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New York County Lawyer

The Beat of New York Law

Cybersecurity for Attorneys

By Gordon Eng, Esq.

Recent news reports of hacking attacks targeting some of the largest corporations in America saw serious data breaches at such household names as Target, Home Depot, and JPMorgan. The cyberattacks involved the losses of credit card and other personally identifiable information of thousands of individuals. Even some well-known high tech companies have fallen prey to cyberattacks. The ubiquitous nature of cyber mischievous goes well beyond the meme lone wolf, barely old enough to order a martini, locked away in a room, fingers wildly pounding away at code with single-minded determination to hack some Internet site or inject some malware into an unsuspecting victim. Today the game has gone major league and is played by organized teams of cybercriminals with millions of dollars at stake. Nation-states have jumped into the game as well, and cyber security is now on par with national security. Yet, despite the increasing sophistication of the modern-day cybercriminal, some forms of cybercrime rely as much on the susceptibility of the victim as on high-tech prowess. Borrowing a page from classic business marketing principles (i.e., product differentiation) cybercriminals have learned to target their victims in a way that differentiates their particular scheme so that victims will be more susceptible to their brand of cybercrime.

In one variation of a classic con game, which has been going on for at least the past five years, cybercriminals have been surprisingly successful in targeting a specific class of victim: attorneys and law firms in the United States and Canada. And regrettably, attorneys and law firms in the New York tristate region, like hundreds of their brethren throughout North America, have fallen prey to these fraudulent schemes. This article describes how the scam works and what attorneys can do to protect themselves.

The Cyber Collection Con Game

The Set-up

Typically an attorney or law firm will receive an email from a potential new client claiming to be a foreign citizen or representing a foreign corporation (Asia seems to be one of the geographic regions of choice for this scheme). There will be a number of variations on the theme, but the gist of the message is that the sender is owed money from a corporate debtor or an errant spouse or former business partner. The money is owed from some kind of business or real estate transaction, or from a divorce or tort settlement. The debtor is domiciled or resident in the United States—hence the need for an American attorney. The potential new client asks the attorney for help in collecting the money in exchange for a not-so-nominal percentage of the amount successfully collected. The amount in question is invariably in the hundreds of thousands of dollars; often translating to a five or even six figure fee for the attorney or law firm.

Before agreeing to the representation, a skeptical attorney may perform some due diligence and make a few phone calls or check out the Internet for the debtor's website. It inevitably turns out that the information provided by the potential client appears legitimate: there is a company website, and a company representative from the purported debtor actually responds when the attorney telephones or emails. The errant company or erstwhile spouse/partner acknowledges the debt. Within days the debtor gets in touch with the attorney and communicates a willingness to settle.

The Scam

Shortly after making contact with the debtor, the attorney receives a cashier check in settlement of the purported debt. The check will look legitimate in every way; it will be numbered; have a company name, logo and address and phone number; and a signature. The check will be printed on quality paper and bear the usual bank routing serial numbers on the bottom footer. Before depositing the check, the attorney may contact the

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CyberCrime on the Rise

Offense	Section	Sentence*
Obtaining National Security Information	(a)(1)	10 (20) years
Accessing a Computer and Obtaining Information	(a)(2)	1 or 5 (10)
Trespassing in a Government Computer	(a)(3)	1 (10)
Accessing a Computer to Defraud & Obtain Value	(a)(4)	5 (10)
Intentionally Damaging by Knowing Transmission	(a)(5)(A)	1 or 10 (20)
Recklessly Damaging by Intentional Access	(a)(5)(B)	1 or 5 (20)
Negligently Causing Damage & Loss by Intentional Access	(a)(5)(C)	1 (10)
Trafficking in Passwords	(a)(6)	1 (10)
Extortion Involving Computers	(a)(7)	5 (10)

Summary of CFAA Penalties

By Joseph Bambara, Esq.

One thing is very clear: The cybersecurity programs deployed at most US enterprises, defense departments included, do not rival the persistence, current skills, and technological prowess of our cyber adversaries. Last October 2014, Daniel Trenton Krueger, a leader of the computer hacking group known as Team Digi7al, was convicted for hacking the U.S. Navy, National Geospatial-Intelligence Agency, and over 50 public and private computer systems including the U.S. Department of Homeland Security. See www.justice.gov/criminal/cybercrime. Today, nation-states, crime syndicates, and even

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The New York International Arbitration Boom

By Clara Flebus, Esq.

New York is fast becoming a preferred seat for international arbitration worldwide. According to the 2013 Statistical Report of the International Court of Arbitration of the International Chamber of Commerce (ICC), the largest and most prominent international arbitration institution in the world, New York is one of the six most popular venues for international arbitration globally, along with Paris, London, Geneva, Zurich, and Singapore. Many important factors are contributing to the boom in New York. First, New York has been, and continues to be a financial and business capital of the world—a significant portion of the legal community is frequently involved in some of the world's most complex international commercial transactions and international contracts often containing an arbitration clause. Second, New York is widely recognized as having well-developed contract and commercial law, that is often selected as the law governing commercial agreements in cross-border relationships and transactions, because it is stable, predictable, and respectful of party autonomy. In addition, New York courts have repeatedly emphasized a strong public policy in favor of arbitration. Finally, New York hosts many of the most respected arbitration and alternative dispute resolution institutions, and offers a wide choice of arbitrators with international commercial experience, cultural diversity, knowledge of international private law, and experience in applying New York contract and commercial law.

Thanks to the advantages naturally stemming from New York's historic role as a global financial center and the efforts made by the legal community to attract more arbitrations, so far New York has ranked as the most favored seat for international arbitration in the United States. Indeed, the ICC report reflects that 63 percent of the new U.S. ICC cases filed in 2013 chose New York as the arbitral seat. Similarly, the statistics of the International Center for Dispute Resolution (ICDR), reflect New York's dominance as a venue for international arbitrations seated in the United States. In 2013, New York hosted almost three times more arbitrations than Miami, the next most popular location for this practice. Statistics for that year also show that ICDR handled nearly 1,165 new international cases – that number is up from 510 cases administered in 2000. These growing figures have a significant impact on revenues and profits of New York law firms. Notably, proprietary research conducted for the New York State Bar Associa-

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CYBERSECURITY

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payer. A company representative confirms that the check is legitimate and is indeed intended as payment to settle the debt in question. In keeping with usual practice, the attorney deposits the check in the attorney's or law firm's client trust account and contacts the now client with the wonderful news that the debt has been successfully collected. The client responds almost immediately with a grateful but urgent request to wire transfer the proceeds to the client's foreign bank account minus a generous portion for attorney's fees.

In accordance with the client's instruction, the attorney's bank is instructed to wire the money less the agreed upon fee to the payee bank account in favor of the client. The wire transfer is paid out of the attorney's client trust account in which the cashier check was deposited.

Several days later perhaps after a week goes by, the attorney receives notice from the bank that the settlement check was counterfeit, and the bank is looking to the attorney or law firm to make the bank whole for the amounts transferred to the foreign bank.

The Harm

The story invariably ends sadly with the attorney's failed attempts to retrieve the funds only to be have been informed by the foreign payee bank that the money was withdrawn and the account closed with no further information as to the whereabouts of the former account holder. The attorney is now indebted to the bank for the lost funds and may face additional disciplinary action if legitimate client funds in the client trust account have been lost.

How and Why Attorneys Fall Prey

One may wonder how an attorney could be so gullible to be taken in by what appears to be an obvious scam. What distinguishes this scam from the garden variety "Nigerian Prince"[1] type scams—which are easily ignored—is the attention to detail and the care in preparing the appearance of legitimacy. Given the level of multi-player coordination and counterfeit documentation, the set-up, scam, and getaway could be right out of an episode of Mission Impossible. The emails are addressed specifically to the attorney; they contain detailed information about the foreign corporation that is requesting legal help; included in the set-up are details of the American debtor; the circumstances giving rise to the debt (perhaps even a summary of the foreign procedural history) as well as past failed efforts at collection are set forth in a convincing manner. Moreover, the set-up correspondence contains web links and phone numbers to persons who can seemingly verify the legitimacy of the debt and debtor.[2]

Notably, another variation of this scam is sending an overpayment for a retainer in the form of a counterfeit cashier check. When the unsuspecting attorney notifies the client of the overpayment, the client requests the attorney to send a cash wire transfer for the overage. The attorney obliges before the cashier check bounces and thus becomes yet another victim. Two Hawaii firms lost more than $500,000 falling victim to this variation.[3]

The fraudsters behind the cyber collection con game have been successful and continue to prey on attorneys despite repeated alerts and warnings from law enforcement, media, and other bar organizations over the past several years. As recently as in the closing weeks of 2014, the Connecticut statewide grievance committee and local law enforcement issued an alert that several attorneys in Connecticut have fallen victim to this scam.

The scheme has been successful for a number of reasons not the least of which is the impact of the recent recession on attorney employment and the drop in business overall. As described in a recent Ethics Alert from the State Bar of California, "A lawyer's desire, and often need, for new clients and cash flow or simply quick access to cash based on relatively high profit opportunities

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CYBERCRIME

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youthful hackers leverage cutting edge techniques to launch attacks that are targeted and difficult to detect. Increasingly these are attacks that attempt to steal sensitive and valuable intellectual property, private communications, and other strategic assets and information. The cost of cybercrime rose again in 2014, with the average cost of a crime in the U.S. reaching $12.7 million, compared to $11.56 million reported in 2013.

Our main cybercrime legislation, the Computer Fraud and Abuse Act (CFAA), enacted by Congress before the Internet in 1986, attempted to strike an "appropriate balance between the Federal Government's interest in computer crime and the interests and abilities of the States to proscribe and punish such offenses." Needless to say, todays computer crimes are typically interstate and frequently international. That said, the CFAA has been amended almost every year since its inception to keep pace with an expanding set of offences. The current version of the CFAA includes seven types of criminal activity, outlined in the chart above.

We have additional federal and state law that address cybercrime but controlling its expansion will require more than laws. To control cybercrime effectively, we must establish public-private collaborations between federal and state law enforcement agencies, the information technology industry, information security organizations and especially the internet companies. This is easier said than done but anything less will allow cybercrime to eclipse terrorism as the biggest threat to our safety.

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ARBITRATION BOOM

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tion, estimated that an increase of 10 to 20 percent in international dispute resolution business in New York could produce about $200 to $400 million in incremental revenues annually for the local law firms.

In addition to the existing benefits offered to parties who come to New York, several new initiatives have been developed that are aimed at further enhancing the attractiveness of New York as a global topflight venue for international disputes. The most innovative initiatives recently implemented are the creation of the International Arbitration Part in New York Supreme Court—a specialized part that handles all international arbitration related matters filed in state court—and the establishment of a dedicated center for international arbitration in Midtown Manhattan. Both initiatives are poised to bolster the resources of New York as a forum for international dispute resolution that is fully equipped to compete with traditional international arbitration venues globally.

The International Arbitration Part

By order dated September 16, 2013, the Chief Administrative Judge of the Courts of New York State designated Commercial Division Justice Charles E. Ramos to hear all applications related to international arbitration brought under CPLR Article 75 or the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.,* before the New York Supreme Court, New York County. The creation of Justice Ramos' specialized part puts New York on equal footing with other leading venues for international arbitration disputes, including France, Britain, Sweden, Switzerland, and China, which all have designated courts or judges that entertain applications to challenge or enforce arbitral awards. In 2010, at least three other jurisdictions established specialized courts to deal with matters related to international arbitration—Australia, India, and Ireland. Having dedicated courts ensures that these types of cases are handled with consistency and expertise, and shows the governments' recognition of the importance of arbitration to their economies. In that regard, the establishment of the International Arbitration Part constitutes a substantial effort in raising the profile of New York as a global arbitration seat.

So far, the cases submitted to Justice Ramos have covered most aspects of litigation ancillary to international arbitration, and included applications to compel or stay arbitration, for provisional relief, and to confirm or vacate arbitral awards. To properly designate a case as one relating to international arbitration to be assigned to Justice Ramos, attorneys must follow specific instructions contained in the "Administrative Order Relating to International Arbitration," available on the Commercial Division's website at http://www.nycourts.gov/courts/comdiv. Pursuant to the Administrative Order, a party commencing a special proceeding involving international arbitration must check the box "Other Special Proceeding" on the Request for Judicial Intervention (RJI), and write out "international arbitration" in the blank space provided. If an international arbitration issue is raised in an action that is pending but not yet assigned (*e.g.,* as a motion to stay action and compel arbitration), a party must check the box "Other Commercial," and write "international arbitration" in the space provided. In the latter instance, a party must also file a Commercial Division RJI Addendum, in which it should note that the matter concerns international arbitration. A copy of the Administrative Order must be attached to any request to assign or transfer an action or proceeding to Part 53.

The practices and procedures for litigating a matter involving international arbitration before Justice Ramos are set forth in the "International Arbitration Part Rules"of Part 53, also published on the Commercial Division's website. Justice Ramos is committed to giving a fast track to these applications, which may be brought on an expedited basis by order to show cause. The overall goal is to make New York a comfortable venue and to make it clear to litigants that the courts will enforce valid and binding agreements to arbitrate and expedite the process. The Rules also emphasize that if parties wish to avail themselves of proceedings before the International Arbitration Part, they are strongly advised to include a forum selection clause in their contracts that explicitly waives the right of removal to Federal Court, which is available under Chapter 2 of the Federal Arbitration Act.

The New York International Arbitration Center

The other important innovation that recently changed the landscape of international arbitration in New York is the creation of the New York International Arbitration Center (NYIAC), a state-of-the art center that opened its doors in 2013 and features hearing rooms, breakout rooms, audio and video conferencing, and facilities for simultaneous interpretation. NYIAC is a nonprofit organization founded by a consortium of 37 leading New York law firms, which provide financial support and leadership for the center. The Center

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Message from Lew Tesser President of NYCLA

Getting Involved

Dear Member:

As we dive into 2015, you may be exploring opportunities that would positively impact your career. As a Member of NYCLA, you have many opportunities at your fingertips to help you succeed.

By joining or becoming more involved in one of NYCLA's many open Committees and Sections you can meet industry leaders and professionals inside and outside your practice area and stay on the cutting edge of the profession.

I've outlined some activities currently underway within some of our most popular groups.

ADR Committee—The ADR Committee closed 2014 out with a December meeting featuring Elizabeth Clement, President of the Association for Conflict Resolution of Greater New York. The Committee's first meeting of 2015 featured Hon. Douglas McKeon, the Administrative Judge of Bronx County, a noted ADR expert, who spoke about a pilot program designed to encourage early mediation of medical malpractice cases throughout New York State. The Committee is planning additional CLE programs in 2015 including a program on Trusts and Estates, partnering with the Estates Trusts Section and the Elder Law Committee. A CLE on International Arbitration, co-sponsored by the NYCLA Foreign and International Law Committee, is also in the works. The ADR Committee also is committed to fostering and nurturing member writing projects.

Federal Courts Committee—NYCLA's Federal Courts Committee meets with and promotes the interests of the federal courts in New York. The Committee meets with a federal judge virtually every month of the year and sponsors or co-sponsors special events in addition to its regular meetings. The Committee recently has sponsored or co-sponsored continuing legal education programs on winning cases in federal court (moderated by federal judges), electronic discovery, proposed changes to the federal rules, as well as NYCLA's forum commemorating the 50th anniversary of the Civil Rights Act of 1964, at which Magistrate Judge Ellis and EDNY District Judge Chen were participants. Over the last several years, the Committee has met with such judges as SDNY Chief Judge Preska, EDNY Chief Judge Amon, and SDNY Bankruptcy Court Chief Judge Cecilia Morris. At its Weinfeld Luncheon last year, more than 45 federal judges were in attendance to honor EDNY Chief Judge Amon. The Federal Courts Committee also issues position papers on topics of interest to federal practitioners, most recently position papers on electronic discovery, proposed local rules changes, and proposed federal rules changes. The Committee also took an active role in advocating for increases in the budget for

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Message from the NYCLA Foundation

And We're Off! Resolve to be Your Best in 2015

Dear Member:

Now that we are well into the New Year, I am sure you've made valiant efforts toward achieving those personal and professional resolutions (or goals) you made at the close of 2014. Whatever they are and how ever well you are progressing to ensure you make good on them, I hope that you've considered including NYCLA in your short list. So let's chat about that short list, shall we?

I, for one, have a few basic professional ones in mind. First, be more on time to meetings which also means being more vocal about staying on schedule when attending functions and other meetings. As a NYCLA member, we engage in so many groups/committees, and social events—sometimes it can be challenging to be diligent about our schedules; this is a good time to get back on track. Secondly, I thought about how I could be more attentive to client needs, especially when I'm under the gun. Yes, we all get busy, but let's not forget why we are here and why we do what we do. Ours is a job of service and keeping this in mind, I am seeking ways I can tighten my "customer service," so to speak. And thirdly, as a NYCLA leader, I aim to listen more closely to what our membership feels it needs, lacks, and wants—even if it's something we have to work toward over time. Everyone has their own reason for being a NYCLA member—I see no reason to shy away from professional requests and needs; I want to hear them and engage. Again, I aim to accomplish these items this year, and like everyone on the planet, I will give my very best effort to achieve them!

So what are your goals or resolutions for 2015? Maybe you have none, didn't think about it much, or are continuing toward the completion of something you started in 2014. I'd like to hope that maybe your experiences at NYCLA have inspired these goals in some way, and if they have (or have not), I encourage you to consider how your involvement in NYCLA programs and events can help you further your goals. For example, maybe you'd like to work with one of NYCLA's pro bono programs in 2015, or join a committee and run for chair. If you are a young lawyer, maybe you will consider making a greater effort to help the NYCLA Foundation fundraise on a grassroots level. These are just a few I can think of, but the sky's the limit. I sincerely encourage you to consider leaning in a little more in 2015 for the sake of our fantastic NYCLA community.

Finally, as you revise your short list, don't forget to add "Give a donation to the NYCLA Foundation." Donations to the Foundation are tax deductible to the fullest extent of the law, and therefore, the one item on our short list we can all resolve to do.

Carol Sigmond
President, NYCLA Foundation

Don't Let Your Body Language Betray You

Savvy attorneys (both in *and out* of the courtroom) know that face-to-face listeners are *watching* you when you speak. Like actors, they are always mindful of the fact that gestures and body language send very strong signals about character, trustworthiness, confidence, and more.

A Harvard Business School study revealed that that 55 percent of the success of your speaking is dependent upon your non-verbal communication. A 2007 study by the *American Optometric Association* found that vision was the number one sense that people would not want to live without. Dr. Vince Young, an ophthalmologist at Albert Einstein Medical Center in Philadelphia, reports, "Americans tend to fear vision loss more than anything: more than memory loss or heart disease."

This reliance upon *the visual* is true for prospects in your pitch meetings as well as jurors in the courtroom. Here are a few things to remember about general perception of body language among people raised in the United States, whether they are observing you in a conference room or a courtroom:

1. A smile is the most direct way to say, "I'm happy to be in your presence."

2. The head nod is very important in communication and tells the communication partner "I understand" and/or "I agree". It elicits a positive response in the partner and is particularly effective for attorneys involved in business discussions or negotiations.

3. Raising your hand or fingers in front of your mouth during conversation can communicate a withholding of information or reluctance to be completely forthcoming.

4. Helplessness and/or an urgency to be understood are communicated when you speak with your hands open at chest level and spread sideways with the palms up. Both behaviors can project a lack of confidence.

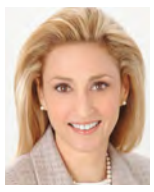
5. Speaking with the hands up and palms facing outward can communicate messages influenced by gender. When a man does this, it can send a placating message; when a woman does it, the message can be perceived as flirtatious.

Remember that your face-to-face listeners are not just passively seeing: they are observing your physical demeanor carefully (sometimes subconsciously) and *always interpreting meaning* from every aspect of your body language.

As you speak with clients, prospects, jurors, and judges, maintain awareness of these five points about body language. Strive to make any necessary physical adjustments, even if it takes you out of your comfort zone. The more you "try on" new behaviors, the more comfortable these behaviors will feel to you.

(Do remember not to rehearse your body language! *Allow* effective gestures to be the organic *result* of a focus on your message and your listeners' needs.)

When you become comfortable with a physical demeanor that is truly effective, you will enhance your projection of a positive and professional image – and your ability to persuade.



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Employment Discrimination: Evolution of the "Stray Remarks" Doctrine Post-Price Waterhouse

By Onya Brinson, Esq.

Employment discrimination claims under Title VII[1] and related statutes have long been susceptible to a variety of challenges which allow courts to grant summary judgment by artificially limiting the potential value of plaintiff's evidence. One such challenge is the so-called "stray remarks" doctrine, which aims to undermine the evidentiary value of comments that may indicate an employer's discriminatory intent. Courts define "stray remarks" as comments that are too isolated or attenuated in nature to show evidence of the discriminatory intent in an employment discrimination action. This doctrine, born out of Justice O'Connor's concurrence in a case that did not address "stray remarks," nevertheless spread like wildfire to the detriment of many valid employment discrimination cases.

The origin of the "stray remarks" doctrine

The origin of the "stray remarks" doctrine is the case of *Price Waterhouse v. Hopkins*. In this case, the Supreme Court held that an employee may prove discrimination by demonstrating that an employment decision was made in part based on illegitimate reasons; known as the "mixed-motives" theory. The majority of the Court noted that an employment discrimination plaintiff must show that the employer actually relied on gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part.[2] The plaintiff, a candidate for a Price Waterhouse partnership, was denied partnership in part because of gender biases that the plaintiff would have been better served by being more feminine in appearance and action. Justice Sandra Day O'Connor's concurrence advocated for shifting the burden to employers to justify employment actions taken under the appearance of discriminatory intent. She qualified her position by writing the following:

"stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiffs' burden in this regard."[3]

Although Justice O' Connor's concurrence was not representative of the majority opinion, the theory of "stray remarks" gained considerable traction in the courts after *Price Waterhouse*. A Westlaw search for the term "Title VII" with the terms "stray" within three words of the words "comment," "comments," "remark," or "remarks" yields no results in any employment discrimination cases prior to 1989.[4] However, after *Price Waterhouse*, the number of hits grew exponentially from six hits in 1989 to 204 federal cases involving the "stray remarks" doctrine in 2010.[5]

"Stray remarks" has become a legal jellyfish with many tentacles to aid employers defending employment discrimination claims. There are five defenses that encompass the "stray remarks" doctrine: (1) the remark(s) were made by an actor too removed from the decision making process at issue; (2) the remark(s) were isolated, as opposed to being part of a broader pattern of comments which tend to evidence discriminatory bias; (3) the remark(s) were not made within sufficient temporal proximity to the adverse action at issue in the controversy; (4) the remarks are too ambiguous to be clearly probative of discriminatory bias; and (5) the remark(s) are too contextually attenuated from the adverse action at issue in the action to be reflective of discriminatory bias.[6]

The Second Circuit has, along with the other federal circuits, adhered to the "stray remarks" doctrine post- *Price WaterHouse*, even after the Supreme Court's admonition in *Reeves v. Sanderson Plumbing, Inc*. that district courts need to draw all reasonable inferences from statements supporting the plaintiff's prima facie case.[7] In Reeves, the Supreme Court rejected the district court's ruling, which, "while acknowledging 'the potentially damning nature' of [the] age related comments… the court discounted them on the ground that they 'were not made in the direct context of Reeves's termination."[8] The Court concluded that the Court of Appeals had "impermissibly substituted its judgment concerning the weight of evidence for the jury's."[9] However, Post-*Reeves*, the Supreme Court's admonition to the lower appeals courts against substituting its judgment for that of a jury's largely has gone unheeded.

The "stray remarks" doctrine application in the 2nd Circuit

While the Second Circuit has adopted the "stray remarks" doctrine, it has struggled to find a balance when evaluating "stray remarks" at summary judgment. In a 2007 opinion, *Tomassi v. Insignia Fin. Grp., Inc*., the Second Circuit stated that district courts presented with comments as evidence of discriminatory intent should review those comments in the context of the entire case:

In ruling that [the] remarks lacked evidentiary significance because they were "stray," the court failed to apply the correct standard. Instead of disregarding some of the evidence because of such a classification, the court should have considered all the evidence in the light most favorable to the plaintiff to determine whether it could support a reasonable finding in the plaintiffs favor . . . . Where we described remarks as "stray," the purpose of doing so was to recognize that all comments pertaining to a protected class are not equally probative of discrimination and to explain in generalized terms why the evidence in the particular case was not sufficient. We did not mean to suggest that remarks should first be categorized either as stray or not stray and then disregarded if they fall into the stray category.[10]

Nevertheless, the 2nd Circuit has entrenched the "stray remarks" doctrine into its jurisprudence, and has crafted a standard for determining when it will consider remarks as "stray:"

The more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination. The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative the remark will be.[11]

As a result, the 2nd Circuit uses four factors to determine whether a remark is probative: (1) who made a remark (i.e., a decision-maker, a supervisor, or a low-level coworker; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark (i.e., whether a reasonable juror could view the remark as discriminatory); and (4) the context in which the remark was made (i.e., whether it was related to the decision-making process).[12]

The inconsistency of the "stray remarks" doctrine in summary judgment

The Second Circuit has broadly applied the "stray remarks" doctrine when granting summary judgment, depriving the jury of an opportunity to consider relevant evidence. While the Second Circuit has rejected the "stray remarks" doctrine on a number of occasions, in many instances it has shown an unwillingness to consider all the evidence or give appropriate weight to comments that evince discriminatory animus.

There has been a disturbing trend in the 2nd Circuit with employment discrimination cases to discount remarks as "stray" in they do not provide direct evidence of animus. In *Silver v. North Shore Univ. Hosp*., shortly after *Tomassi*, the Southern District concluded that an employer's statement referring to both the employer and the plaintiff's age, "people aren't going to lay out money for people like us any-

{ *See* **Stray Remarks** *on page 5* }

Is a Constitutional Convention Required to Resurrect Court Consolidation Efforts?

By Mitchell Nisonoff, Esq.

The truth is the justice system does need review . . . . We can beat the bureaucracy. We can get results. We can make the changes that we need to make. We can get the resources that we need. And we can restore confidence and trust in the justice system both in perception and reality . . . . Frederick Douglass once said, "If there is no struggle, there is no progress." We know that in New York nothing comes easy. None of the ones worth it come easily. If it comes easy you didn't need it in the first place . . . .

— Second Inaugural Address, Governor Andrew Cuomo, January 1, 2015

In light of persistent failures of efforts to merge the courts over several decades, is it an auspicious time in the next few years to hold a constitutional convention to amend the New York State Constitution?

Sixty years ago, in 1955, the "Tweed Commission" called for a sweeping reorganization of the courts.[1] Since then, the need for meaningful consolidation of the courts has been apparent, and there have been significant, albeit unsuccessful, efforts to propose such consolidation.[2] The latest, most noteworthy, effort was in 2007, when the Special Commission on the Future of the New York State proposed a consolidation of the state's 11 major trial courts[3] into a streamlined, two-tier structure, and the creation of a Fifth Judicial Department. The Commission concluded that these reforms would greatly improve the administration of justice and save litigants, the state, and the economy over $500 million per year. Then-Chief Judge Judith Kaye endorsed the Commission's findings, and then-Governor Eliot Spitzer proposed a constitutional amendment to restructure the state's court system that includes nearly all of the elements proposed by the Commission.[4] Historical efforts to simplify the state's court system have been endorsed by the League of Women Voters of New York, the Fund for Modern Courts, and the New York City Bar.

With the advent of the new Legislature, a new Chief Justice (in a year), and perpetual struggles over a stagnant Judiciary budget, I pose this question: should these efforts now be resurrected and, if so, by what means?

Some have attributed the derailment of the latest efforts to consolidate the courts to the resignation of Governor Spitzer and retirement of Chief Judge Kaye in 2008. However, court reform efforts of such magnitude cannot be expected to be achieved necessarily in one year or the next. Our sister State of New Jersey, often held up as having one of the most highly integrated court systems, is a noteworthy example. That state's court system was drastically revised by its Constitutional Convention of 1947, but only after a *century-long* struggle.[5] However, the central argument of great fiscal savings to the State, court system and litigants has only grown more persuasive in the last several years when the Judiciary has to make to do with stagnant and reduced budgets. Economic considerations were cited as foremost for the "[u]nification of Courts" by the Committee on the Judiciary of New Jersey's 1947 Constitutional Convention:

By this means, the judicial system is simplified and the condition for economical and efficient administration established. It is the sole known technique for abolishing jurisdictional controversies which delay justice and waste the time and money of litigants and courts.[6]

There has never been entire agreement, even among reform supporters, as to how the courts should be consolidated and whether and how many judges be elected or appointed.[7] And, with previous efforts to effect court mergers, unions for court personnel previously had raised questions about the effect upon their pay, bargaining units and working conditions.[8]

I suggest that New Jersey had shown that a constitutional convention is the appropriate and respected vehicle to hammer out these kinds of issues. In 1993, reportedly despairing of the Legislature's repeated failure to effect judicial reforms, among other things, the late Governor Mario Cuomo then called for a constitutional convention.[9] While Governor Andrew Cuomo had not directly addressed proposals for court mergers, in his last inaugural speech, he now calls for "need[ed]" "review" of the "justice system."

Our own Constitution provides that the power to amend it is that of the state Legislature or a formally elected constitutional convention, and then the voters.[10] It also requires that the electorate every two decades to be asked if they want a constitutional convention for that purpose.[11] The next automatic referendum is scheduled in just two years, in 2017.

And it is not unconventional for the State to hold a constitutional convention. Including a convention held in 1777, when delegates gathered in White Plains to draft the New York Constitution, the State has had nine conventions. If the public does not like the result of the convention's work, as in 1967, it can reject it. The constitution provides that if a convention is called, three delegates from each state senate district and 15 at-large delegates are to be elected. (Each delegate is compensated at the same rate as a member of the state legislature.) Three votes are required: to authorize the convention, then to elect delegates, and finally to accept the convention's work.

Will the electorate be allowed to vote for a convention for purposes of effecting long-delayed court reform, or will it be forced to wait until 2017?

Mitchell Nisonoff, Esq. is co-chair of NYCLA's Civil Court Practice Section. He has been in the practice of law for over 30 years. In 2014, he was the coursebook author of the New York State Bar Association course, "Election Law and Representing the Political Candidate," and author of comments, "Does Albany Have the Will to Create Family Court Judgeships?" (NYLJ, April 24, 2014).

[1] *See* Subcomm. On Modernization & Simplification of the Court Structure, N.Y. Temp. Comm'n on the Courts, A Proposed Simplified State-Wide Court System, at 1-12 (1955).

[2] As the 2007 Special Commission report noted: "For many generations, commissions . . . , as well as legislative panels and other groups, have decried the structure of New York courts, and have proposed a remarkably consistent slate of potential reforms. These include proposals from the Tweed Commission in the 1950s; the Dominick and Vance Commissions in the 1970s; a legislative plan that received first passage in the Legislature in 1985; and a comprehensive reform package proposed by Chief Judge Kaye in 1997 that received resounding support throughout the state." Report by the Special Commission on the Future of New York Courts, *A Court System For the Future: The Promise of Court Restructuring in New York State,* February 2007, http://nycourts.gov/reports/courtsys-4future_2007.pdf, p. 49.

[3] New York's eleven trial courts are: the Supreme Court, which sits in all sixty-two counties statewide; the Court of Claims, which also sits statewide; Surrogate's Courts in each county; County Courts in each county outside New York City; Family Courts in New York City and in each of the fifty-seven counties outside of New York City; the New York City Civil Court; the New York City Criminal Court; District Courts for parts of Long Island; a separate City Court for each of the sixty-one cities outside New York City; and Town and Village Justice Courts in most towns and villages statewide.

[4] Message from the Chair Carey R. Dunne, Special Commission on the Future of the New York State Court Courts, http://www.nycourtreform.org.

[5] *See* John E. Bebout and Joseph Harrison, *The Working of the New Jersey Constitution of 1947,* 10 Wm. & Mary L. Review 337, 343 (1968), http://scholarship.law.wm.edu/wmlr/vol10/iss2/4.

[6] Bebout and Harrison, *supra,* at 343-344.

[7] For example, the New York City Bar opposes "a court consolidation that results in a system even more dependent upon judicial elections than in the current system." http://www.nycbar.org/legislative-affairs/policy-issues-aamp-advocacy/justice-system/court-restructuring.

[8] F. Lynn, "Court Merger Seen as Dead in Legislature," NY Times, June 8, 1987, http://www.nytimes.com/1987/06/08/nyregion/court-merger-seen-as-dead-in-legislature.html.

[9] E. Leo Milonas, "New York's Archaic Courts," NY Times, September 9, 1993, http://www.nytimes.com/1993/09/09/opinion/new-york-s-archaic-courts.html.

[10] N.Y. State Constitution, Article XIX ("Amendments to Constitution"), Sections 1 (amendment proposed by Legislature and then approved by majority vote of electors), and 2 (amendment adopted by constitutional convention and then approved by majority vote of electors).

[11] *Id.*, Section 2.

STRAY REMARKS

Continued from page 4

more" was evidence of the employer's discriminatory intent, and denied summary judgment.[13] *Savino v. Town of Southeast*, the court found the remark, "You Guineas think you can get away with anything" as evidence of discriminatory animus in an Equal Protection case.[14]

However, in *St. Louis v. New York City Health & Hosp. Corp*., the court found that the defendant's statement that "she did not like working with females," on an almost daily basis did not constitute evidence of gender discrimination in the plaintiff's Title VII and § 1983 actions.[15]

In some cases, the Second Circuit has found that "a remark made by someone other than the person who made the decision adversely affecting the plaintiff may have little tendency to show that the decision-maker was motivated by the discriminatory sentiment expressed in the remark."[16] Similarly, the 2nd Circuit has differentiated "the stray remarks of a colleague" from "comments made directly to" the plaintiff by someone with "enormous influence in the decision-making process."[17]

One recent case within the 2nd Circuit, *Westbrook v. City Univ. Of N.Y*., the Eastern District of New York granted summary judgment motion on the subset of "stray remarks" doctrine that the remark was too ambiguous to be clearly probative of discriminatory bias. The remark that was used by a CUNY Director "those people," referring to a predominately African American college, was "stray," and was insufficient to create material issues of fact for a jury.[18] Similarly, in *Gilmore v. Lancer Ins. Co*., the Eastern District decision held that a remark such as, "men here don't get promoted," failed to give rise of inference to discrimination, as the court found the remark was not made in sufficient temporal proximity to the plaintiff's termination a year later.[19]

Recently in the Southern District case *Greene v. Enlarged School District of the City of Middletown*, the court granted summary judgment to the defendant in a disability discrimination case where the defendant's comment that the plaintiff was the "poor woe is me type" while staring at her amputated arm. The district court held that the comment "was too oblique and remote" to be evidence of discriminatory intent.[20] However, the comment was made just one month before the plaintiff's termination. The *Greene* decision applies an unworkable standard that conflicts with *Tomassi* and Supreme Court precedent: that direct statements of bias such as the example cited by the court, "You Guineas think you can get away with anything," will not be considered "stray."[21] This misapplication of law in employment discrimination cases sets a dangerous precedent.

Former United Stated District Judge for the District of Massachusetts and Harvard Law School Professor Nancy Gertner stresses the dangers in employment heuris-

{ *See* **Stray Remarks** *on page 6* }

STRAY REMARKS

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tics such as stray remarks, what Professor Gertner calls "Loser's Rules" for employment discrimination plaintiffs.[22] Professor Gertner points out that while Justice O'Connor in *Price Waterhouse* noted that certain statements "by nondecisionmakers, or statements by decisionmakers unrelated to the decision profess itself" are not "direct evidence" of discrimination,[23] she did not say that such remarks were never evidence of discrimination or never probative of discriminatory animus.[24]

Professor Gertner used one of her district court decisions to explain the erroneous logic that lower courts have followed with "stray remarks" and how the concept is used to discount clear discriminatory statements:

If a manager makes an ageist remark, it could well be a window on his soul, a reflection of his animus, or arguably, just a slip of the tongue somehow unrelated to his "true" feelings. If other managers were nearby, they could well have dismissed the overheard comment as an aberration, or it could have created a new norm of conduct for the company, an atmosphere of impunity. The point is that the inference to be given the remark should not be made by judges, particularly judges who have not heard the entire story.[25]

A balance in the 2nd Circuit courts on how to consistently apply the "stray remarks" doctrine has not been reached. At best, the current standard favors employers and provides courts with a ready excuse to discount relevant evidence in favor of granting summary judgment for the employer. The 2nd Circuit courts should be diligent in applying the standard that was laid out in *Tomassi*, and not substitute its judgment for the jury's when that the comments at issue could evince the employer's discriminatory intent. As Professor Gartner has pointed out, many courts are granting summary judgment motions without viewing probative remarks in their complete context. This kind of incomplete analysis has the danger of continuing to erode legitimate employment discrimination cases, as well as creating a burden of proof for the plaintiff that was never intended.

Onya Brinson, Esq. is an Employment Discrimination Investigator for the New York City Housing Authority Department of Equal Opportunity and a 2013 graduate of CUNY Law School. She is a member of the NYCLA Labor & Employment Committee.

[1] Title VII of the 1964 Civil Rights Act makes it "an unlawful employment practice for an employer … to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin…." 42 U.S.C. [section] 2000e-2(a).

[2] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, [section] 107, 105 Stat. 1071, 1075-76.

[3] See *Price Waterhouse*, 490 U.S. at 261-79 (O'Connor, J., concurring).

[4] Kerri Lynn Stone, *Taking in strays: a critique of the stray comment doctrine in employment discrimination law*, 77.1 Missouri Law Review (Winter 2012), http://law.missouri.edu/lawreview/

[5] Stone, *Taking in strays*, 77.1 Missouri Law Review (Winter 2012)

[6] *Taking in Strays*, (Winter 2012)

[7] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

[8] Id.

[9] Id. at 153.

[10] *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 115-16 (2d Cir. 2007).

[11] *Henry v. Wyeth Pharma., Inc.*, 616 F.3d 134, 149 (2d Cir. 2010)

[12] *Greene v. Enlarged City School District of the City of Middletown*, 2014 WL 1688133 (S.D.N.Y. 2014); citing *Henry v. Wyeth Pharma., Inc.*, 616 F.3d 134, 149 (2d Cir. 2010)

[13] *Silver v. North Shore Univ. Hosp.*, 490 F.Supp. 2d 354, 356 (S.D.N.Y. 2007)

[14] *Savino v. Town of Southeast*, 11 Civ.483(NSR), 2013 WL 5730043, at *3 (S.D.N.Y. 2013)

[15] *St. Louis v. New York City Health & Hosp. Corp.*, 682 F.Supp.2d 216, 226 (E.D.N.Y. 2010)

[16] *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); see *Tomassi* v. *Insignia Fin. Grp., Inc.*, 478 F.3d 111, 115-16 (2d Cir. 2007).

[17] *Rose v. New York City Bd. Of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001)

[18] *Westbrook v. City Univ. Of N.Y.*, 591 F. Supp. 2d 207, 228 (E.D.N.Y. 2008); see *Taking in Strays*

[19] *Gilmore v. Lancer Ins. Co.*, No. 08-CV-0628 (JFB)(WDW), 2010 WL 87587, at *10 (E.D.N.Y. 2010); see *Taking in Strays*

[20] *Greene*, 2014 WL 1688133 (S.D.N.Y. 2014)

[21] *Savino v. Town of Southeast*, 2013 WL 5730043, at *3 (S.D.N.Y. 2013)

[22] Nancy Gertner, *Losers' Rules*, 122 Yale L.J. Online 109 (2012), http://yalelawjournal.org/forum/losers-rules.

[22] *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring).

[23] Gertner, *Losers' Rules*, (2012).

[24] *Diaz v. Jiten Hotel Management, Inc.*, 762 F.Supp.2d 319, 323 (D. Mass. 2011).

NEW YORK COUNTY NYCLA LAWYERS' ASSOCIATION

Recent Events

NYCLA Holds Forum on Civil Rights Act Anniversary

On December 4, NYCLA held a forum, Remembering the Dream: Personal and Professional Reflections in honor of the anniversary of the Civil Rights Act.

NYCLA was honored to have in attendance, among others, (left to right) Catherine Christian, New York County District Attorney's Office; Hon. Pamela Chen, E.D.N.Y.; Hon. Ronald Ellis, Magistrate Judge, S.D.N.Y.; Hon. Jenny Rivera, New York State Court of Appeals; Hon. George Bundy Smith, Retired; Lewis F. Tesser, NYCLA President, Partner Tesser Ryan & Rochman, LLP; Vincent Chang, Wollmuth, Maher & Deutsch.

NYCLA Celebrates S.D.N.Y. 225th Anniversary

On December 17 nearly 1,000 members of the New York legal community gathered at NYCLA's 100th Annual Dinner at the Waldorf Astoria Hotel to celebrate the U.S. District Court for the Southern District of New York's 225th Anniversary.

Hon. Sonia Sotomayor, Associate Justice of the Supreme Court of the United States, who gave remarks at the Dinner, is pictured with former Senior Associate Judge of the New York State Court of Appeals, Hon. Carmen Beauchamp Ciparick.

NYCLA President, Lew Tesser, presents the 2014 Boris Kostelanetz President's Medal to Hon. Loretta A. Preska, Chief Judge, United States District Court for the Southern District of New York.

Former Mayor of New York City, Rudy Giuliani, presents the 2014 William Nelson Cromwell Award to Honorable Michael B. Mukasey, Former Chief Judge, United States District Court for the Southern District of New York, and Former Attorney General of the United States.

Bottom row, left to right: Judge Deborah H. Batts, Senior United States District Judge of the Southern District of New York; Hon. Loretta A. Preska, Chief Judge of the U.S. District Court for the Southern District of New York; Hon. Michael B. Mukasey, former Attorney General of the United States; Hon. Ruth Bader Ginsberg, Associate Justice of the Supreme Court of the United States; and Hon. Sonia Sotomayor, Associate Justice of the Supreme Court of the United States. Top row, left to right: Lewis F. Tesser, NYCLA President; Judge P. Kevin Castel, United States District Judge of the Southern District of New York; Rudy Giuliani, former Mayor of New York City; and Robert L. Haig, Annual Dinner Chair.

Attendees gather for this special celebration

In The News

A roundup of recent national and local news stories featuring NYCLA and its members

Celebrating a Century
New York Law Journal
December 19, 2014
http://www.newyorklawjournal.com/id=1202712818836?slreturn=20141131114832

Judges Playfully Dispute Whether New York's Federal Court is the Oldest
New York Times
December 25, 2014
http://www.nytimes.com/2014/12/26/nyregion/a-new-york-court-celebrates-its-status-as-the-nations-oldest-but-others-arent-so-sure.html?_r=1

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.

February 1-14
Bruce Green
212-636-6851

February 15-28
Malvina Nathanson
212-608-6771

March 1-15
Anne Loranger
610-617-3087

March 16-31
Richard Maltz
212-705-4804

Please Note: Assignments are subject to change.

Questions to the hotline are limited to an inquiring attorney's own conduct under New York's Rules of Professional Conduct. Also, the hotline does not answer questions that are being litigated in a pending legal proceeding or before a grievance committee, or questions of law. Calls to the hotline are confidential but not privileged. For a full discussion of Ethics Hotline guidelines, please see the article "Guidelines on NYCLA's Ethics Hotline," published in the September 2006 issue of *New York County Lawyer.*

Committee Reports

NYCLA frequently reports, comments on, and supports issues affecting the New York legal community:

- SUPREME COURT COMMITTEE Sends Comments to OCA on Proposed New Rule of the Commercial Division Regarding Responses and Objections to Document Requests

Issues for Clients in the Burgeoning Art Market

By Alexander M. Ritchie, Esq.

The recent surge in volume and amounts paid for art have prompted a proportionate rise in legal issues between buyers and sellers and general legal trends in the market overall. These issues and trends touch on a variety of areas but concerns with authenticity and tax liability have some of the greatest potential for problems. While there are preventative measures and the market has generated novel solutions, overall the potential for problems at each stage of a transaction involving artwork can greatly benefit from an attorney representing either a buyer or a seller who can approach a transaction with the utmost of preparation and vigilance.

Authenticity

Given the increase in interest in art as an investment raises the issue of authenticity. Unlike many other markets, the art market in its diversity of media and offerings from antiquity to the modern, lacks a cogent, universal, and effective standard against which a buyer or seller can verify they are dealing with an authentic work. For example, in the real estate market a potential buyer can verify the chain of title and potential encumbrances via public records concerning the property, while a potential buyer of artwork typically has to rely on the veracity of documentation produced by the seller and their own research through external sources.[1] Since work attributed to well-known artists sold through the largest galleries and auction houses are still subject to questions of authenticity or problems of provenance[2] it is prudent for buyers at all price levels to approach the determination of authenticity with a proper amount of due diligence and skepticism.

Proper due diligence is critical and may be achieved several ways. Collectors may go through official sources connected with the artist or estate of the artist, or they can also contract an auction house or art gallery to perform such research. One alternative that has arisen in the protection of buyers and sellers is the offering of title insurance for artwork. For a percentage of the appraised value, an insurance company will guarantee the authenticity of the work in the transaction up to the appraised value. Further, the insurance protection can also be carried forward through the chain of future owners when the piece is sold or passed by will or inheritance. While this is an additional cost to a transaction, typically 1.5 to 3 percent of the appraised value, it is very often a small investment for peace of mind and a hedge against the possible legal costs that could result from a challenge to authenticity. While a few insurance companies have come forward in offering this product, ARIS Title Insurance is successfully specializing in this product offering, showing that where guarantees fail to exist in the art world experts will come forward to provide their assistance and financial guarantee.

Tax Liability

The purchase of art by collectors and investors also raises tax liability issues. For example, if an owner of a substantial art collection dies leaving his collection to his heirs they can be liable for up to 60 percent of the collection's value in taxes. Not only is such a percentage prohibitive, the IRS can require that this amount be paid within nine months following inheritance. This short time frame further compounds the problem and for a collection of substantial value (and an equally substantial tax bill) can very often require the liquidation of an intended family legacy in a fire-sale context merely to cover this cost.

Another example of potential tax risk is the issue of continued possession. Assume an art collector wants to properly protect their collection from unfavorable taxes and preserve it for the enjoyment of his children. They use an attorney to establish a trust for this purpose and has the collection transferred into that trust. However, while alive they still wish to enjoy the collection so they keep a number of pieces on the walls of their home. Even with the completion of all paperwork and the transfer, the continued physical possession, according to the rules of the IRS, would nullify the effectiveness of the transfer to the trust and the transferees are potentially liable for the tax consequences as though no transfer was made at all.

A solution to allow the works to remain on the transferor's walls would be if the trust rents the artwork back to the transferor for their use and enjoyment. This requires the transferor to pay the trust fair market value for the use of the works. This would achieve the continued enjoyment of the works by the transferor while effectively safeguarding future transferees from the unexpected tax liability. This example demonstrates the need of a collector to consult proper counsel for guidance on what, at first blush to a lay collector, appears to be a non-issue, but can become an expensive mistake.

With record-shattering prices closing out 2014 the art market is still swelling with new totals as collectors and investors move more of their funds into this market. There is no immediate sign of this abating. Both buyers and sellers will continue to seek ways to meet this demand, but will continue to encounter impediments to their participation as either a buyer or a seller. The market will continue to naturally develop more novel structures to avoid or resolve issues as both parties attempt to avoid negative consequences by either sale or transfer. In a market with few safeguards, participants tend to rely on instinct and their belief of how a rule should be rather than reaching out to a qualified expert for assistance. While seeking expertise does take more time and may result in a buyer or seller learning an answer they may not like, the savings in terms of future time, money, and potential frustration are well worth it.

For attorneys this can be an exciting but often confusing area of the law as it involves multiple practice areas. Of utmost importance in working with any client is the need for full transparency of goals, history, and their knowledge of any piece they possess or are seeking to buy. Purchasing new works can be an exciting journey for a client to embark upon especially in such an active market but having an attorney act as an effective guide for due diligence and along to consult with experts help to ensure the best possible outcome.

Alexander Ritchie, Esq. a Member of several NYCLA Committees including Art Law and Foreign & International Law, currently lives in New York City and is licensed in both New York and California. While living abroad, he worked in Geneva, Switzerland for two years. He is currently with Private Capital Consulting, LLC in New York.

[1] Research revealing a lack of information about a piece can give a potential buyer a false sense of security, with the hope that the lack of negative information means there are no questions to be raised about the work. This belief ("no news is good news") can be rife with potential future liability.

[1] The provenance of a work of art refers to the history of the ownership of the work through its chain of title. While a continuous chain of title is ideal, gaps in the history of ownership do not in and of themselves suggest impropriety. However, gaps or ambiguities of ownership surrounding certain individuals, countries or periods of time (i.e. a transfer from Germany during 1933-1945) are prima facie red flags requiring further investigation.

Library Notes

By Dan Jordan

The reciprocity agreement between the New York City Bar Library and the NYCLA Library has come to an end. NYCB members may purchase a day pass for $40.00 to use the NYCLA library.

Free off-site access to legal research resources: NYCLA members who are residents of New York State and who are admitted to practice before the New York Courts may apply for a New York State Library-Attorney Borrower's card. Holders of the card receive special services from the New York State Library including free Internet access to approximately 75 databases, including four legal research databases. The four legal databases are:

State Capital Universe—A Lexis Database with Annotated Codes and pending legislation for the 50 states, the District of Columbia, Puerto Rico and the Virgin Islands.
The NY-Consolidated Law Service contains all the elements found in the print version:

- The text of the statute from Lexis, including the history of the statute
- Practice Insights—a written explanation by a subject scholar
- Cross references and access to Matthew Bender treatises and forms
- A list of cases citing the statute that will open up full text with a click

IndexMaster—A finding tool that will guide you from an unknown legal term and identify what treatises discuss the concept.

LegalTrac—An index to 1,600 legal periodicals, providing full text for 250+ journals.

Loislaw—A Wolters Kluwer service providing access to primary source materials nationwide, secondary source materials and finding tools.

Boolean searching of cases, statutes, session laws and administrative regulations for all 50 states, the District of Columbia, and the Federal system. For New York the materials include AG opinions, NYSBA Ethics Opinions, New York City Charter and Administrative Code. Cases are also searchable by citation, name, attorneys on appeal and authoring judge.

Secondary source materials include numerous treatises from Wolters Kluwer including Wigmore on Evidence; The New York Evidence Handbook; Ginsberg and Martin on Bankruptcy; Aspen Business Torts Reporter; Civil Rico Practice Manual, Representing the Elderly Client, Civil Rights in the Workplace; Price on Estate Planning and Will Drafting and so much more. Loislaw also contains approximately 100 treatises from the New York State Bar Association.

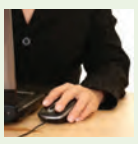
GlobalCite is Wolters Kluwers citation indexing service, to find cases and treatises citing a case, statute or regulation.

Qualifying NYCLA Members are encouraged to apply for the New York State Library-Attorney Borrower's Card. Contact Djordan@NYCLA.org for further information and the application for this important program from the New York State Library.

Use the NYCLA library's fee based services from anywhere. When you need assistance, send an email to reference@nycla.org. Having trouble finding a case, a statute, a Record and Brief, an NYCRR provision? Need some research in an unfamiliar area of law? Contact the NYCLA Library for guidance and assistance at reference@nycla.org.

For a handout on Westlaw resources on advising small businesses, email djordan@nycla.org.

To make suggestions about book, ebook, or database purchases for the NYCLA Library, please contact **Dan Jordan**, *Director of Library Service*, at **djordan@nycla.org** or at **212-267-6646, x201**.



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Westlaw: Employment Law Research on Westlaw Next
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1 MCLE Credit: 1 Skills; Transitional

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Westlaw: Advanced Research on Westlaw Next
March 3 – 11 am-noon
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Lexis: Advanced Legal Research
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Westlaw: Introduction to Westlaw Next
March 26 – 1-2 p.m.
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Westlaw: Public Records Research on Westlaw Next
March 26 – 2:30-3:30 p.m.
1 MCLE Credit: 1 Skills; Transitional

April

Westlaw: Introduction to Westlaw Next
Apr. 09 – 1-2 p.m.
1 MCLE Credit: 1 Skills; Transitional

U.S. Bankruptcy Court Electronic Case Filing System
Apr.15 – 10:00 a.m.-12:30 .m.
2.5 MCLE Credits: 2.5 Skills; Transitional
Member: $65 Non-member: $85 Non-legal Staff: $35

Westlaw: Advanced Research on Westlaw Next
Apr. 21 – 1-2 p.m.
1 MCLE Credit: 1 Skills; Transitional

Westlaw: Public Records Research on Westlaw Next
Apr. 21 – 2:30-3:30 p.m.
1 MCLE Credit: 1 Skills; Transitional

Lexis: Basic Legal Research
Apr. 22 – 10:30-11:30 a.m.
1 MCLE Credit: 1 Skills; Transitional

Lexis: Advanced Legal Research
Apr. 22 – 12-1 p.m.
1 MCLE Credit: 1 Skills; Transitional

Lexis: The Ethical Challenge Presented by Social Media Metadata.
Apr.22 – 1:30-2:30 p.m.
1 MCLE Credit: 1 Skills; Transitional

Unless otherwise noted, courses are free and open to the public. **Register at nycla.org**
Questions? Contact **Irina Chopinova** at **ichopinova@nycla.org** or **212-267-6646 Ext. 203.**

Upcoming Events

April

Law Day Luncheon
Friday, April 17 – Reception-11:30 a.m., Lunch-12:30 p.m.
Cipriani Wall Street, 55 Wall Street
NYCLA's Supreme Court Committee, chaired by Pamela L. Gallagher, Esq. and Brian Graifman, Esq., will host the annual Law Day Luncheon on Friday, April 17, 2015. The Capozzoli Gavel Award will be presented to Hon. Sheila Abdus-Salaam, Associate Judge, New York Court of Appeals.

Portrait Unveiling of a Former President, Michael Miller
Thursday, April 30 - 5:30 p.m.
Join us as we unveil a portrait of Michael Miller, President of NYCLA from 2002-2004. Reception to follow ceremony.

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.

Young Lawyers' Awards: Call for Nominations

NYCLA'S YOUNG LAWYERS' SECTION is accepting nominations through Monday, March 16th for its Young Lawyers' Section Awards, to be presented in spring 2015. The Awards will honor attorneys and law students who deserve recognition for their contributions to the legal profession. Nomination categories:

1. **The NYCLA YLS Rising Leader of the Bar Award** – presented to a NYCLA member, admitted no more than 10 years, who has demonstrated commitment and leadership within the broader legal community.
2. **The NYCLA YLS Law Student Award** – presented to a NYCLA member who has demonstrated excellence in both academics and community leadership.
3. **The NYCLA YLS Rising Leader of NYCLA Award** – presented to a NYCLA member, admitted no more than 10 years, who has made substantial contributions to the NYCLA community.

Submit a nomination for any of these awards. Include a biography and statement about the nominee's achievements, to the attention of Oriana Carravetta, Esq., NYCLA YLS Dinner Chair, by email: NYCLA.YLS.AWARDS@gmail.com by March 16, 2015. Nominees need to be NYCLA Members for at least one year.

How to Get Clients From the Web in 2015

By Andrew Cabasso

In the new year, attorneys are looking for new ways to bring in more business to their firms. When considering Internet marketing, there are different methods, each with its own strengths and weaknesses.

Search Engine Optimization

With search engine optimization, the goal is to get better visibility in search engine results, particularly on Google (it generates a significant majority of search traffic). When someone types a search query related to your practice area, you want to show up as the top result. Most of Google's traffic goes to the first result for a search, with less for the second, third, and fourth results, and barely any traffic for sites beyond the first page of search results.

Sometimes when people talk about SEO methods they are thinking about "getting a lot of links" or listing the law firm in a lot of online directories. In 2015, the single-most effective way to boost your website's search visibility is by writing content on your own website - specifically, blog content. You may be adverse to the notion of a blog on your website, but it is guaranteed to bring you more traffic than any other type of "search optimization" method. That being said, blog writing is not just about writing a lot of content.

Write about what people are searching for. In particular, your current and former clients can give you ideas. Those questions your prospective clients had in initial consultations – those questions are what your prospective clients are searching for online. Write blog posts that answer prospective clients' questions. Write FAQs. Spend less time writing treatises on developments in the law (because most clients are not interested or searching for developments in an area of law), and spend more time writing with your client in mind. The least effective blog posts are ones written that are geared toward other lawyers. Remember, your target audience is new clients, not lawyers.

One caveat with SEO is that it does not work immediately, and being the #1 result in Google can take time (and may never happen if you are in a super-competitive practice area / market like New York personal injury). It usually takes 3-4 months to start seeing an initial traffic boost. Over time, as Google's algorithm begins to "trust" your site and your content, you will get better visibility with subsequent posts. But, for each post to get visibility and traction, it takes time.

Pay-Per-Click Advertising

Pay-Per-Click (PPC) marketing brings new prospective clients to you *immediately*. With a PPC platform like Google Adwords, you can target your advertisements to appear when people search for specific keywords in Google. You can choose as many keywords as you want to create ads for, and any time someone clicks on your ad, you pay Google. With each click, you've brought someone to your site hopefully looking for a lawyer providing the services you offer.

The most obvious benefit is the immediate, relevant traffic. You get visitors to your site who are searching for exactly what you offer. If someone searches for "New York residential real estate lawyer" you can display an ad for a New York real estate lawyer, and then, upon an ad click, send the visitor to your webpage specifically about residential real estate.

With PPC, though, there is a huge potential to overspend on ads if you do not know what you are doing. With broad keywords, you can end up paying for traffic for visitors that are not looking to speak with a lawyer. And, if people are clicking your ad and coming to a webpage that does not provide the exact information they are looking for, they will just as quickly hit the Back button on their web browser and go to the next law firm.

When you sign up for an online advertising platform with Google, usually a salesperson from the Adwords team will contact you to try and help you set up your account. Take their advice with a grain of salt because it is always in their best interest to have you spend the most you can afford to spend.

Find-a-Lawyer Directory

There are many lawyer directories and find-a-lawyer websites out there. A *lot*, actually. Their main goal is to connect lawyers and clients, usually charging the lawyer a subscription fee for membership to their platform. The newer find-a-lawyer platforms include Lawdingo, Priori Legal, LawTrades and LawKick. You are probably more familiar with the lawyer directories though like FindLaw, Avvo, Martindale / Lawyers.com, and LegalMatch. Their subscription prices range anywhere from $99 per month to over of $1,500 per month depending on the practice area and location. It should be noted that these directories can be very hit or miss, and you may often end up paying for prospective clients just looking for free legal advice.

Social Media

Because of attorney advertising and solicitation rules, social media may not be the channel you want to use to advertise to prospective clients; however, social media can be a great channel for sharing relevant blog content or firm-related news to people in your network. If you share relevant and interesting content, your potential referral sources may keep you in mind when they have a case to share. Moreover, sharing content on social media platforms can help you boost your SEO.

E-mail Marketing

This one often gets overlooked, but in general it's the strongest method of Internet marketing out there. It is more effective than Pay Per Click advertising and Search Engine Optimization. *But*, the key is in how to grow your email list and run an effective email marketing campaign. Mostly, lawyers use email marketing with a monthly or quarterly newsletter email blast to everyone on their list. Their newsletters discuss what the firm has been up to in the last month / quarter. Sure, it keeps your firm on the minds of your clients, but the content is generally not very targeted. The best email marketing campaigns are ones that are segmented, sent to specific subsets of your audience. Know who is on your email list and what content they would find interesting.

Send separate emails to prospective clients interested in each specific practice area; send separate emails to current clients in each specific practice area; send separate emails to former clients; and, send separate emails to your network and referral sources. The more targeted you can be, the more likely the recipient will read what you have to say.

Conclusion

In 2015, experiment with different methods of Internet marketing. Start making an effort to get your law firm better visibility online. The Yellow Pages are dead and the Internet is not going to shut down anytime soon. People are looking to the Internet now to find lawyers. Start working on making sure that your law firm shows up in Google for your practice areas. Also, see if online advertising or legal directories can bring in new clients. You may find that they have a great return on investment. Email marketing campaigns can be easy to set up, and are incredibly effective for the time you spend on them. There is a lot you can do online to bring in more business for your firm in the new year. Let's start 2015 on the right foot.

Andrew Cabasso is a practicing attorney and co-founder of JurisPage, a law firm Internet marketing agency and NYCLA Member Benefit partner, that helps solos and small firms improve their Internet presence. He is the author of Search Engine Optimization for Lawyers and The Complete Guide to Attorney PPC. He has given many CLEs on website design and Internet marketing to legal professionals.

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leads to short-cuts that have severe hidden risks, including loss of money, particularly client trust account funds, bank liability, State Bar discipline, and even damage to a lawyer's reputation, standing or business."[4]

Another factor in recent years that also makes attorneys ripe targets for this cyber con game is the increasing reliance by attorneys on Internet referrals to attract clients and conduct business via email.[5]

Behind the Scenes: How It's Done

The nature of the collection con game means it must be carried out by a team of cybercriminals. The individual who contacts the attorney or law firm are is called the "catcher."[6] The individual who coordinates bank accounts and obtains checks from the individuals who create the counterfeit checks is referred to as the "runner."[7] The counterfeit checks look real because they are often stolen from legitimate companies, with the amount, payee name, and phone number altered.[8] The catcher and runners coordinate their actions so that any unsuspecting attorney will have his or her phone calls or emails answered by a different co-conspirator ready to give the right confirmation and answers to any follow up inquiries.[9] This is possible because the contact information is supplied by the catcher during the set-up.

The losses involved are staggering considering the target victims—attorneys who are trained to be skeptical and familiar with garden variety fraud. In one collection ring alone, operating across a number of states and in more than half a dozen countries, over 80 lawyers and law firms were reported to have lost over $32 million to the ring with more than $100 million in attempted losses involving another 300 victim attorneys and law firms.[10]

Ethical Considerations of Rule 1.15

In its recent alert, the Connecticut grievance committee also reminded attorneys that victims of this fraud not only face loss of funds but may jeopardize other client funds in the trust accounts that have been debited; thus possibly violating Rule 1.15 (b) of the Connecticut Rules of Professional Conduct, which provides for maintaining and safeguarding client funds (similar rules apply in New York and New Jersey as well as the ABA Model Rules).

The collection scam turns on an attorney's willingness to wire transfer funds before the check has cleared. Accordingly, the first rule is to never wire transfer funds until the check has cleared and the bank has confirmed this in writing or on your bank statement. Attorneys should not rely on a telephone confirmation of clearance by a bank clerk. The bank may even tell you that the funds are available to disburse, but this does not mean that the check has cleared. If you transfer money out of the account and the check turns out to be counterfeit, the bank will charge back any losses to your client trust account.[11]

Other Red Flags that may signal the scam:

- Unsolicited contact (particularly from foreign countries) addressed generically (e.g., Dear Counselor)
- Client is willing to pay an unusually high fee
- The cashier check arrives around the time of a bank holiday, which will slow the collection process and add pressure to wire transfer the funds before getting bank confirmation that the check has cleared
- Do not rely on the contact phone or email addresses provided by the new client when performing due diligence; contact the debtor through phone and email information obtained independently from the sender
- Beware of e-mails that claim you were recommended by the bar association
- Be highly suspicious of being pressured to act quickly for you to transfer the funds by wire
- Do not deposit the check in the trust account until you can ascertain the check's provenance and legitimacy and advise the client you will not transfer any funds until the check has cleared; consider depositing the check in a separate escrow account separate from your firm's client trust account

This scheme is an example of clever product differentiation insofar as few attorneys would fall for garden variety advance-fee scams, but the cyber collection con game is custom tailored for unsuspecting and unwary attorneys. This scam has all the trappings designed to pique the interest of and ultimately reel in attorneys. Namely, the scam involves legal representation with a patina of colorable claims involving debt collection, debtor-creditor, property, tort or domestic relations law. The temptation to make a significant fee for relatively little

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work is what draws many victims in. As the saying goes, if it's too good to be true it probably is too good to be true. If you have been contacted by a scammer, you should notify your local FBI regional office.

Gordon Eng is the General Counsel and Chief Compliance Officer of SKY Harbor Capital Management, LLC, an SEC-registered investment adviser. Mr. Eng serves on the NYCLA Board of Directors and as Chair of the NYCLA Audit Committee. He is a member of NYCLA Ethics Committee, the NYSBA House of Delegates and the NYSBA Committee on Standards of Attorney Conduct ("COSAC"). Mr. Eng is admitted to practice in New York and Connecticut. The views expressed here are his own and not necessarily that of his firm.

[1] A long-running advance-fee scam that typically involves an individual representing to be a deposed Nigerian prince or some such character in need of assistance to access a treasure trove of some sort in exchange for a significant portion of the proceeds if any the victim will share the use of his or her bank account and help with advance fees to pay for expenses or other necessary costs to access the purported treasure. See Finn Brunton, *The long, weird history of the Nigerian email scam*, Boston Globe, May 19, 2013.

[2] Todd C. Scott, *Scammed! Sophisticated Check Fraud Schemes Target Lawyers*, ABA Law Trends & News, Fall 2010 Vol. 7, No.1.

[3] Id.

[4] The State Bar of California Ethics Hotliner, Internet Scams Targeting Attorneys, Ethics Alert, January, 2011

[5] Jennifer Smith, In Email, Scammers Take Aim At Lawyers, Online Wall Street Journal, August 5, 2012 (subs. req.)

[6] See Superseding Indictment in USA v. Emmanuel Ekhator, et al, in the United States District Court for the Middle District of Pennsylvania, Cr. No. 1:10-CR-244, Chief Judge Kane, filed November 3, 2010, Harrisburg, PA.

[7] Id.

[8] Id.

[9] The State Bar of California Ethics Hotliner, Internet Scams Targeting Attorneys, Ethics Alert, January, 2011

[10] Jennifer Smith, In Email, Scammers Take Aim At Lawyers, Online Wall Street Journal, August 5, 2012 (subs. req.)

[11] See Superseding Indictment in USA v. Emmanuel Ekhator, et al, in the United States District Court for the Middle District of Pennsylvania, Cr. No. 1:10-CR-244, Chief Judge Kane, filed November 3, 2010, Harrisburg, PA.

[12] Id.

[13] Id.

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was conceived in response to the establishment of international arbitration centers that cater to the particular needs of the international legal community in other financial hubs around the world, such as Paris, Hong Kong, and Singapore.

NYIAC operates as a world-class arbitration facility as well as a center for the study and promotion of international arbitration. It is important to note that NYIAC does not administer arbitration, but rather provides hearing support services to arbitral proceedings conducted under any institutional rules and *ad hoc* arbitrations. NYIAC Executive Director Alexandra Dosman recently stated that the center has hosted 34 hearings since its opening, and was booked for an additional five cases that eventually settled. "We are experiencing a 'New York moment' for international arbitration – there is tremendous energy and activity in the sector," said Ms. Dosman. In the past few months, NYIAC has also offered an impressive array of sophisticated dispute resolution programs featuring distinguished panelists from the academic, legal, judicial, and business communities. "Our programs are designed to provoke discussion and debate on cutting-edge issues in international arbitration," Ms. Dosman explained, "an objective that is consistent with NYIAC's mission of keeping New York at the forefront of the expansion in demand for first-class global dispute resolution." Information about NYIAC and its programs can be found at: http://nyiac.org.

Parting Thoughts

As a crossroads of the world, New York presents many attributes that attract international dispute resolution, including, thousands of attorneys with expertise in multiple legal systems as well as New York substantive and arbitral law, a plethora of experienced independent arbitrators, many respected arbitration and alternative dispute resolution institutions, and a wealth of ancillary resources such as court reporters, translation and interpretation services, trial consultants, document support services, and information technology support. In this context, the creation of a specialized part for international arbitration issues and the establishment of NYIAC, place New York in a better position to compete with other leading international dispute resolution fora in London, Paris, and Asia, for a bigger slice of the international arbitration pie. In the words of Justice Ramos, "what international litigators and parties need is a reliable, neutral setting and the U.S., particularly New York, can certainly provide that."

Clara Flebus, Esq., a NYCLA member, is an Appellate Court Attorney in New York Supreme Court, who assists in the disposition of international arbitration related matters before the International Arbitration Part of the Commercial Division. She is the Co-Chair of NYCLA's Foreign & International Law Committee, and a member of the Appellate Courts and Arbitration & ADR Committees, and Young Lawyers Section.

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the federal judiciary, assisting with NYCLA's effort. For the first half of 2015, the Committee has meetings planned with former SDNY US Attorney Robert Fiske, Second Circuit Chief Judge Robert Katzmann, and SDNY District Judge Colleen McMahon. The Committee is also in the process of completing a Retrospective History of the EDNY's cases since 1990, planning a related reception at the EDNY, and preparing commentary on several recent proposed changes to the FRCP. Other upcoming events include a forum with two magistrate judges on changes to the discovery rules and the Committee's annual summer party at Battery Gardens.

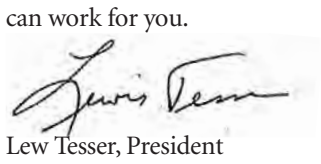
Cyberspace Law Committee—NYCLA's Cyberspace Committee addresses issues such as privacy, security, biometrics, jurisdiction, B2B, auctions, franchising, e-contracting, and ubiquitous molecular computing within the borderless environment of cyberspace. In 2014, the Committee held a CLE on Privacy and the Law with Judge James Francis that was attended by more than 120 people. Recent Committee meetings have featured presentations on Cyberbullying and Social Media by the authors of a new book on that topic, and presentations by Committee members on cloud computing, privacy, and e-discovery. The Committee's upcoming events include a CLE on eDiscovery and the use of technology-assisted review; a CLE, co-sponsored with NYCLA's Admiralty and Maritime Law Committee, on cybersecurity; and a CLE on cross-border discovery. The Committee additionally is developing a response to current legislation to amend the ECPA.

Committee on Women in the Law—NYCLA's Committee on Women in the Law works to assure equal rights and opportunities for women, provides a forum for discussing legal issues affecting women, and provides resources and support for female lawyers to help them succeed in the profession. The Committee's upcoming events include a film screening of After Tiller and the second Women in Law: Policy Perspectives and Personal Progression Conference. After Tiller, a documentary film examining the lives and experiences of late term abortion providers after the 2009 shooting of Dr. George Tiller, will be screened at NYCLA on April 15th. A panel discussion, including Lana Wilson, the film's director, exploring abortion access as it exists today will immediately follow the film. The Women in Law Conference will be held on May 1, where the Edith Spivack Award will be presented during a lunch-time ceremony. One of the Co-Chairs of the Committee also will be attending the United Nations forum in March, which will examine women's issues in an international context. Finally, the Committee is co-sponsoring two events this spring, the first on Breast Cancer Awareness and the second a Spotlight on Women in the Media.

Civil Rights and Liberties Committee—The Civil Rights and Liberties Committee reviews legislation and other matters affecting rights guaranteed by the New York State and Federal Constitutions. The Committee is currently working on a report addressing Police Licensure and Decertification legislation, and another report addressing whether the federal government has the right to review email communications sent between attorneys and their inmate clients. Lastly, the Committee is working with other civil rights organizations, including the Legal Aid Society of New York and the New York Chapter of the National Police Accountability Project, to draft a Best Practices Manual for Police Misconduct Litigation.

Consider joining one of these or another of our over 60 committees. If you're already a member of a group and want to get more involved, look out for emails from your Committee or Section Chair about upcoming meetings and opportunities. If you're looking to join a new group, log onto NYCLA.org with your Member ID and password then click on "Join a Committee" on the left navigation under "Members Only."

I hope to see you at NYCLA. Please email me at ltesser@tesserryan.com or tweet me @NYCLAPres and let me know how NYCLA can work for you.



Lew Tesser, President
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