Hall is largely responsible for arranging our professional and personal obligations. NYCLA is also significantly involved in the local legal landscape. In New York City, where City Hall is largely responsible for arranging indigent criminal defense services, those services have been consolidated in recent years, with more and more cases going to a few large legal aid organizations. Unclear about that consolidation—and the corresponding budget pressure on the orga—

[See MESSAGE on page 11]
The Florida bar adopted similar reasoning in a recent advisory opinion addressing the “Skills and Expertise” section of the LinkedIn profile. The question posed was whether an attorney may hold oneself out as a “specialist” or an “expert” if the lawyer is not board certified. Florida’s rule governing whether an attorney may hold oneself out as a “specialist” or an “expert” if the lawyer is not board certified, even if the lawyer “comes to know” of the falsely represented areas of law and the lawyer did not publish the representation in the Florida bar’s directory. The opinion noted, when a lawyer can remediate the falsity, Rule 3.3 does not require lawyers to “take reasonable remedial measures” unless the falsity is still available. Rule 3.3 thus does not permit disclosure. In those circumstances, a lawyer’s disclosing the falsity would violate Rules 3.3 and 1.6.

The Duration of a Lawyer’s Duties Under Rule 3.3

Under ABA Model Rule 3.3(c), a lawyer’s duty to remedy the false evidence ends at “the conclusion of the proceeding.” The City Bar Opin. 2013-2 stated, “Rule 3.3 does not establish a fixed timeframe for terminating this provision. The absence of a clear rule on this point has resulted in two opinions addressing the issue: N.Y. State Bar Op. 837, and the New York City Bar Op. 2013-2.”

The State Bar opinion concluded that a lawyer’s duty to remedy false evidence continues beyond the end of the proceeding in question. At the same time, the duty a lawyer has under Rule 3.3 lasts only while “reasonable remedial measures” are still available. Rule 3.3 thus does not permit disclosing a client’s use of false evidence when doing so would not serve any remedial purpose. City Bar Op. 2013-2 reached the same conclusion, but also relates that conclusion to Rule 3.3’s broader purpose. The City Bar Opin. notes that Rule 3.3’s purpose is “to protect the integrity of the adjudicative process by preventing the trier of fact from being misled by false evidence.” Thus, for a client’s use of false evidence to continue beyond Rule 3.3’s(a)(3) “they ‘must have a reasonable prospect of protecting the integrity of the adjudicative process.’”

With this approach, the City Bar Opin. explains that if the tribunal in which the false evidence was originally used still has power under the law to reopen the proceeding and consider new evidence, then a lawyer should disclose the falsity both to the original tribunal and to opposing counsel. The City Bar opinion notes that “remedying the false evidence to opposing counsel, without more, would not satisfy Rule 3.3, unless doing so would protect the integrity of the adjudicative process.”

The opinion also concluded that if the original tribunal would no longer have power to reopen the proceedings, but another tribunal would, then the lawyer should disclose the false evidence to opposing counsel, or, if appropriate, the opposing party. The opinion notes that the lawyer’s duty would end there, because the lawyer would not be required to commence a new proceeding before a new tribunal. Instead, opposing counsel on the opposing party would have to decide whether they can and should commence a new proceeding.

In short, Rule 3.3 probably does not require lawyers to remedy a client’s use of false evidence, when the lawyer has not appeared for the client before a tribunal, and the client—rather than the lawyer—offered the evidence. When Rule 3.3 does apply, it requires a lawyer to remedy false evidence only if the lawyer “knows” of the falsity.

NYCLA Ethics Opinion 741 offers some guidance to lawyers in deciding whether or not they “know” about the falsity of evidence. Drawing from In re Doe, 847 E2d 57 (2d Cir. 1993), the opinion suggests that because of Rule 3.3’s “knowledge” requirement, the rule does not apply when a lawyer simply suspects or believes that a client has used false evidence. However, Second Circuit pointed out in In re Doe, a lawyer need not have “proof beyond moral certainty” before the lawyer has “knowledge.”
coordinate those efforts. State and local bar associations, as well as those in charge of state or local public assistance programs across the country, are doing the same thing. Why do we talk about this in terms of “professionalism”? Because this complex, highly sensitive issue involves both the interaction among lawyers—similar to more traditional professionalism issues like civility—and the interaction between lawyers and the public they serve. Moreover, it is an issue that is resistant to rules-based solutions. Indeed, the New York State Bar Association and the ABA House of Delegates have both opposed including mandatory retirement ages in law firm partnership agreements, while (in seeming contradiction) a recent ballot initiative in New York to amend the State Constitution to increase the retirement ages for certain judges failed miserably. These developments show that while it is not illegal to be leery of aging lawyers (and judges), the profession itself is loath to make blanket pronouncements about its most valued members, and to treat the issue on a lawyer-by-lawyer basis. This goes beyond the Rules of Professional Conduct and other court rules, and requires the profession itself to develop a standard practice that can help lawyers, lawyer regulators, law firms and others address what is becoming a fast-growing problem.

Indeed, all of us know lawyers in their 70s and 80s who still practice with vigor, have all their faculties, and are an asset to the Bar and public.

But is it really a problem? Many senior lawyers say it is not, and even resent the implication—and a broad perception—that lawyers who are past 70 or 80 might be less able than younger lawyers to practice fully. Any loss in stamina or technological savviness, these lawyers note, is made up for in increased maturity, experience, and judgment. So, all of us know lawyers in their 70s and 80s who still practice with vigor, have all their faculties, and are an asset to the Bar and public. These lawyers can—and should—continue to practice as long as they are able to do so.

Yet is the last phase that is the rub. As the NOBC/APRL Report recognized, while “impairments to a lawyer’s ability to practice may develop at any age,” the senior population is particularly likely to develop age related impairments which, if unrecognized or unaddressed, may adversely affect clients and the ability to practice law. Many of us have known senior lawyers or judges whose abilities have faded, but who still practice because either they do not recognize the problem or the burden of finding a replacement. Indeed, the NOBC/APRL Report was born of a concern that many senior lawyers were finding it increasingly difficult to function in the disciplinary system for the first time, and were being forced to end long, otherwise distinguished careers via suspension or disbarment, often in mental health-related court proceedings, or awareness to avoid trouble. To risk a gross analogy, this is no different than when aging parents can no longer safely drive. The parents may deny it; their adult children are reluctant to discuss it; but they represent a danger to the public just as surely.

It is with all this in mind that the professionalism movement has turned to the issue of aging in our profession. We want to find ways for able senior lawyers to continue to contribute, while learning to identify lawyers whose age has become an impairment and help them ease into a new phase of their careers humanely and with dignity, protecting the public at the same time. While analyzing this issue may begin with the Rules of Professional Conduct—including RPC 11.1 (requiring lawyers “to provide competent representation”); 1.5(b) (prohibiting lawyers from “neglecting a matter”); 1.4 (requiring lawyers to consult with their clients) and 8.3 (requiring lawyers to report a lawyer who has “committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer’s . . . fitness to practice law”)—it does not end there. It requires coordinated efforts from court administrators, the organized Bar, disciplinary prosecutors, law firms, and many others, and it covers the entire spectrum of practicing lawyers, from solo practitioners to those who work in the world’s largest firms.

Here are just a few examples:

- Change in Status:
  - Senior lawyers and the public they serve, are consistent with the highest standards of lawyer professionalism.

  Ronald Mueckoff is the Head of the Professional Responsibility Group at Frankfurt Kuehn Klein & Selz, P.C. He is the Chair of the NYCLA Task Force on Professional Responsibility, a Past President of the Association of Professional Responsibility Lawyers, and an Adjunct Professor of Professional Responsibility at Cardozo Law School.

  1. National Organization of Bar Councils:
  - “Lawyers’ Joint Committee on Aging Lawyers, Final Report” (NOBC/APRL Report) at 1 in 2.
  - See id. at 3.
  - Id., citing T. Karas, Facing Drop in Ap-
  - Id. at 5-6.
  - See id., id. (suggesting the types of training and men-
    torship and training programs needed to assist young lawyers)

  - See http://www.nysba.org/workarea/Down-
    loadAsset.aspx?did=27981
  - The NYLSA, a web site, for example, makes clear on its Lawyer Assistance Program “addresses depression and other mental health issues,” and focuses on “identifying the impairment” and devising a treatment program for it. See http://www.nysba.org/CustomTemplates/SecondaryStandard-
    s/32375
  - See also, id. at 18.
  - 22 N.Y.C.R. S. § 118.1(b).
  - 3 Id.
  - 4 See, other jurisdictions which have their own versions of “lawyer assistance programs”

  5. NYCBA Task Force Report at 5-6, 100-02 (suggesting the types of training and men-
    toring programs needed to assist young lawyers)
Technology has allowed the discovery process to become faster, easier, and more accurate. Targeted database searches have replaced poring through reams of paper in search of the “smoking gun” or crucial evidence to prove your case. Along with new technology comes new considerations when determining what practices are ethi- cal under New York’s Rules of Professional Conduct (RPC). But what does technology change about legal ethics? While certainly most ethical obligations remain the same, attorneys cannot ignore the impact technology may have on maintaining an ethical legal prac- tice. Attorneys ignore technology at their own peril. One illustration of the role of practice. Attorneys ignore technology at their own peril. One illustration of the role of technology in e-discovery is the case of Qualcomm’s e-discovery process. The failure to disclose the documents resulted in sanctions against the outside attorneys by the Magistrate Judge. Though the san-This may be generally understood to refer only to legal knowledge, it can also refer to the technology associated with practicing law.”

Competence
Rule 1.1(a) of New York’s RPC states that “[a] lawyer shall provide competent repre- sentation to a client. Competent representa- tion requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” While

they have no further inquiry into the existence of additional documents. The court found that the outside attorneys violated their ethical duties when, “given the numerous warning flags, that they did not “know or suspect” that Qualcomm had not con- ducted an adequate search.” Commentary surrounding the case seems to indicate that part of the reason for this failure to inquire was due to counsel’s unfamiliarity with Qualcomm’s e-discovery process. The failure to disclose the documents resulted in sanctions against the outside attorneys by the Magistrate Judge. Though the san-

In some ways, e-discovery has made litigation more effective by allowing for targeted production of relevant documents from millions of bytes of data.

Delay of Litigation
In some ways, e-discovery has made litigation more effective by allowing for targeted production of relevant documents from millions of bytes of data. Data stor-

Business

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The New York County Lawyer

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Amended its Comment 8 to Rule 1.1 to provide, “in a case in which the attorney is unaware how an e-discovery platform works, for example, how the documents are indexed or what keyword searches were used, he cannot be certain that he has found the most relevant information to help win his client’s case.

Confidentiality
The duty to protect clients’ secrets under Rule 1.6 becomes even more important when dealing with technology and e-discovery. This is especially true where, as in many cases, e-discovery is outsourced to a third-party vendor. An attorney should question the security of client information. An attorney should inquire how client data is stored, and how many employees have access to the data, as well as the quali- fications of the individuals performing document searches. For example, a vendor who uses licensed attorneys to search the documents would provide more security for clients’ confidential information, since those document discovery attorneys are bound under the Rules of Professional Conduct. A firm using non-attorneys, or foreign attorneys not bound by the Rules of Professional Conduct, would have to provide additional assurances that client secrets remain confidential. This may be accomplished by having a licensed attorney in the relevant jurisdiction supervising the document discovery attorneys. In that case, Rule 5.1 would apply to the supervising attorney, thus protecting the clients’ interests.

In producing data during discovery, the attorney should also consider whether scrubbing metadata or encrypting documents is required. As far as New York is concerned, there is no ethical duty to either scrub metadata or encrypt documents in discovery, as opposed to e-mail corre- spondence between attorneys, scrubbing metadata could result in the spoliation of evidence.

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BUDGET CUTS
Panel 4: Impact of Budget Cuts on the Federal Courts—Part 2, Court Operations, the Administration of Justice

This panel featured Chief Judge Robert Katzenmeyer of the Second Circuit, the Hon. Loretta Presky of the SDNY, Edward Friedland, District Executive, SDNY, and Preet Bharara, U.S. Attorney, Southern District of New York. They described the financial position of the federal judiciary as “dire.”

Noting that the judicial budget occupies less than two-tenths of one percent of the total federal budget, Chief Judge Preska stated that the budget cuts have “forced the courts to be creative in the extreme.” She warned that with continued cuts, the courts would not be able to fulfill constitutional duties “fundamental to ordered liberty.”

Chief Judge Katzenmeyer described staffing cuts that stripped the court of “210 years of institutional memory.” Citing the example of law deks now performing “meat cleaver” cuts, he explained that SDNY’s non-salary budget had been slashed 34 percent, with drastic cuts in maintenance and law enforcement. “It is now difficult to conduct business or to resolve disputes,” he argued.

Furthermore, the cuts could be of “constitutional dimension in spending for such purposes would prevent him from replacing attorneys who retire or resign.” In 2013, he had 20 fewer AUSAs and in 2012, resulting in the delay or possibly even the abandonment of resource-intensive cases that involve issues important to the public.

Consistent with Lynch’s testimony, Bharara explained that his office generally requires more security and thus has reduced its non-salary budget to 25 percent. He claimed that a reduction in spending for such purposes could result in increased recidivism and mental health treatment programs could result in increased recidivism and could not operate on continuing resolutions providing inadequate, unpredictable, and insufficient amounts to the courts.

Chief Judge Amon also pointed out that drug and mental health treatment programs could result in increased recidivism.

She made clear, however, that the court could not operate on continuing resolutions providing inadequate, unpredictable, and insufficient amounts to the courts.

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Denney remarked that families are in crisis; they face financial and mental health challenges and court delays could permanently damage a parent’s relationship with his or her children. For example, delays in Family Court could delay sending a child to a special education school even if the need for such schooling exists.

Budget cuts have reduced the hours of court operations, so trials must be squeezed into a few hours in the morning or after- noon. Some custody cases take years to decide. Several of the past panelists said cases go to trial since judges do not have the time to resolve issues prior to trial or during lunch as they used to do.

In Supreme Court, judges (who may have presided over a case for months or years) often send financial issues to overburdened referees. As a result, follow-up meetings, two trials with two different judges.

Galacatos described the CLARO program, with which NYCLA is involved, which has held 9,200 consultations with litigants defending themselves in consumer debt cases. She works with legal service representatives who telephone consumers and ask if they have any comments or complaints that they would like to make in order to have a more accurate understanding of the situation.

Galacatos noted that, in 2013, SDNY’s non-salary budget had been slashed 34 percent, with drastic cuts in maintenance and law enforcement. “It is now difficult to conduct business or to resolve disputes,” he argued.

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Panel 5: Impact of Budget Cuts on the Federal Courts—Part 3, Bankruptcy, Business and Consumers

This panel included Hon. Carla E. Craig, Chief Bankruptcy Judge, EDNY; Vito Jennis, Clerk of the United States Bankruptcy Court, SDNY presenting the testimony of Hon. Cecelia Morris, Chief Bankruptcy Judge; James B. Kobak, Jr., U.S. Trustee for the Southern District of New York; and William Z. Schraver, President of the National Association of Bankruptcy Trustees.

Craig spoke about the transforma- tion of bankruptcy in moving individual bankruptcies to mass actions to maintain a functioning bankruptcy system in the interest of “providing a level playing field.”

Krasndorf spoke about the government’s role in bankruptcy, and the importance of bankruptcy being a “systemic” tool.

She warned that, if the situation continues, confidence in the bankruptcy system could erode.

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Companies from dropping their group health insurance. The law hopes to prevent them from offering a minimum standard of health coverage. Firms that meet all of the requirements will be eligible for a tax credit for two years on their return of up to 30 percent of the health insurance premiums paid. To qualify, a firm must meet the following:
1. Pay for at least 50 percent of the “Employee Only” monthly premium for its employees;
2. Have the equivalent of less than 25 full-time employees;
3. Pay an average annual wage that is less than $50,000 per employee.

The percentage of premiums given as a tax credit is maximized for firms with average salaries below $25,000. Firms with larger average salaries are gradually phased out until the average salary exceeds $50,000. Owners and their family members do not count toward the calculation of the average salary, nor are their premiums included in the tax credit. While the above guidelines come directly from the IRS, we recommend firms contact their tax professional to confirm their eligibility for the tax credit.

We recognize that many firms will have a headcount or average salary that makes them ineligible for the credit. Ultimately, we hope to see some level of tax credits extended to all employers providing group health insurance. While it may seem to favor companies with certain demographics, the legislation may actually level the playing field, encouraging more employers to offer health insurance.

Tax Credits for Small Firms Providing Health Insurance

By Aaron Mitchell

The newly enacted healthcare reform will have a financial impact on firms of all size. The primary initiatives of the Patient Protection and Affordable Care Act are to make health insurance more available and more affordable to most Americans. So far, the legislation hasn’t lowered group insurance premiums for many firms. However, small firms may be the first to see a financial benefit.

Perhaps the most publicized aspect of the legislation is the requirement of any company with at least 50 full-time employees to offer health insurance coverage. Beginning in 2014, companies with at least 50 full-time employees will incur a penalty if they do not offer a minimum standard of health insurance. The law hopes to prevent companies from dropping their group health coverage, adding to the uninsured population in the United States.

One of the less publicized parts of the legislation is a potential tax credit for many small firms and companies that provide health coverage. Firms that meet all of the requirements will be eligible for a tax credit for two years on their return of up to 30 percent of the health insurance premiums paid. To qualify, a firm must meet the following:
1. Pay for at least 50 percent of the “Employee Only” monthly premium for its employees;
2. Have the equivalent of less than 25 full-time employees;
3. Pay an average annual wage that is less than $50,000 per employee.

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We recognize that many firms will have a headcount or average salary that makes them ineligible for the credit. Ultimately, we hope to see some level of tax credits extended to all employers providing group health insurance. While it may seem to favor companies with certain demographics, the legislation may actually level the playing field, encouraging more employers to offer health insurance.

Large firms and companies often have lower premiums because the risk is spread out over more lives. Smaller companies often have higher rates per employee and have seen much greater volatility in their annual insurance renewals. Small groups have routinely received annual premium increases of 15 to 20 percent or higher. Rather than penalize small employers for not offering coverage, the legislation uses the carrot of a tax credit to qualifying companies to entice smaller employers to maintain or begin offering health insurance.

NYCLA Comments on and Supports Issues

NYCLA frequently reports, comments on, and supports issues affecting the New York City legal community and has recently commented on or supported the following issues:

- Estates, Trusts, and Surrogate’s Court Practice Section sends comments to OCA about proposed rule limiting public access to certain documents filed in the Surrogate’s Court containing personal identifying and financial data;
- Civil Court Practice Section sends comment to OCA on the recommendation for amendment to the Uniform Rules for the New York City Civil Court and City Courts outside of New York City.

Learn more on the News & Publications section of nycla.org.

Ethics Hotline

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.

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 the article below, “Guidelines on NYCLA’s Ethics Hotline,” published in the September 2006 issue of New York County Lawyer.

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<thead>
<tr>
<th>Date</th>
<th>Name</th>
<th>Phone Number</th>
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<tbody>
<tr>
<td>February 1-14</td>
<td>Bruce Green</td>
<td>212-636-6851</td>
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<tr>
<td>February 15-28</td>
<td>Richard Maltz</td>
<td>212-705-4804</td>
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<tr>
<td>March 1-15</td>
<td>Greg LeDonne</td>
<td>212-335-9152</td>
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<tr>
<td>March 16-31</td>
<td>Bruce Kelly</td>
<td>212-715-1080</td>
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Please Note: Assignments are subject to change.

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From Orlando to Miami...
From Tampa to the Keys
The New York legal community gathered for an evening of celebration at NYCLA’s 99th Annual Dinner on December 17 at the Waldorf Astoria Hotel. This special event celebrated service to the bar and the community and honored the law firm partners and in-house counsel who lead the pro bono efforts of their firms and corporations.

Annual Dinner Honorees and Dais Guests
Annual Dinner honorees and dais guests including recipients of the 2013 Boris Kostelanetz President’s Medal, the authors of the critically acclaimed six-volume treatise Commercial Litigation in New York State Courts, published by NYCLA and Thomson Reuters, gather at this annual special event.

Pro Bono Service Honored
Members of the New York legal community were honored for their dedication to pro bono service at the 2013 Dinner.

Bottom row, left to right: Louis O’Neill, White & Case LLP; Vilia B. Hayes, Hughes Hubbard & Reed LLP; Sarah Loseminis Cave, Hughes Hubbard & Reed LLP; Jack Yoskowitz, Seward & Kissel LLP; and Deborah Kaye, BNY Mellon.

Top row, left to right: John E. Tsavaris II, Kenyon & Kenyon LLP; Kent A. Yalowitz, Arnold & Porter LLP; Gonzalo S. Zeballos, Baker & Hostetler, LLP; and Charles K. O’Neill, Chadbourne & Parke LLP.

Former Detroit mayor and former American Bar Association President Dennis Archer (left) presents NYCLA’s Diversity Award to Thomas L. Sager (right), Senior Vice President and General Counsel of DuPont for his leadership, efforts and achievements in increasing diversity in the legal profession.

Jane C. Sherburne (center), Senior Executive Vice President, General Counsel and Corporate Secretary of Bank of New York Mellon, receives the 2013 William Nelson Cromwell Award for her leadership and dedication to pro bono service. Congratulating her are NYCLA President Barbara Moses (left) and Michele Hirshman (right).

Law and Literature Committee Presents Award
On November 12, on behalf of the Law and Literature Committee, past NYCLA President Michael Miller (left) and Law and Literature Committee Co-Chairs Alan Fell (second from left) and Walter Frank (second from right), presented the Law and Literature Award to Professor James Simon (far right), author, FDR and Chief Justice Hughes: The President, the Supreme Court, and the Epic Battle Over the New Deal, at a special award ceremony and CLE program.
February
15th Annual FINRA Listens…and Speaks
Monday, February 3—5 p.m.
Sponsored by the Committee on Labor Relations & Employment Law and the Committee on Securities and Exchanges
Speakers: Katherine M. Bayer, Esq., Director, Northeast Regional Office, FINRA Dispute Resolution
Moderator: Martin L. Feinberg, Esq.

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.

March
Portrait Unveiling of a Former President, Stewart D. Aaron
Wednesday, March 5—6 p.m.
Join as we unveil a portrait of immediate past NYCLA President Stewart D. Aaron, partner and head of New York office at Arnold & Porter LLP, by artist Rachel Sard. Reception to follow ceremony.

Speaking Tip: Barristers Must Breathe for Business!
By Maria Guida

Does nervous tension decrease your “gravitas” when you are speaking in the office, boardroom, or courtroom? Calm your nerves with breathing techniques that actors use before going on stage!

The great Russian director and teacher, Constantin Stanislavski, studied performances of the great actors of his era (Duse, Bernhardt, and Salvini) and discovered that physical relaxation was one of the most important qualities that they all shared—qualities that helped them project authenticity and power on stage. When we feel tense, afraid, or angry, we tend to take shallow breaths and sometimes even hold the breath. Breathing deeply slows the breathing process and reduces tension. It also enhances your ability to listen, respond with poise, and think quickly on your feet.

Here is a simple breathing exercise that will calm you down right before any important speaking moment:

• Inhale slowly through your nose for a slow count of five;
• Hold that breath for a slow count of five;
• Exhale slowly through your mouth for a slow count of five.

Repeat this exercise three or four times right before you begin speaking. As you begin to develop lung power, increase the slow count of inhalations and exhalations to seven, nine, ten, fifteen, etc. Using the breath in this way will center you, balance your nervous system, and calm your jittery nerves. Now, go into that speaking situation with greater confidence, authority, and authenticity!

Maria Guida is a speaking strategist/coach at major law firms and law associations, as well as a corporate and television spokesperson. As an actor on Broadway, TV, and film, she has worked with Paul Newman, James Earl Jones, and Kevin Kline. Maria can be reached at 718-884-2282 or via email at maria@successfulspeakerinc.com.

SPECIAL EVENT
CLE, A Knicks Game, Dinner and LOUNGE SUITE SEATING
All in one Night!!

Attend a Special Event designed just for NYCLA CLE Institute Attendees
Friday, April 4, 2014

• Start the evening at 6:30 p.m. for a CLE program on NYCLA’s Top 10 Financial Concepts Attorneys Need to Know (1.5 NY/NJ CLE Credits; 1.5 CPE Credits for Accountants), presented by Joseph Novello. The Financial Training Organization, conducted in a Suite at Madison Square Garden
• Enjoy an all-inclusive gourmet buffet dinner (including Jean-Georges Wedge Salad, Nachos, Sushi, Filet Mignon, Jean George Pasta and Shrimp, Spring Rolls, Hot Dogs, Chicken Fingers And MORE) and assorted non-alcoholic beverages
• Enjoy the Knicks – Washington Wizards game from a Private Lounge Level Suite
• Visit with a former Knick player (Alumni) in the Lounge Suite
• Popcorn, cookies, Ben and Jerry Ice Cream Bars, Brownies and Blondies and more during the game

NYCLA Members and Guests: $250
Non-members: $299
REGISTER EARLY - SPACE IS EXTREMELY LIMITED!

For more info or to register go to www.nycla.org
By Dan Jordan

My Resolutions

Like everyone, I make a few resolutions as each New Year is about to begin. Many people, once a resolution is made, have a steel will and accomplish what they set out to do. I, on the other hand, have to review my list at least weekly to try to stay on track. I hope you will indulge me as I review my list here.

Take the Time to Learn WestlawNext

It is hard to make time to learn new research skills. WestlawNext has been in the NYCLA Library for the past year. The NYCLA subscription to Westlaw databases allows Patron Access through either WestlawNext or Westlaw Classic (same databases, different interfaces), with WestlawNext being touted as saving time, our most precious commodity.

Westlaw/WestlawNext is the primary legal research tool available in the NYCLA Library. In addition to primary source materials, WestlawNext/Westlaw has hundreds and perhaps thousands of West treatises and form sets. Examples of some of the lesser-known titles are:

- Data Security and Privacy Law, by Ronald Weikers;
- Internet Law and Practice, by Joseph Fazio;
- Information Law, by Raymond Nimmer; and
- Film and Multimedia Law, by James Sammataro.

Seek the Elusive Work/Life Balance

If I save time with WestlawNext, I may be able to read some articles on achieving work life balance. The LegalTrac database, accessed through a NYSL-ABC card, gave me the full text of the following recent article:

-Werner, Wendy; Determine your work-life balance. 38 Law Practice 56 (2012). And bibliographic information about the next two [found in full-text on the web]:

For me, the work life balance includes a greater focus and commitment to getting my five to seven vegetables per day. I also need to move more.

Imprint Upon My Fellow NYCLA Members the Value that the NYCLA Library Can Bring to Their Practice

New additions include:


I encourage you, as a NYCLA member, to get involved in our groups making an impact—join a new Committee, volunteer to get involved in our groups making an impact. You can also make suggestions about books, ebooks, or database purchases, please contact NYCLA’s Director of Library Service, Dan Jordan, at djordan@nycla.org or phone 212-267-6646, x201.
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For the third year in a row, NAM was voted the #1 ADR firm.