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# LAWYERS IN CYBERSPACE: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers

Leslie C. Levin<sup>†</sup>

Lawyers learn from other lawyers. Whether they work in private law firms, government offices, legal services clinics or as in-house counsel, lawyers draw upon their observations of their professional communities for their understanding of their roles as lawyers and for guidance concerning how to practice law. These professional communities not only help them learn the basic skills needed to practice law, but they communicate the formal rules and informal norms that guide lawyers in their decisionmaking in practice. In some practice settings most of the lessons are learned within a single organization, such as the large law firm, the corporation, or the government office.<sup>1</sup> Solo and small firm lawyers may be more likely to look beyond their own offices for their understanding of professional norms.<sup>2</sup>

In recent years, computer technology has greatly facilitated education and advice-seeking among lawyers in all practice areas. Listservs have become a common way for lawyers with similar interests to communicate and obtain answers to their questions. Legal listservs have proliferated since the early 1990's and have become a very important source of information for lawyers. Listservs for lawyers exist on legal topics ranging from Admiralty to Workers' Compensation, and for lawyers practicing in a variety of practice settings.<sup>3</sup> Listservs such as "the Healthy Lawyer"

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1. See EVE SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* 122–28, 150, 153–54, 159–60, 165–66 (1986); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *LAW & SOC'Y REV.* 457, 471–78, 490 (2000); Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 *FORDHAM L. REV.* 809, 819–21, 826–27 (1998).

2. Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 *FORDHAM L. REV.* 847, 871–76, 893–95 (2001); see also LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 47–60 (2001).

3. For example, one of the most well-known listservs for large firm associates is Greedy Associates, which can be found at <http://greedyassociates.com/messageboard>. A corporate

listserv,<sup>4</sup> Gay and Lesbian Association listservs, and the Mexican Attorney listserv also provide information for those seeking to communicate with lawyers who share similar interests or are members of particular groups.<sup>5</sup>

While little scholarly attention has focused on legal listservs, sociologists and psychologists increasingly have devoted attention to the “virtual communities” that have been formed through computer-mediated communications (CMC) and to some of the differences between those communications and face-to-face contacts. Virtual communities have been found to provide significant emotional support and a sense of belonging to their members, even when these communities are composed of people they hardly know.<sup>6</sup> Computer communities also support information exchange as people can easily post questions and find answers and even those in far-flung places can gain access to experienced individuals.<sup>7</sup> And while CMC cannot convey most of the cues that accompany in-person communications, such as facial expressions, body language, or touch, the absence of these cues may have certain benefits. Most notably, those who communicate via computer may perceive the responses they receive via computer as less judgmental and they may be freer in their self-disclosures because they are not looking at their audience as they are communicating to see how each word is judged.<sup>8</sup>

At a time when the legal profession is becoming more specialized, and when legal work can increasingly be performed without face-to-face

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counsel listserv can be found at <http://www.acca.com/beijing/listservfaq.php>. A listserv for legal services litigation directors is described at <http://www.pic.org/aboutlaac/accomplishments2003.htm>.

4. The Healthy Lawyer listserv “is maintained primarily for members of the Florida Bar who are seeking greater happiness, health and balance in their lives, or who would like to share with others their methods for maximizing those qualities in their lives as lawyers.” It notes that as “side benefits,” such discussions “may also provide a supportive contacts and a sense of connectedness with other lawyers, thus helping to counteract the feeling of isolation that can result from the demands and stresses of practice.” See <http://fla-lap.org/qlsm/healthylawyer.html>.

5. For example, the North Carolina Gay and Lesbian Association listserv can be found at [http://www.ncgala.org/Membership\\_Connection.html](http://www.ncgala.org/Membership_Connection.html). The Mexican Attorney listserv can be reached by contacting [mexicanlawforum@topeka.wuacc.edu](mailto:mexicanlawforum@topeka.wuacc.edu). Lists of many legal listservs can be found at [www.lib.uchicago.edu/~llou/lawlists/info.html](http://www.lib.uchicago.edu/~llou/lawlists/info.html) and at [www.wash.law.edu/listservs](http://www.wash.law.edu/listservs).

6. See, e.g., HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 1–24 (MIT Press ed. 2000); Janet Moursund, *SANCTUARY: Social Support on the Internet*, in *MAPPING CYBERSPACE: SOCIAL RESEARCH ON THE ELECTRONIC FRONTIER* 67–74 (Joseph E. Behar ed., 1997); Barry Wellman et al., *Computer Networks as Social Networks: Collaborative Work, Telework, and Virtual Community*, 22 ANN. REV. SOC. 213, 220 (1996).

7. Wellman et al., *supra* note 6, at 219.

8. Nancy Weinberg, *Compassion by Computer*, 13 COMPUTERS IN HUMAN SERVICES 51, 62 (1997).

contact, legal listservs may both create a sense of community and reinforce community norms among its members.<sup>9</sup> Listservs have the capacity to transmit messages immediately, and the written communications distill their messages and symbols in ways that may be more powerful than live observation of events. The impact of the message on the reader—especially the less experienced professional who may not have fully formed views—may be significant. Whether such listservs enhance the sense that lawyers are part of a large learned profession, or are members of distinct legal communities with their own values, needs and agendas, remains to be seen.

This article seeks to begin to explore the effects of legal listservs on the professional development and ethical decisionmaking of lawyers.<sup>10</sup> We already know that listservs can be an important source of emotional support and information exchange in other contexts,<sup>11</sup> and that they can also be used as an effective means to organize political action.<sup>12</sup> It seems likely, in addition, that legal listservs can provide a powerful means of educating and socializing lawyers and can serve as an important resource when lawyers engage in decisionmaking.

In order to start this inquiry, I begin by looking at the ways in which one group of lawyers—members of the New York State Trial Lawyers Association (NYSTLA)—use their General Forum listserv to help them practice law and form their understanding of accepted conduct within their community of practice.<sup>13</sup> This listserv is open to members of the legal community who are willing to pay NYSTLA dues and thus, unlike some

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9. I use the term “community” in its broadest sense. Scholars disagree about what constitutes “community” and whether communities can truly occur without geographical boundaries in cyberspace. See, e.g., Nancy K. Baym, *The Emergence of Online Community*, in *CYBERSOCIETY 2.0: REVISITING COMPUTER-MEDIATED COMMUNICATION AND COMMUNITY* 35, 36–38 (Steven G. Jones ed., 1998); Steven G. Jones, *Information, Internet, and Community: Notes Toward an Understanding of Community in the Information Age*, in *CYBERSOCIETY 2.0: REVISITING COMPUTER-MEDIATED COMMUNICATION AND COMMUNITY* 1, 1–26 (Steven G. Jones ed., 1998).

10. I am using the term “professional development” very broadly to include all aspects of the transition from law student to lawyer, with particular emphasis on the process of learning skills and substantive law. I also include the ongoing education of a lawyer that is necessary to represent clients competently and to comply with ethical rules.

11. See *supra* note 6 and accompanying text; see also Kakuko Miyata, *Social Support for Japanese Mothers Online and Offline*, in *THE INTERNET IN EVERYDAY LIFE* 522–23 (Barry Wellman & Caroline Haythornthwaite eds., 2002).

12. See, e.g., RHEINGOLD, *supra* note 6, at 256–89; Andrew Boyd, *The Web Rewires the Movement*, *THE NATION*, Aug. 16, 2003, at 16.

13. I learned about this listserv when I was interviewing solo and small firm lawyers in 2001. Two of the lawyers I interviewed independently mentioned that they found the listserv to be very useful in their practices.

legal listservs, is relatively easy to observe.<sup>14</sup> It is important to stress, however, that the listserv may have idiosyncratic characteristics, both because of its relatively open nature and because of the history and traditions of the trial lawyers. These lawyers tend to specialize and are predominantly male.<sup>15</sup> Personal injury lawyers operate within a complex practice hierarchy<sup>16</sup> and they often rely on lawyer referral networks to move cases to the lawyers who handle particular types of injuries or products or to lawyers who handle cases of a certain size.<sup>17</sup> These lawyers also rely heavily on advice networks of other attorneys both within and outside their offices to help them answer questions and make important decisions in practice.<sup>18</sup> The tradition of advice-seeking among plaintiffs' trial lawyers goes back many years.

By studying the NYSTLA General Forum listserv, I hope to identify some useful areas for future inquiry concerning legal listservs generally. This first foray into the area is largely observational: I read many of the posts on the General Forum listserv from 2000–2004 and performed word searches to track discussions on particular topics. I also did calculations to determine the frequency of certain types of postings and the gender of those who posted.<sup>19</sup>

In order to understand the NYSTLA General Forum listserv, however, it is also necessary to place it within the context of the history and culture of the organization. Part I of the article describes the New York State Trial Lawyers Association, including its history, its members, its current mission, and its self-image, in order to place its listserv in context. Part II of the article describes how NYSTLA members use the General Forum listserv to help educate young lawyers and to provide advice and assistance to more experienced lawyers. Part III looks at how listserv participants use the

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14. See *infra* note 57 and accompanying text.

15. John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 761–62 (1998); David Hechler, *Women Progress, but Few Queens of Torts: Lifestyle, Personality Cited as Key Reasons*, N.J.L.J., Sept. 20, 2004, at 1; Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar* 71–73, 90–91 (2001) (unpublished Ph.D. dissertation, University of Illinois at Chicago) (on file with author).

16. Stephen Daniels & Joanne Martin, "It Was the Best of Times, It Was the Worst of Times": *The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEXAS L. REV. 1781, 1783, 1785 (2002).

17. *Id.* at 1791–95; Herbert M. Kritzer & Jayanth K. Krishnan, *Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their Implications for Case Handling*, 21 LAW & POL'Y 347, 357–59 (1999); Parikh, *supra* note 15, at 133–37.

18. See Parikh, *supra* note 15, at 172–79, 194–95.

19. In the course of earlier research, I also interviewed three NYSTLA members whose comments appear later in this article.

listserv to help resolve ethical issues and to reinforce the values of their professional community. In Part IV, I make some observations about the role of the listserv in creating and maintaining a virtual community of lawyers and its impact on the professional development, ethical decisionmaking and self-image of an important segment of the bar. I also draw upon some of the research concerning CMC to make some tentative predictions about the future impact of legal listservs on the professional development of lawyers and on the legal profession as a whole. The article concludes with some suggestions for future research.

### I. THE NEW YORK STATE TRIAL LAWYERS ASSOCIATION

There are trial lawyer associations in virtually every state.<sup>20</sup> Most of them are affiliated with the Association of Trial Lawyers of America (ATLA), which describes itself as “the world’s largest trial bar.”<sup>21</sup> ATLA was formed due to a concern about the political clout wielded by employers and insurance companies, a desire to train attorneys for injured workers, and a desire to facilitate the exchange of ideas among attorneys.<sup>22</sup> Today ATLA is comprised of more than 56,000 members nationwide.<sup>23</sup> Regular membership is open to any lawyer licensed to practice law “who is committed to the concept of a fair trial, the adversary system, and just results for the injured and the accused, and who, for the most part, does not represent the defense of personal injury litigation.”<sup>24</sup>

The New York State Trial Lawyers Association is comprised of approximately 5000 members throughout New York,<sup>25</sup> including practicing lawyers, judges and paralegals. Since its formation in 1953, its membership policy has been inclusive rather than exclusive. Although it is not limited to plaintiffs’ lawyers or personal injury lawyers, its members mostly practice in the personal injury field. NYSTLA’s members include some of the most well-known personal injury lawyers in New York State.

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20. See <http://www.atla.org/ActivistCenter/Tier3/StateAffairs.aspx>.

21. See [www.atla.org/info/guide.aspx](http://www.atla.org/info/guide.aspx). For a good description of ATLA’s history and current activities, see Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501, 511–27 (1997–98).

22. *ATLA at Fifty*, TRIAL, July 1996, at 40.

23. See <http://www.atla.org/info/guide.aspx#Back>.

24. See [www.atla.org/info/guide.aspx](http://www.atla.org/info/guide.aspx). Membership categories also exist for law professors, military members, and retired members. There are also paralegal affiliates and judicial fellows. *Id.*

25. New York State Trial Lawyers Association, *NYSTLA: The First 50 Years*, at 50 (2003), available at <http://www.nystla.org./index.cfm?fuseaction=archives&categoryID=131> [hereinafter *NYSTLA: The First 50 Years*].

NYSTLA was initially started by some of the most prominent New York City lawyers in the personal injury field who felt that there was no bar organization for plaintiffs' trial lawyers.<sup>26</sup> According to NYSTLA's official history, the organization started at a time before medical malpractice, environmental litigation, and strict liability were recognized by the courts and the trial lawyers sought, inter alia, to reform the law to help their neighbors and friends who were injured and suffering from injustices.<sup>27</sup> NYSTLA's stated mission is "[t]o promote a safer and healthier society, to assure access to the civil justice system by those who are wrongfully injured and to advance representation of the public by ethical, well-trained lawyers."<sup>28</sup>

NYSTLA focused from the beginning on training and educating trial lawyers. In 1957, it offered weekly lectures on trial techniques to audiences of 300–400 lawyers at Brooklyn Law School.<sup>29</sup> In 1958, workshops were offered for promising young lawyers, during which the student walked through various phases of trial while an experienced trial lawyer critiqued his work.<sup>30</sup> As NYSTLA's original publication, *The Plaintiff's Advocate*, noted in 1959:

in no area of the law are men more directed to better educating themselves post-gradually than they are at the trial bar. They give of their leisure time. They give of their evenings. They give of their weekends to attend seminars, to attend lectures, to read law journals, to read medical texts to fit themselves so as to better represent the public.<sup>31</sup>

Today the organization continues to view lawyer education as one of its most important functions and it prides itself on offering high quality continuing legal education (CLE).<sup>32</sup>

Fostering communication among trial lawyers and assisting them in their law practices has also been an important goal of the organization. Since the late 1950's, NYSTLA has offered seminars or "clinics" where lawyers could present problems and receive feedback from more experienced lawyers. In 1958, the former president of NYSTLA created the Product Liability

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26. *Id.* at 3. Those lawyers included Jacob Fuchsberg, who later served on the New York Court of Appeals, and Alfred S. Julien, founder of the law firm of Julien & Schlesinger, which was at one time one of the preeminent personal injury firms in New York City.

27. *Id.* at 3–4.

28. A description of NYSTLA's mission can be found at [www.nystla.org](http://www.nystla.org).

29. Alfred S. Julien, *Our President Says*, THE PLAINTIFF'S ADVOC., Mar. 1957, at 4, 6.

30. NYSTLA: *The First 50 Years*, *supra* note 25, at 8.

31. Alfred S. Julien, *The Tort Lawyer in Public Service*, THE PLAINTIFF'S ADVOC., Apr. 1959, at 9, 11.

32. NYSTLA: *The First 50 Years*, *supra* note 25, at 42.



Exchange as a central filing place for plaintiffs' attorneys with lawsuits involving a particular drug or product to determine whether similar claims were pending elsewhere in the United States.<sup>33</sup> NYSTLA currently maintains an expert witness document bank which contains depositions and trial transcripts of expert witness testimony and a "Forms & Documents" page where members can share information.<sup>34</sup>

NYSTLA has also worked to defend the interests of trial lawyers and their clients. According to NYSTLA's official history, trial lawyers have been under attack by the insurance industry since at least 1958, when *The Defense Law Journal* appeared and there were calls within the insurance industry to find ways to combat NYSTLA.<sup>35</sup> NYSTLA was also concerned that year because newspapers and magazines ran articles with an "anti-trial lawyer message."<sup>36</sup> This view of the trial lawyer as maligned and embattled has persisted throughout the history of NYSTLA. In 1963, NYSTLA's president wrote that the tort lawyer

is being attacked from many quarters. Newspapers, magazines, and television, in many instances, malign his purposes. Increased paperwork is threatening his very existence. Jury verdicts are being cut at trial and appellate court levels. Calendar congestion still exists in many of our courts. Insurance companies are taking advantage of these factors and are not settling cases until they are actually on trial.<sup>37</sup>

It is therefore not surprising that almost from its inception, NYSTLA has engaged in lobbying. Its first lobbying efforts can be traced back to 1956, after a bill was introduced in the New York State Senate to eliminate jury trials in negligence cases in order to alleviate congestion in the courts.<sup>38</sup> NYSTLA started using a public relations firm in 1960 to oppose a bill that limited the ability of plaintiffs to recover against New York City for sidewalk accidents.<sup>39</sup> In 1976, NYSTLA formed LAWPAC to give itself an ongoing lobbying presence in Albany.<sup>40</sup> Starting in 1985, NYSTLA actively opposed "tort reform" efforts in New York by forming a committee that created the Alliance for Consumer Rights, which worked with labor unions,

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33. Alfred S. Julien, *Subliminal Propaganda*, in LEGAL ESSAYS OF THE PLAINTIFF'S ADVOCATE 469-70 (1961).

34. See <http://www.nystla.org/index.cfm?fuseaction=archives&categoryID=106>; <http://www.nystla.cust.servlets.net/forum.jspa?forumID=5>.

35. NYSTLA: *The First 50 Years*, *supra* note 25, at 9-11.

36. Julien, *supra* note 33, at 471.

37. NYSTLA: *The First 50 Years*, *supra* note 25, at 15.

38. Alfred S. Julien, *Our President Says*, THE PLAINTIFF'S ADVOCATE, Feb. 1956, at 2.

39. NYSTLA: *The First 50 Years*, *supra* note 25, at 12.

40. *Id.* at 19.

environmentalists and consumer rights groups to lobby against measures that would limit the public's access to the courthouse.<sup>41</sup>

As part of its public relations campaign and part of its mission, NYSTLA works to improve the image of plaintiffs' lawyers. As early as 1959, Al Julien wrote:

Nowadays, it is the tort lawyer that receives the attacks, and they are unwarranted and unjustified. It is because we have ourselves been . . . failing in our own public relations as a group. Singularly, we have done nothing to secure for ourselves the proper position we should have in the spectrum of public communication media. All other fields, all other professions, all other lines of endeavor contend for their proper place in the sun. We, the most articulate, seem to be completely indifferent with respect to public relations.<sup>42</sup>

NYSTLA's official history explains that in an effort to improve the image of trial lawyers, the organization sought to become a leader among bar associations in "striving for the public good."<sup>43</sup> Following the events of September 11, 2001, NYSTLA, along with ATLA, voted to give all claimants to the Victim Compensation Fund free, skilled representation for their claims. This undertaking, known as "Trial Lawyers Care," has been described as the largest pro bono program in the history of the American bar.<sup>44</sup>

Today NYSTLA is a formidable political force within New York State. It has a twenty-four-person staff, lobbyists and a public relations firm.<sup>45</sup> It has the third largest political action committee in the state and each election cycle it donates one million dollars to candidates for statewide office and in the state legislature as well as to political parties.<sup>46</sup> Yet notwithstanding NYSTLA's political clout and its success in many of its lobbying efforts,<sup>47</sup> it continues to use war and siege metaphors in its communications with its

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41. *Id.* at 24.

42. Julien, *supra* note 31, at 10.

43. *NYSTLA: The First Fifty Years*, *supra* note 25, at 13.

44. Larry S. Stewart, *Letter to the Editor: Articles Fail to Recognize Trial Lawyers' Work*, N.Y.L.J., Aug. 28, 2002, at 2.

45. *NYSTLA: The First 50 Years*, *supra* note 25, at 51–52.

46. Daniel Wise, *New Trial Lawyers' Chief Eyes Reform*, N.Y.L.J., June 28, 2002, at 1.

47. See, e.g., *Contributions Still Flowing into Politicians' Coffers*, NEWSDAY, Oct. 19, 2003, at A50 (reporting that legislation opposed by NYSTLA, which had contributed more than \$300,000 to legislators and the New York State Republican party, was not enacted); John Caher, *Trial Lawyer Lobbying Kills Tort Reform Bill*, N.Y.L.J., Mar. 21, 2000, at 1.

members.<sup>48</sup> Its rhetoric also continues self-consciously to paint its members as underdogs who fight for the public and must also fight for respect. For example, Jeffrey Lichtman, NYSTLA's president from 2002–2003, made the following statement, which is typical of the rhetoric of the organization, at a NYSTLA meeting:

You're the heroes, not the villains. . . . We have the stories in our office, in our file rooms. Widows, widowers, orphans, amputees, brain-damaged children, people who have been disfigured, humiliated and left crippled. The forces that are working against us are attacking them. We have to be prepared to fight for the people in the court of public opinion.<sup>49</sup>

## II. THE NYSTLA LISTSERV AND ITS IMPACT ON LAWYER SKILLS, COMPETENCE, AND ADVICE-GIVING IN PRACTICE

Trial lawyers are storytellers. They tell stories not only when they appear before juries, but when they talk to their colleagues as well. They teach about trial tactics through their stories. They seek advice from their colleagues through their stories.<sup>50</sup> They recognize storytelling as an important aspect of being a trial lawyer.<sup>51</sup>

One sixty-something lawyer recounted his education through such stories as follows:

A: In the law business, in the early, early days of the New York Trial Lawyers Association when everybody who was really good was a member, the Harry Geres, and the Mel Blocks, and Kreinberg and Kelner—all the famous names of that period, in spite of the fact that they were intensively competitive and sometimes mean, vindictive, and venal, they were some of the most generous people in the world to young people and all of them contributed something to my skills as a trial lawyer.

Q: How did they do that?

A: Generally by telling war stories and answering questions.

It was probably at the bar. I don't drink and never have. . . . But these guys would hang out at the bar across from Federal Plaza

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48. This symbolism is not inapt. Recently, Maurice Greenberg, the Chairman of AIG, the world's largest insurer, referred to the trial lawyers as "terrorists." *Greenberg in Row Over Terror Slur at Lawyers*, INS. DAY, Feb. 27, 2004, at 1.

49. *NYSTLA: The First 50 Years*, *supra* note 25, at 54.

50. *See, e.g.*, Levin, *supra* note 2, at 872 n.97.

51. *See* Gary B. Pillersdorf, *President's Message*, BILL OF PARTICULARS, Dec. 1998, available at <http://208.45.141.59/index.cfm?fuseaction=article&articleID=634>.

which has the greatest Nestle pie in the world, and I used to eat my Nestle pie and they would tell war stories and I would sit there and listen. And if you questioned them, they will give away the store. They will tell you quite frankly how certain things are done. And that's how I learned.<sup>52</sup>

Other NYSTLA members have recounted similar examples of learning through the stories they heard from prominent members of the personal injury bar.

It is therefore not entirely surprising that the tradition of storytelling has continued, in a somewhat truncated form, through NYSTLA's website and its highly successful listserv. NYSTLA launched its website in 1995.<sup>53</sup> Its professionally designed web page displays a wealth of information about the progress of important legislation concerning trial lawyers, "news alerts," member resources, continuing legal education programs, and lawyer listserv discussion groups. The news alerts focus on articles about proposed "tort reform" and on stories that are of concern because they portray trial lawyers in an unflattering light.<sup>54</sup> The web page also contains a consumer section with information about consumer rights.

The NYSTList General Forum listserv (NYSTList) started in the late 1990's. According to NYSTLA, the listserv is open to all members, has 1100 participants and receives 800 posts per week.<sup>55</sup> NYSTLA refers to it as a "collective brain trust."<sup>56</sup> Messages posted on the NYSTList are archived and are available going back to 2000. The messages posted on the listserv may be accessed by anyone who joins NYSTLA. Since NYSTLA has virtually no membership requirements other than being a lawyer, a paralegal or a judge, and a willingness to pay dues, members recognize that the NYSTList is "quite public."<sup>57</sup> Unlike many other legal listservs, the

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52. Interview with Attorney #1 in Suffolk County, New York (Mar. 14, 2001) (on file with author).

53. *NYSTLA: The First 50 Years*, *supra* note 25, at 39. The website can be found at <http://www.nystla.org>.

54. For example, the titles of two of the news alerts appearing on March 16, 2004, were "State Senate Proposes 'Tort Reform' Package" and "Newsweek's Inaccuracies: 'Lawsuit from Hell' Examined."

55. *NYSTLA: The First 50 Years*, *supra* note 25, at 44. The latter claim appears somewhat inflated. It appears from the archived messages that at its height in 2002, the NYSTList had 13,655 new posts and 15,642 messages.

56. *Id.*

57. Helene Blank, *Why I Love/Hate the Listserv and Other Important Questions of Our Time*, BILL OF PARTICULARS, Fall 2002, available at <http://www.nystla.org/index.cfm?fuseaction=article&articleID=930>. One lawyer who frequently posts on the list noted that "[i]t is no secret that there are defense attorneys that have joined NYSTLA for the sole purpose of monitoring this ListServe." Posting of Attorney in Manhattan, N.Y., to NYSTList (Mar. 23, 2004) (copies of all NYSTList postings quoted in this article are on file with author).

NYSTList has not posted any limitations on the use or republication of NYSTList posts.

There are new posts every day on the NYSTList. During the two-week period April 16–April 30, 2004, there were 138 new topics posted on the listserv. Those topics were posted by 86 different participants. There were almost 150 replies posted to those topics, including from 33 NYSTLA members who did not themselves post new topics during the two week time period. Only 11 of the 119 active listserv participants during that period appeared to be women.<sup>58</sup> Of course, the number of messages posted does not capture the extent to which off-list communications may have occurred between lawyers who posted topics and other NYSTLA members. Indeed, in some cases lawyers who post questions on the NYSTList explicitly request private replies to their posts.

The listserv fosters camaraderie among participants.<sup>59</sup> It also serves as an important source of shared information about judges, defense experts, and insurance companies, and is a source of important practice tips. As one NYSTLA board member noted about the practice tips on the NYSTList:

This is something you cannot look up. We each benefit from the practical experience that our colleagues have had on the front lines. . . . The tricks and tools of the trade that help us during trial or negotiating around a courthouse can't be looked up anywhere. Like folklore, these learning experiences need to be orally told and retold.<sup>60</sup>

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The public nature of the NYSTList provides a partial, but admittedly not completely satisfactory answer to the ethics of studying this listserv or any listserv. The mere process of studying and reporting upon communications that appear on listservs can adversely affect the freedom with which participants communicate on the listserv long after the published report appears. See, e.g., Elizabeth Reid, *Informed Consent in the Study of On-Line Communities: A Reflection on the Effects of Computer-Mediated Social Research*, 12 THE INFORMATION SOCIETY 169, 172, 174 (1996). Indeed, even listserv participants who enthusiastically consented to the publication of their postings when they knew their group was being studied have been found to change their minds after the publications appeared. *Id.* at 172. At the same time, listservs provide a rich source of information about a growing and important cultural, social and educational phenomenon. In the case of NYSTLA, there is evidence that some NYSTList participants are turning to a new closed "Plaintiffs Only" listserv, which is only available to lawyers who work exclusively representing plaintiffs, in order to preserve the privacy of their communications. See *infra* note 115. I have made no effort to access that listserv.

58. NYSTLA members can post on the listserv anonymously, although the vast majority of posters provide their full names, and many include their addresses and phone numbers. During the two week period sampled, the gender of seven other participants could not be determined from the identifying information provided.

59. Blank, *supra* note 57.

60. *Id.*

One look at the NYSTList makes clear that it is a powerful teaching tool, both for new lawyers and lawyers with substantial practice experience. Posts on the listserv that serve to educate lawyers range from announcements of CLE programs, to substantive legal questions, to questions about the procedures in certain courthouses, and requests for examples of briefs and other papers that lawyers need to file.<sup>61</sup> One typical example was a post entitled “stupid question,” from a lawyer who said he was “inexperienced and need[s] guidance.”<sup>62</sup> After the question was posted asking what could be done for an injured passenger whose son was driving the automobile in which she was injured, four lawyers responded, including one who replied, “Don’t apologize—if we can’t help those who need it, we’re worthless.” In the course of those postings, two of the responding lawyers agreed to exchange copies of opinions that they had mentioned to educate one another about some recently decided legal issues.

Of course, the actual quality of the legal advice and information on the NYSTList is an open question, although it appears that in many cases, the open nature of the information exchange encouraged the correct answer eventually to emerge. This would most often occur when an incorrect response was posted and other lawyers would correct the information. In doing so, not only was the original poster of the inquiry provided with accurate information, but the lawyers who posted inaccurate information also benefited by learning that their understanding of the law was incorrect.<sup>63</sup> Thus, the benefits to the lawyers who participate and to their clients seem significant.

It is clear that some of the questions on the NYSTList are very routine, and some raise more novel issues. For example, during the week of January 12–19, 2004, the listserv posted sixty-five new topics. A Rockland County lawyer posted the following question about a New York procedural rule that had been amended six weeks earlier. His post read:

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61. Some of the questions had a purely commercial purpose such as requests for referrals and requests for the names of out-of-state lawyers to whom to refer particular matters. Other questions of a commercial nature include postings by people looking for office space or for associates to join their practices, although these postings more often appeared on the NYSTLA Jobs and Careers Forum listserv, which is also open to all members of NYSTLA.

62. Posting of Attorney in Queens, N.Y., to NYSTList (Jan. 15, 2004).

63. For example, after a lawyer posted a question about the prospects of a claim by an undocumented alien for lost earnings, a second lawyer responded that he did not have much hope of recovering future earnings in light of U.S. Supreme Court precedent. After two other lawyers posted that they had won on the precise issue in New York state trial courts, the second lawyer responded, “I am glad to find out I was wrong and defeatist. Silly me.” He then added, “can you keep us posted on how the First Department rules?” Posting of Attorney in Manhattan, N.Y. to NYSTList (Nov. 6, 2003).

The new CPLR 3017 (C) provides that:

“In an action to recover damages for personal injuries or wrongful death, the complaint, counterclaim, cross-claim, interpleader complaint, and third-party complaint shall contain a prayer for general relief but shall not state the amount of damages to which the pleader deems himself entitled.”

I cannot find a definition of what kinds of cases constitute personal injury cases. Is a legal malpractice case a PI case? Does it depend on what the underlying case was? For example, does it make a difference if the underlying case [was] a breach of contract or bankruptcy matter as opposed to a motor vehicle or malpractice action?<sup>64</sup>

This question provoked a debate between two other lawyers about the likely interpretation of the new rule.

While the listserv helps lawyers with novel legal questions, it is also apparent that some lawyers rely on the listserv rather than do their own research. For example, one lawyer asked: “My client is receiving social security disability payments. Are these payments subject to a lien?”<sup>65</sup> (This question received the simple answer “no.”) Another lawyer asked a legal question after confessing that he had not done research because he had not yet been retained. As one NYSTLA board member complained “for too many of my brethren, this listserv is used as a poor substitute for hard work. There are so many legal questions asked that are easily ascertainable by opening up McKinney’s or doing a little legal research.”<sup>66</sup>

In addition to the posts that sought information about the law, judges or defense experts, other questions could be more aptly described as advice-seeking. The postings on the listserv that I place in the category of advice-seeking include, *inter alia*, questions about the value of cases, questions about case strategy, and questions about how to handle client problems. For example, one posting was headed “What’s it worth—Facial Scarring on 14-year-old boy.” On the same day, a Brooklyn lawyer posted an inquiry entitled “Worth of Case” that read:

Listmates:

Case is coming up for mediation. Truck with commercial policy ran stop sign into our client. Most serious injuries are torn medial meniscus w/ surgery and four fractured teeth, which a

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64. Posting of Attorney in Rockland County, N.Y., to NYSTList (Jan. 14, 2004).

65. Posting of anonymous Attorney to NYSTList (Jan. 14, 2004).

66. Blank, *supra* note 57.

dentist replaced with caps. Any ideas of what we should demand, and what would be a reasonable settlement?<sup>67</sup>

Another typical post read “if anyone has experience with . . . [carbon monoxide poisoning cases from a home boiler] I would like the opportunity to discuss strategy, experts and the like.”<sup>68</sup>

Regardless of how the posts are categorized, many serve the function of educating lawyers about the law and allowing them to test their understanding of legal principles by asking questions of other lawyers. These posts also help lawyers provide competent representation of their clients when they may be handling a new type of matter and may not have office mates to whom they can turn for advice. This type of resource may be especially important to lawyers who do not exclusively handle personal injury cases, since the personal injury field is becoming a specialized area of practice.<sup>69</sup> Finally, by seeking advice about the value of cases, less experienced lawyers can assess the settlement value of matters even before they take the case on and can continue to test their judgments as they are negotiating with defendants. This helps to maximize the victim’s recovery while insuring that lawyers are not holding out for unreasonable sums or pursuing strategies that are not in their clients’ best interests.<sup>70</sup>

### III. THE LISTSERV AND ITS IMPACT ON LAWYERS’ UNDERSTANDING OF ETHICAL RULES AND PRACTICE NORMS

More than twice a week lawyers on the NYSTList posed questions that raised ethical issues and these invariably received responses from their listmates.<sup>71</sup> Their questions reflected that they were seeking to comply with

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67. Posting of Attorney in Brooklyn, N.Y., to NYSTList (Nov. 6, 2003).

68. Posting of Attorney in Nassau County, N.Y., to NYSTList (Jan. 23, 2004).

69. Heinz et al., *supra* note 15, at 761–62.

70. Of course, the use of legal listservs can also present some problems that need to be seriously considered. One obvious problem is the risk that lawyers will reveal confidential client information on the listerv and possibly waive attorney-client privilege when they post a query. For example, lawyers who post on the NYSTList usually reveal their identities and in some cases, it may be possible to determine their clients’ identities based on the information posted and newspaper stories or public court files. Another potential problem is that lawyers who rely on listservs instead of doing their own legal research may not obtain the correct answers to their questions. Some other potential problems raised by the use of legal listservs are described at *infra* notes 137–38, 140–41 and accompanying text.

71. The term “ethical” is used here in a narrow sense to mean compliance with the New York Code of Professional Responsibility and the other rules and laws governing lawyers.

The calculation of the frequency with which ethical issues were raised on the listserv is somewhat rough. For example, in December 2003, there were eleven new posts that raised clear ethical issues, including questions about conflicts of interest and the maintenance of funds in



the formal rules of professional conduct and other relevant law. In many cases the listserv responses urged lawyers to look beyond the rules and to take the ethical high ground. Topics raised included questions about handling money in escrow, referral fees, conflicts of interest, dishonest clients, withdrawal from representation, and advertising. A few examples of discussion of ethical issues will be presented here to give a flavor of the types of ethical advice that the lawyers give and receive, how they form their understanding of practice norms and how the “talk” on the listserv may shape their understanding of appropriate conduct within this community of practitioners.

### *A. Money Issues*

Money is almost always a concern for solo and small firm lawyers.<sup>72</sup> The types of money issues discussed by the lawyers on the NYSTList usually concerned questions relating to money held in escrow, contingent fee arrangements and referral fees. Although some of these topics are addressed in New York’s Code of Professional Responsibility, other lawyers’ questions were not directly answered by the Code.

The questions about money held in escrow tended to be ones that were susceptible of a definite answer. For example, one lawyer asked:

A colleague and I represented two men on criminal charges—a year ago they were acquitted and we just now settled a related civil suit for malicious prosecution. . . . The two clients still owe us \$ for the criminal work. The question is there anything improper or questionable in depositing the civil recovery and then paying ourselves directly from the IOLA account not only our 1/3 legal fee but also (with client permission) the criminal \$ still owed?<sup>73</sup>

The answer to this question is “no,” so long as the clients consent.<sup>74</sup> Another lawyer asked what to do about a settlement check that had been deposited in

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escrow accounts. Yet during a single week in October 2002, there were five new posts that clearly raised difficult ethical issues and a few other new posts that tangentially raised ethical issues, such as whether certain expenses could be billed as disbursements. The five new ethical issues posted during the week of October 1, 2002, when compared to the total new topics posted that week (123) was not proportionally great, but the fact that even five ethical issues appeared in a week suggests that listserv participants were exposed to discussions of ethical issues on a fairly regular basis.

72. See CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 13–17 (1996); Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 320–21 (2004).

73. Posting of Attorney in Manhattan, N.Y., to NYSTList (Aug. 20, 2001).

74. N.Y. CODE OF PROF’L RESPONSIBILITY DR 9-102 (B)(4).

a client trust account when a client had “dropped off the face of the earth.”<sup>75</sup> He received four responses, including one from a lawyer who had consulted a law professor, one who provided him with the New York State Comptroller’s website for details concerning unclaimed funds, and one who provided the cite to the relevant court rule.<sup>76</sup>

Questions about contingent fees also reflected efforts to understand and comply with the relevant law. For example, a Brooklyn lawyer asked:

Client is injured in a trip and fall at a hospital. Most significant injury is fractured hip. Goes to a different hospital, surgeon commits malpractice while repairing the hip. Client suffers considerable pain and suffering, including second operation.

Which contingency fee schedule to use—negligence or medical?<sup>77</sup>

Three attorneys suggested that the clients should sign both schedules. Other contingent fee questions were more routine and sought to determine, for example, whether a contingent fee could be charged in a no-fault case.<sup>78</sup> In still other cases, lawyers posted to ask about the ethical practices of other lawyers with whom they were having disputes about contingent or referral fees.

Sometimes the lawyers’ questions prompted responses that looked beyond the answers contained in the formal rules. For example, one lawyer asked whether it was permissible to accept a referral fee when he had referred a matter to another attorney due to a conflict of interest. Virtually all of the lawyers who posted responses said that this would be impermissible. In fact, a New York State Bar Association ethics opinion permits lawyers to share a referral fee where a waivable conflict is involved,<sup>79</sup> but only one of the lawyer respondents cited that rule. Yet as another lawyer noted:

I agree with those listmates whose practice is never to accept a referral fee where referral was made due to conflict of representation. This has been my practice too. Especially true where you have discussed the case, even minimally, with the client you later referred to another attorney. There may be rules or

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75. Posting of Attorney in Manhattan, N.Y., to NYSTList (Jan. 18, 2000).

76. N.Y. COMP. CODES R. & REGS. tit. 22, § 691.20(d)(2) (2003).

77. Posting of anonymous Attorney, to NYSTList (Nov. 13, 2000).

78. This particular question generated many responses including that 1) the practice was prohibited by court rules; 2) a bar ethics opinion said it was permissible to charge fees but the fees must be commensurate with services performed; and 3) the New York Insurance Department prescribes a maximum fee of \$800.

79. New York State Bar Ass’n Op. 745 (July 18, 2001).

statutes or case law, but you don't need them. Regardless, getting a referral fee for a case in which you cannot ethically represent the client due to conflict would simply smell.<sup>80</sup>

Responses to other posts also reflect that sometimes the listserv participants urge conduct that goes above and beyond the formal rules. One lawyer headed his post "Physician Blackmale" [sic] and asked:

How would you handle this situation

I was referred a case against a difficult defendant. . . . During settlement negotiations with the carrier, the outstanding medical liens were attempted to be reduced. Initially the defendant offered \$3,000, and there was \$3,600 or so outstanding from treating Chiropractor. . . . I explained the situation to the chiropractors [sic] office who, after bargaining for a while, reluctantly reduced their lien IN WRITING to \$1,000.

Defendant eventually offered more money. . . . They finally came up with \$8,000. Chiropractor [name omitted] now got wind of this from client and ORDERED me not to disburse any money . . . .

Although chiro put her reduction of the lien, in writing, and signed it, she now claims she wants more money since there is more money to be had. She was also paid by the plaintiffs [sic] private carrier [name omitted]. The attorney who referred me this case claims that if I do not deal with this chiropractor she is threatening to file a grievance (for what, I do not know).<sup>81</sup>

Most of the responses suggested that the lawyers felt more sympathy for the chiropractor than the posting lawyer. One lawyer wrote:

I don't mean to be critical but why are you asking us this question about the chiropractor? It sounds like you told the chiro that you were going to settle the case for \$3,000 and, because you were only getting \$3,000, she agreed to reduce her fee to \$1,000.

Now that you are getting \$8,000, what do you think is the right thing to do?<sup>82</sup>

When the posting lawyer wrote back explaining that he thought the chiropractor had run up her bill, that he believed the \$1,000 lien was a fair and equitable amount, and that he thought that "the RIGHT thing to do

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80. Posting of Attorney in Manhattan, N.Y., to NYSTList (Jan. 28, 2002).

81. Posting of Attorney in Brooklyn, N.Y., to NYSTList (Apr. 5, 2002).

82. Posting of Attorney in Manhattan, N.Y., to NYSTList (Apr. 6, 2002).

would be to give the client the money rather than the greedy chiropractor,”<sup>83</sup> another NYSTList member was not persuaded. He wrote:

Sorry, I disagree with you. Whether or not you “like” this chiro, whether or not you think she received alot of money considering the injuries she treated, you must deal with her candidly. . . . How would you feel if it was your attorney’s lien in play here?<sup>84</sup>

In other words, even though the posting lawyer had a legal basis for not paying more money to the chiropractor (the signed agreement reducing the lien), the listserv participants urged the lawyer to take what they viewed as the morally appropriate course of action.

The posts on the listserv also provide insight into the community’s norms for dealing with fee conflicts between trial lawyers. In one such inquiry, a NYSTList participant asked how to handle a situation in which he had been substituted out as trial counsel by another lawyer, who had signed an agreement saying that upon resolution of the lawsuit, the court would decide the original lawyer’s fee. Since then, the case had settled, but the NYSTList participant feared that the trial lawyer who substituted for him had disbursed the entire fee to himself. When the lawyer asked for suggestions, one NYSTLA member suggested that he draft a letter to the disciplinary committee and send it to the incoming attorney with a note saying he expected a good faith offer within seven days or that he would mail the letter to the disciplinary committee. A second NYSTLA member wrote:

I take great exception to the method suggested. . . . At some point in everyones [sic] career, they too, will be involved in a fee dispute with another attorney. I HOPE that they are not faced with a veiled threat. . . . While one attorney may be an [ass] in ignoring you, your civility will only serve to show others how to act.<sup>85</sup>

A third lawyer suggested that the letter might constitute extortion, although a fourth lawyer disagreed. In such ways, the listserv communicates the community’s values to participants and makes explicit some of the competing considerations that may help inform decisions about how to treat clients, treating doctors, and other lawyers.

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83. Posting of anonymous Attorney to NYSTList (Apr. 7, 2002).

84. Posting of Attorney in Manhattan, N.Y., to NYSTList (Apr. 8, 2002).

85. Posting of Attorney in Manhattan, N.Y., to NYSTList (Aug. 9, 2002).

*B. Conflict of Interest Issues*

The lawyers on the listserv occasionally had questions about conflicts of interest, including both possible conflicts that they confronted and conflicts that they perceived on the part of defense counsel. The conflict of interest issues about which these lawyers sought advice often concerned possible conflicts of interest relating to passengers and drivers involved in automobile accidents. In such cases, listserv members often counseled their colleagues against representing both passenger and driver. Even when there was no apparent conflict (e.g., a husband and wife who were rear-ended at a stop sign), the lawyers advised the inquiring attorney to negotiate the settlements individually and to be mindful of conflicts in that context.

Other types of conflicts were also discussed on the NYSTList, sometimes with very different answers. One attorney wrote:

An attorney represents a doctor 11 years ago in a malpractice matter that is settled after jury selection. Now, a plaintiff seeks to retain this attorney to sue the same doctor. . . . Is there a conflict of interest that would prevent this attorney from representing this plaintiff against this MD?<sup>86</sup>

The first attorney who answered this question wrote there was “absolutely no conflict” because the representation was about a different matter unless there was confidential information that was divulged that may come into play. A second attorney answered:

There most certainly would be a conflict. Same individual—same type of case (Medmal). You may have obtained client confidences from the doctor in the first matter, which could be used against him/her in this matter. . . . Why take the risk?<sup>87</sup>

Thereafter, the two lawyers continued to exchange posts about whether the old matter and the potential new matter were “substantially related” under New York Disciplinary Rule 5-108, so as to preclude the lawyer from representing the new client.

Another post entitled “Help . . . ethics question” evoked responses that sounded like old friends sitting around a table giving advice to a colleague. A Manhattan attorney explained he had been asked by a long-standing client to represent him in a slip and fall personal injury case against defendants/property owners that had been clients of the lawyer. The lawyer explained the matters were completely unrelated to the prior representation

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86. Posting of anonymous Attorney to NYSTList (Sept. 7, 2000).

87. Posting of Attorney in Brooklyn, N.Y., to NYSTList (Sept. 7, 2000).

and that his relationship with the defendants has ended but he asked “[a]m I better off staying clear and referring this one out?”<sup>88</sup>

Three lawyers responded that the matter should be referred out in brief answers like this one:

Stand tall on this one. Refer the matter out and take no referral fee. Explain to your current client that even the possibility of a conflict should be avoided. Hopefully your current client will appreciate the fact that we are indeed an honorable profession.<sup>89</sup>

Two others advised (correctly) that there was no impermissible conflict so long as the matters were not substantially related and the lawyer was not privy to confidential information that he could use against his former client. Two provided more practical responses. For example, after noting that there was nothing improper about suing former clients about whom a lawyer had no confidential information, one attorney noted:

However, as a practical business matter you will probably lose the old client as a referral source. I would not be surprised if the old client were to call you and complain about suing him. Even though you’ll offer a logical explanation that it is nothing personal and that you’re only after the insurance, the former client’s emotions will rule.

Therefore, if you value the old client’s recommendation and if the old client sent you other clients, I recommend that you do not take the case as atty [sic] of record. Refer it out, tell the client what you’re doing (and look like a hero), and take a referral fee.<sup>90</sup>

One striking thing about the advice concerning conflicts was that many of the responses were conservative. Lawyers often advised a “safe rather than sorry” approach that involved declining business, even when the conflict could be waived by the clients. This is seemingly different from the approach in larger firms where lawyers may go to great lengths to find their way around a conflict.<sup>91</sup>

### *C. Ambulance Chasing*

One topic that garnered many listserv comments was “ambulance chasing” and the use of “runners” who engage in in-person solicitation of

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88. Posting of anonymous Attorney to NYSTList (June, 7, 2001).

89. Posting of Attorney in Manhattan, N.Y., to NYSTList (June 7, 2001).

90. Posting of Attorney in Manhattan, N.Y., to NYSTList (June 8, 2001).

91. See Susan P. Shapiro, *Bushwacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 151–52 (2003).

clients. This is a sensitive topic for personal injury lawyers, who have long been branded as “unethical” for engaging in such behavior.<sup>92</sup> NYSTLA members who posted comments unanimously disapproved of the conduct, which is clearly prohibited by the lawyers’ ethical rules, but the reasons why it was unacceptable seemingly related more to the lawyers’ economic and reputational interests than it did to the impact on the clients who were solicited. The lawyers’ comments provide a rare look at the practice of ambulance chasing, and at NYSTLA members’ response to this practice.

The NYSTList participants noted that ambulance chasing and the use of “runners” to sign up accident victims has been a problem for years and continues to be a problem in New York. Lawyers wrote of “investigators” employed by chiropractors or other health care providers who listened to police radios, arrived at accident scenes before the police and offered to set up a client with a chiropractor and a lawyer. Sometimes money was offered to the client to go to the treating facility. One lawyer explained:

I recently found myself in the living room of a potential client. There were lawyers’ business cards everywhere. The best was a “sign up package” of forms that the tow truck driver/auto body guy gave to this potential client. Moreover, even after I was formally retained, this “guy” continued to call my client in an effort to get him to go with the ambulance chasers.<sup>93</sup>

Another said:

A lawyer friend of mine told me recently that he will no longer recommend to new clients that they go to the hospital ER, as they never come back, having been “signed up” by some other attorney at the ER.<sup>94</sup>

A third lawyer noted, “[a]mbulance chasing exists everywhere I have practiced. All of us who handle plaintiffs’ cases have had at least one potentially lucrative case stolen from us.”<sup>95</sup>

The listserv responses were full of rhetoric condemning the behavior of runners and ambulance chasers, who were referred to as “vermin,” “bums,” and “a blight on our profession.” The condemnation focused mainly on the loss of business and the negative image it created for other trial lawyers. As one noted, “[t]his has become a serious problem and is depriving

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92. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 48–50 (1976); GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870–1970*, at 374–76 (1970).

93. Posting of Attorney in the Bronx, N.Y., to NYSTList (Apr. 14, 2000).

94. Posting of Attorney in Manhattan, N.Y., to NYSTList (Apr. 23, 2000).

95. Posting of Attorney in Putnam County, N.Y., to NYSTList (Apr. 13, 2000).

‘legitimate’ attorneys from obtaining cases.”<sup>96</sup> Another noted that ambulance chasers are “STEALING from our pockets.”<sup>97</sup> Similarly, other lawyers noted:

Our yellow pages ads used to be a lot more effective! These days people have lawyers before they even get home from the hospital—they never need to pick up the yellow pages!<sup>98</sup>

We all should make clear to all in a position to make a difference that it is our practices and livelihoods that are at stake and that a lot of the activities are already illegal and all are unethical and that we demand that they be dealt with accordingly.<sup>99</sup>

While several lawyers called on NYSTLA to take action to stop ambulance chasing, others raised questions about whether NYSTLA was willing to do so. One lawyer noted:

For such a vocal group, NYSTLA’s silence on the topic of ambulance chasing is deafening. I would gladly increase my firm’s monthly contribution to [NYSTLA’s *New York Book of Champions*] if I could be certain part of the money would go to cleaning up our own backyard.<sup>100</sup>

Another lawyer said:

There can be no middle ground with this disgraceful practice. We should push legislation to make such conduct a felony, irrespective of the bad P.R. we might get by bringing this conduct to light.<sup>101</sup>

When another NYSTLA member directly questioned NYSTLA’s commitment to ridding the profession of ambulance chasers, a member of NYSTLA’s leadership responded:

I assure . . . all of you, for that matter, that we at NYSTLA do, in fact, care very much about these problems, the business difficulties they create for far too many of us, the ethical concerns,

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96. Posting of Attorney in Westchester County, N.Y., to NYSTList (Apr. 12, 2000).

97. Posting of Attorney in Schenectady, N.Y., to NYSTList (Sept. 23, 2003).

98. Posting of Attorney in Nassau County, N.Y., to NYSTList (Apr. 11, 2000).

99. Posting of Attorney in Brooklyn, N.Y., to NYSTList (Apr. 13, 2000).

100. Posting of Attorney in Nassau County, N.Y., to NYSTList (Apr. 21, 2000). *The New York Book of Champions of Justice* contains a list of the law firms and lawyers who have pledged to contribute on a monthly basis to the Alliance for Consumer Rights, LawPAC, and ATLAPAC to support trial lawyers’ lobbying efforts. See <http://www.nystla.org.index.cfm?fuseaction=article&articleID=854>.

101. Posting of Attorney in Delaware County, N.Y., to NYSTList (Apr. 24, 2000).



and particularly the terrible image this kind of behavior confirms for those who have already been propagandized to react negatively to trial lawyers.<sup>102</sup>

The writer went on to explain that NYSTLA's Executive Committee had appointed a committee to work on "finding the best and most realistic solutions to these problems." Shortly thereafter, a former NYSTLA president drafted proposed legislation concerning "Barratry and the Solicitation of Professional Employment" and making it a crime for lawyers to solicit clients.<sup>103</sup>

Other lawyers suggested more direct means of dealing with ambulance chasers, including having NYSTLA collect the names of chasers and reporting them to the appropriate authorities, forming an ad hoc committee outside of NYSTLA to deal with the issue, and having individual lawyers pledge to turn the names of chasers over to the disciplinary authorities and the district attorney. One Rochester lawyer wrote:

I hope others will join me in announcing to all who read this that I will be reporting any and all violations of ethical parameters by those who chase the almighty ambulance. If we all agree publicly, perhaps together we can let the offenders know that we will no longer be silently tolerating this outrageous behavior. Together we can overcome this and clean up our own embarrassments. . . . Is anybody out there with me?<sup>104</sup>

But some lawyers voiced concern about going after ambulance chasers, both for economic and public relations reasons:

While we bear the responsibility to police our own, it could become a very costly war of attrition. For example, the attempts to challenge the local ambulance chasers have been met with threats that they would mass advertise 25% contingency fee agreements. That is a threat many of us take seriously. The ambulance chasers continue to flaunt the ethical canons with impunity.

The statewide organization must try to solve this problem quickly and privately. Otherwise, the media would love to print stories about the "ethical sharks" fighting with the unethical ones. That type of well publicized battle would make tort reform seem

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102. Posting of Attorney in Manhattan, N.Y., to NYSTList (Apr. 25, 2000).

103. Although that legislation did not pass, there was already other legislation making it unlawful for an Attorney "to employ any person for the purpose of soliciting or aiding, assisting or abetting in the solicitation of legal business." N.Y.C.L.S. Jud. § 482 (2004).

104. Posting of Attorney in Rochester, N.Y., to NYSTList (Apr. 28, 2002).

all the more appealing to the general public. In the end, everyone loses.<sup>105</sup>

Another lawyer wrote:

I think you are asking a very politically delicate question. I am [afraid] that even if what you propose is done, too many people will burn. I don't think we even want to imagine who and how many. Unfortunately, as much as I agree with you, I think that ambulance chasing, doctors and lawyers who pay off each other as well as runners are a permanent part of our lives. This is the unfortunate reality.<sup>106</sup>

A third noted the problem that lawyers are unwilling to be seen as “whistle-blowers” on their brethren.

Those who posted on the NYSTList communicated strong disapproval of the practice of ambulance chasing, but some postings suggested that members of NYSTLA's board, some members of the listserv, and some prominent plaintiffs' law firms were involved in “chasing.” Thus, it is impossible to say whether the comments reflected a true consensus among NYSTLA members. But it seems likely that new and less experienced lawyers on the listserv got the message that many NYSTLA members did not consider ambulance chasing to be acceptable conduct.

#### *D. The Threat of Discipline and Bad Publicity*

The threat of discipline hovers over NYSTLA lawyers, who seem to be well-aware that solo and small firm lawyers and lawyers in personal injury practices are more likely to receive discipline complaints than many other lawyers.<sup>107</sup> They are also very concerned about the possibility of attracting negative publicity that will place trial lawyers in a bad light. For example, when one lawyer asked whether it was permissible to charge interest to clients for outlaying expenses, another lawyer shot back, “[t]his seems like a surefire way of getting an invitation to appear before the disciplinary committee; further, why would you want to create another target for tort reformers?”<sup>108</sup>

The advice given on the NYSTList often seemed to reflect these concerns about trial lawyers becoming the subject of lawyer discipline. For example, listserv participants counseled lawyers to settle disputes they had

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105. Posting of Attorney in Buffalo, N.Y., to NYSTList (Apr. 12, 2000).

106. Posting of anonymous Attorney to NYSTList (Apr. 24, 2002).

107. See Levin, *supra* note 72, at 310–12.

108. Posting of Attorney in Manhattan, N.Y., to NYSTList (Feb. 13, 2001).

with treating physicians or with court reporting services over payment issues. Similar advice was given to lawyers who had disputes with clients in order to avoid possible grievances. Even when lawyers had legitimate disputes with their clients, they were often counseled by other listserv participants not to pursue them. For example, when a lawyer had advanced disbursements in a case that the client decided not to pursue and the client had not reimbursed the lawyer for the disbursements, the lawyer was counseled “[w]ould you really want to spend time and money suing this client for disbursements [and at] the same time risk a grievance (albeit a meritless one) being filed against you?”<sup>109</sup>

This is not to say that all NYSTList participants are as mindful of the ethical rules as they should be. For example, when a Manhattan attorney received a letter from a fellow attorney who had threatened to file a grievance against her and cited a disciplinary rule, she wrote, “I do not have that statute in my library and the disciplinary rules are not on Lexis. Does anyone know what this rule says?”<sup>110</sup> She received four responses. One lawyer provided a careful explanation of the rule, another offered help if she called him, and a third delivered a rebuke:

I am sorry that this will sound terrible, but does anyone out there ever actually read what they sign and swear to every two years, when they send in their \$300 registration fee to [the Office of Court Administration]? You are swearing that you have read and are familiar with the [Disciplinary Rules] and the Code of Professional Conduct. . . . I know this writer needed help with a problem, but to post that you don’t have a copy of the Rules and don’t know where to find them is just a little scary.<sup>111</sup>

The fourth lawyer agreed, in a response that reflected the self-consciousness about trial lawyers being scrutinized by the public:

As usual, [name omitted], thank you for the wake up call. There is no excuse for not knowing where to find the [Disciplinary Rules]. . . . I don’t like to engage in public chastisement, but our profession is under constant attack and we need to work very hard to make sure our critics do not have any more fodder for their cannons than they already have. Imagine the editorial that could be written about the attorneys who do not even know about their own Code of Ethics . . . .<sup>112</sup>

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109. Posting of Attorney in Nassau County, N.Y., to NYSTList (Apr. 8, 2002).

110. Posting of Attorney in Manhattan, N.Y., to NYSTList (Aug. 18, 2001).

111. Posting of Attorney in Brooklyn, N.Y., to NYSTList (Aug. 21, 2001).

112. Posting of Attorney in Manhattan, N.Y., to NYSTList (Aug. 22, 2001).

This comment was consistent with other chat on the listserv reflecting an intense concern whenever articles or advertisements appeared in the popular press that put trial lawyers in a negative light. Thus, it is not surprising that when lawyers asked questions about problems that arose in their own practices, the NYSTList participants conveyed to these lawyers that avoiding negative publicity and a disciplinary grievance was more important than pursuing monetary claims, even in a principled dispute.

#### IV. SOME OBSERVATIONS

As sociologist Barry Wellman has noted, the internet is not a separate social system that stands apart from our other interactions, but rather is embedded in our everyday lives.<sup>113</sup> This insight is important when considering the power and the potential of the NYSTList. This community of lawyers was not spawned in cyberspace and the interactions among many of its members are not merely electronic. Rather, NYSTLA has a rich history of collegiality, mutual assistance and story-telling that long pre-dates the time when computers first appeared in law offices. The listserv is best understood when it is situated within the culture of the bar organization, with its history of education and efforts to improve the standing of the profession. The willingness of NYSTLA members to share information on its listserv is only one of the many ways in which the organization helps to form a sense of professional community.

Moreover, NYSTLA is not a typical bar association. It is unabashedly political. As a former officer of NYSTLA explained:

We represent the plaintiffs' bar. We put out \$3 million a year in lobbying. We have, you know, a political arm. . . . We are a don't-question-who-we-are-for-one-minute—We're not fair, we're not in favor of the insurance companies and people respect that kind of candor. I mean when I go to a County Bar or I go to an ABA meeting, I'll tell them, you know I'm [an officer] of the largest plaintiffs' bar in the country and I don't give a shit about the insurance companies. We are here for people who have been injured but understand gentleman—I am a lobbyist. I am a lobbyist for my group. It also makes us very politically effective.<sup>114</sup>

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113. Barry Wellman et al., *The Social Affordances of the Internet for Networked Individualism*, 8 J. COMPUTER-MEDIATED COMM. 1, 2 (2003), available at <http://www.ascusc.org/jcmc/vol8/issue3/wellman.html>.

114. Interview with Attorney # 2, in Westchester County, N.Y. (Feb. 17, 2001).

The commonality of political and economic interests shared by NYSTLA members and the culture of education and advice-sharing seemingly produce a cohesive professional community.

Indeed, being a member of the NYSTLA is a bit like being a part of a large and noisy extended family. Notices come via e-mail every few days advising members of NYSTLA activities, providing communications from the leadership or describing legislative developments. Notices also arrive via facsimile about NYSTLA programming. The pro-consumer rhetoric that accompanies these communications is relentless. While NYSTLA members may disagree internally about how to handle legislative initiatives or practice issues, they are still “family,” and there is seemingly little disagreement about their purpose and the battle they face together in opposing “tort reform.”

Before proceeding it is important to stress that one other feature of NYSTLA’s listserv that may render it different from other legal listservs is the relatively open nature of the list, which undoubtedly contributes to a self-conscious quality to some of the postings. Lawyers who participate in the NYSTList are aware that judges, defense counsel and other lurkers may be reading their messages, although it appears that not all of the lawyers who participate in the NYSTList remember this fact when they post messages.<sup>115</sup>

#### *A. Professional Development and the Development of Community*

For the predominantly solo and small firm lawyers who post messages on the NYSTList, the listserv provides some of the benefits of working in a larger law office. Rather than walk down the hall to ask a question, these lawyers are just a mouse click away from a wealth of information from their professional community. Indeed, it may be easier in some respects to seek advice from the listserv than it is in a law office, because lawyers may be more willing to admit what they do not know to relative strangers.<sup>116</sup>

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115. See *supra* note 57. It is perhaps because of the open nature of the NYSTList that the number of NYSTList posts have diminished significantly in the last two years and that NYSTLA has recently instituted its “Plaintiffs Only” listserv. Lawyers who join that list must affirm that their personal injury and wrongful death practices involve representing plaintiffs only. The “Plaintiffs Only Forum Agreement” requires lawyers to agree “not to share with anyone else the language or contents of anything on the private listserv.” New York State Trial Lawyers Association, Inc., *Plaintiffs Only Forum Agreement*, at <http://www.nystla.org/nicecontent/documents/PlaintiffsForumAffirmation.pdf> (last visited Mar. 23, 2005).

116. One experienced and well-known New York City personal injury lawyer confessed to me that he sometimes asks his associate to post questions on the NYSTList because he does not want it known that he does not know the answer to his questions.

Moreover, unlike firm colleagues who may be out of the office when a question arises, there are so many participants on the NYSTList that someone is almost always available to answer questions. Collectively, the listserv participants may have far more relevant knowledge than is available in even the largest law firms.

For less experienced lawyers working in a solo or small firm practice, this type of resource can contribute in important ways to their professional development. While many lawyers who enter solo and small firm practice manage to find mentors early in their careers, this is not always the case.<sup>117</sup> The listserv provides an easy and relatively inexpensive resource for obtaining copies of pleadings and briefs, for learning about procedures in courthouses, and for obtaining the answers to a range of legal and practical questions. The listserv also provides younger lawyers with answers to more difficult questions of case or trial strategy. As evidenced by the post described earlier by the lawyer who said he was “inexperienced and [needs] guidance,” the listserv participants encourage those types of questions in order to help younger lawyers learn how to practice law and become more competent practitioners.

Indeed, there appears to be a culture on the NYSTList to encourage these questions, even when the inquiring lawyer could have answered the question with relatively little research. When a lawyer complained that too many writers asked questions on the NYSTList that could be readily answered by consulting New York’s court rules, another lawyer noted:

The biggest mistake I tend to see among recent grads is their attitude that all the answers can be found in a book—so they stick their head in a book until [3 a.m.] and still don’t have a practical solution for a client. I would rather see lots of silly questions than have anybody censor them self [sic] for fear of being flamed for the elementary nature of their question. I would suggest that if you see a question so easy that you don’t feel it deserves an answer—don’t answer it.<sup>118</sup>

In a later post on a similar theme, a lawyer noted:

Hear, Hear!! SO, without recrimination, leave us educate when we can!! If the answer is too simple, or it has been published time and time again, so what if we answer fifty times. Whoever is tired, back off (don’t reply!) and someone else will fill in. That is why we are here. Don’t we want uniform, powerful arguments? Do we want inexperienced attorneys or those without the facts/knowledge

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117. Levin, *supra* note 2, at 880–81.

118. Posting of Attorney in Queens, N.Y., to NYSTList (Sept. 7, 2000).

to make bad law? I think not. The danger behind not giving the right answer is that the judges will seize upon bad arguments to make bad law. I will continue to post the same mundane crap in the hopes that the carriers will go crazy, not us. More arrows, better offense/defense. Keep firing, we will provide the ammo!<sup>119</sup>

It appears that the benefits derived from the NYSTList are not limited to the exchange of information and advice, but also include the positive values that these exchanges foster within that legal community. Wellman has observed that online requests for assistance are read by people sitting alone at their screens. Since they do not know if others can respond, it may prompt individuals to provide an answer.<sup>120</sup> At the same time, the online assistance will be observed by others and will be positively rewarded both by reciprocal assistance and by increased esteem. When these acts are observed by an entire group, they perpetuate a norm of mutual aid within the community.<sup>121</sup>

The culture of the NYSTList also encourages an atmosphere of mutual respect. Although there are occasional testy exchanges on the listserv, the “flaming” that is reported to be common in CMC<sup>122</sup> is uncommon on the NYSTList. For example, on one occasion when a response was posted that was judged to be rude by another lawyer, that lawyer wrote:

Once again rudeness rears its ugly head on the list.

We are all capable of asking foolish questions. Some of us know more about the law than others. Let’s not make it personal. We all learned about the impropriety of ad hominem attacks. Let’s not do that.

Can I get an amen on that?<sup>123</sup>

Three lawyers responded “Amen.”

It is therefore not surprising that most NYSTList participants believe that they should not post the names of trial lawyers who engage in undesirable conduct. For example, one attorney described a problem and noted that “Mr. Attorney is a member of our list,” and that “[i]f I don’t hear from him for some more time, I will reveal the name of Mr. Attorney to everyone on the list.”<sup>124</sup> Within a little more than an hour another attorney responded,

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119. Posting of Attorney in Westchester County, N.Y., to NYSTList (Nov. 16, 2002).

120. Wellman et al., *supra* note 6, at 223.

121. *Id.*

122. See, e.g., Nancy K. Baym, *Agreements and Disagreements in Computer-Mediated Discussion*, 29 RES. ON LANGUAGE & SOC. INTERACTION 315, 323 (1996).

123. Posting of Attorney in Rockland County, N.Y., to NYSTList (Dec. 31, 2001).

124. Posting of Attorney in Brooklyn, N.Y., to NYSTList (Nov. 14, 2002).

“publishing a name on the list would tend to lead to other people airing their grievances against each other on the list and will defeat the purpose of it.”<sup>125</sup> By creating a culture in which members are encouraged to resolve conflicts in a relatively civil manner, the community maintains cohesion and can function as “friendly competitors.”<sup>126</sup>

### B. *Ethical Guidance and Community Norms*

Given the helpful and supportive culture of the listserv, it is not surprising that the NYSTList produces an environment in which ethical questions are raised and answered. I do not mean to overstate, however, the extent to which this occurs. It is possible to read posts for three or four days before a topic appears that has ethical implications. Yet it appears that the NYSTList may encourage more discussion about ethical issues than reportedly occurs in large firm practice<sup>127</sup> or in a typical solo or small firm practice.<sup>128</sup>

There are many possible explanations for why ethical discussions may occur with some frequency on the NYSTList. It may be that lawyers are willing to raise an ethical question on the NYSTList because the questions they raise are not that dissimilar from other types of information exchange and advice-seeking that occurs on the listserv. For example, a question about whether a non-lawyer can sign escrow checks<sup>129</sup> is grounded in ethical rules, but is seemingly not that different from other basic practice questions posted on the list. Ethical questions on the list may also arise because of the availability of many lawyers for the ethical discussion at any given time or the fact that CMC need not occur contemporaneously and so the questions may be posed whenever they occur to the lawyer. Indeed, many of the questions were posted on the NYSTList in the late afternoon, in the evening, or early in the morning, when the lawyers may have had more the time to think without interruption. The non-hierarchical nature of CMC may

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125. Posting of Attorney in Manhattan, N.Y., to NYSTList (Nov. 14, 2002). It is possible that the practice of not publishing the names of offending lawyers is also enforced by the list moderator, but even threats to publish names rarely appeared on the listserv.

126. See Parikh, *supra* note 15, at 207.

127. See Sarat, *supra* note 1, at 826–27; Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 *FORDHAM L. REV.* 837, 863 (1998).

128. See Levin, *supra* note 2, at 891–92 (describing small study in which solo and small firm lawyers reportedly did not reach out often for ethical advice).

129. Posting of Attorney in Manhattan, N.Y., to NYSTList (Apr. 5, 2000).



encourage some lawyers to post ethical questions.<sup>130</sup> It is also possible that CMC allows lawyers to ask ethical questions without concern that there will be pressure on them to follow the advice they receive, in contrast to the ethical advice they may receive from office mates, who may be able to observe whether they have followed the advice.

One interesting feature of the NYSTList discussion—which may distinguish it from “real life”—is its focus on the content of ethical rules. In a small study of New York solo and small firm lawyers, many of them reported that they rarely—if ever—consulted the New York Code of Professional Responsibility when confronted with ethical questions in their day-to-day practices.<sup>131</sup> But NYSTList participants often sought the “rule” or the “right answer” when confronted with an ethical issue. It may be that the listserv discussions about ethical rules sensitizes other listserv participants to the fact that there are formal rules that should be consulted when confronted with ethical questions. Or it may also be that the ease with which these lawyers can access the answers to a variety of questions—by simply typing the question—encourages them to ask questions that have answers that are rooted in the relevant formal rules. It may also be the case that the fact that the replies are public encourages respondents to seek out the right answer before they respond, rather than to “wing it” as they might if the question were asked at the photocopy machine or while waiting in court. Regardless of the reason, the NYSTList seemingly creates a community norm that the rules are relevant and should be consulted.

Another feature of the NYSTList that may distinguish it from “real life” conversation is that the posted ethical advice tends to be conservative. There is both recent anecdotal evidence and older research suggesting that the ethical advice given in solo and small firm offices is not all ethically conservative.<sup>132</sup> In contrast, conservative advice may be given on the NYSTList because the lawyers giving it do not share a financial interest in the outcome of the ethical decision. Trial lawyers as a group may be more concerned with the ethical compliance of their members—than with the economic interests of a single lawyer—because they are worried about their negative public image. It may also be that NYSTList participants feel freer to give more cautious advice on the listserv than they might give to a referral partner with whom they were trying to curry favor or a friend whom

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130. Many scholars have noted that CMC promotes more egalitarian participation in discussions and diminish the importance of hierarchy and social status among participants. *See, e.g.,* Wellman et al., *supra* note 6, at 218, 224–25.

131. *See* Levin, *supra* note 72, at 363–65.

132. *See* JEROME E. CARLIN, *LAWYERS' ETHICS* 98–102, 107–09 (1966); Levin, *supra* note 2, at 890, 893–94.

they knew was seeking a particular answer. It is also quite possible that the relatively public forum for the advice-giving only encourages those who would give the most “ethical” responses to post a response on the listserv.

One important question that cannot be answered here is what impact, if any, this advice has on the actual ethical decisionmaking of NYSTList participants. There is evidence that less experienced lawyers in private practice settings learn the community’s norms from observing the lawyers around them and from conversations with office mates, mentors, and adversaries.<sup>133</sup> Obviously the NYSTList provides another potentially important source of information about the community’s values and norms and it is possible that if younger lawyers read the relatively cautious ethical advice on the NYSTList, these views may affect the thinking of lawyers who do not have well-formed views on how to resolve particular ethical questions. Indeed, theories of social psychology suggest that these younger lawyers would tend to conform to what they perceive as the group behavior.<sup>134</sup> At the same time, there is some evidence that the social pressure to conform to majority judgments may be reduced in CMC environments and that individuals tend to be more critical and more willing to assess the information that they receive through computer-mediated communication.<sup>135</sup> Thus, research is needed to determine the actual impact of the NYSTList on the ethical decisionmaking of less experienced lawyers.

More research would also be needed to determine what effect, if any, the NYSTList posts have on the ethical decisionmaking of experienced lawyers who have well-established views and practices concerning various ethical issues. There is a psychological tendency not to re-examine decisions once they have been made,<sup>136</sup> and so experienced lawyers who follow practices that violate the ethical rules may not be quick to re-examine their practices. But even those lawyers may be more likely to rethink their earlier conclusions if confronted with direct evidence that their practices violate clear ethical rules, especially in light of the concerns they seem to share about disciplinary complaints and bad publicity that reflect poorly on trial lawyers.

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133. See MATHER ET AL., *supra* note 2, at 56–63; Levin, *supra* note 72, at 357–59.

134. ELLIOT ARONSON, *THE SOCIAL ANIMAL* 25 (8th ed. 1999).

135. Robert M. Bastress & Joseph D. Harbaugh, *Taking the Lawyer’s Craft into Virtual Space: Computer-Mediated Interviewing, Counseling and Negotiating*, 10 CLINICAL L. REV. 115, 133 (2004). If that is correct, then it may be that listservs would have less influence than, say, colleagues in an office-sharing arrangement.

136. See MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* 34–35, 73 (5th ed. 2002); SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING*, 234 (1993); Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 BROOK. L. REV. 629, 639–40 (1997).

*C. Cautionary Concerns*

It appears, at least from this preliminary study, that the NYSTList has a very positive impact on the participating lawyers. The NYSTList educates lawyers. It promotes competent representation of clients. It counsels ethical conduct by lawyers. It fills a void for some lawyers who may have no mentors or office mates to whom they can turn for advice. It provides emotional support and a sense of "belonging."

But even by NYSTLA's accounts, fewer than twenty-five percent of all NYSTLA members are registered to participate in the NYSTList. It would be useful to know what types of people actually participate in the listserv (even as lurkers) and whether some members feel alienated from or excluded from the list. It is conceivable that some lawyers do not participate due to concerns about their reputation or concerns about referrals. Moreover, there is some evidence that women and some minorities participate less in CMC than white men<sup>137</sup> and that women are less likely to have the topics they raise pursued.<sup>138</sup> Legal listservs might prove to be another area in which women and minorities are subtly excluded from networking and mentoring opportunities.

It is important to consider, too, what might be lost if lawyers routinely opt for CMC rather than face-to-face (or voice-to-voice) communications in their advice-seeking. There is evidence that communication via e-mail is surpassing telephone use.<sup>139</sup> As lawyers become increasingly reliant on computers it is possible that the time available for face-to-face mentoring might decrease. It is also quite possible that certain questions are not being asked on these listservs, either because they are too lengthy and complex to convey in writing or too sensitive to communicate to any list, and that as CMC becomes more common for advice-seeking, the more complex or sensitive questions may not be asked in any form.

It is also important to stress that CMC can be fragile. Misunderstandings and aggressive behavior can significantly diminish participation in some electronic communities.<sup>140</sup> If the culture of the list changes to discourage

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137. Kevin Crowston & Ericka Kammerer, *Communication Style and Gender Differences in Computer-Mediated Communications*, in CYBERGHETTO OR CYBERUTOPIA?: RACE, CLASS, AND GENDER ON THE INTERNET 185, 188-89 (Bosah Ebo ed., 1998); Caroline Haythornthwaite & Barry Wellman, *An Introduction*, in THE INTERNET IN EVERYDAY LIFE 17 (Wellman & Haythornthwaite eds., 2002).

138. Baym, *supra* note 122, at 324.

139. Wellman et al., *supra* note 113, at 8.

140. Martha E. Giminez, *The Dialectics Between the Real and the Virtual: The Case of PSN*, in MAPPING CYBERSPACE: SOCIAL RESEARCH ON THE ELECTRONIC FRONTIER 90 (Joseph E. Behar ed., 1997); see also Beth Kolko & Elizabeth Reid, *Dissolution and Fragmentation:*

“stupid” questions, some important questions may never be asked. Concerns about outside observers or computer security can also limit participation in lists. Indeed, the experience with the NYSTList, which has gone from more than 15,000 posted messages in 2002 to about 6000 posts in 2004<sup>141</sup> suggests that this has happened to the NYSTList. Recent efforts by NYSTLA to create a closed “plaintiffs’ only” listserv may unintentionally keep out less experienced lawyers who are still building their client base and who are not yet willing to limit their practices, but who might benefit most from the advice provided on the list.

Another important question is how the NYSTList affects the lawyers’ view of themselves as part of larger professional community of lawyers. There is no doubt that lawyers who participate on the NYSTList see themselves as part of the larger community of trial lawyers. But rightly or wrongly, NYSTLA promotes the view of trial lawyers as Davids against the insurance-industry Goliath with its battle and siege rhetoric. The NYSTList further encourages that view with its posts about “tort deform,” questionable insurance company tactics and unscrupulous defense-oriented experts. Thus, at a minimum, the NYSTList participants see themselves as aligned against a certain segment of the bar.

At the same time, as NYSTLA members struggle for respect within the legal profession and from the public, the NYSTList participants encourage conduct that (they hope) will produce such respect. This can be seen in the many NYSTList posts that educate lawyers, promote competent representation and espouse ethical conduct. While part of their motivation is no doubt grounded in their economic concerns about the impact of tort reform efforts, their NYSTList posts also reflect their desire to see themselves—and to be viewed—as a respected part of a noble and learned profession.

## V. CONCLUSION

The NYSTLA’s listserv is unquestionably a powerful and important resource for trial lawyers, but this type of listserv raises many questions deserving of further research. At the most basic level, we do not know whether communities of lawyers participate differently in listservs than other communities that have been studied. It is possible, for example, that lawyers are more self-conscious or careful to engage in self-censorship

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*Problems in On-Line Communities*, in CYBERSOCIETY 2.0: REVISITING COMPUTER-MEDIATED COMMUNICATION AND COMMUNITY 212, 216–20 (Steven G. Jones ed., 1998).

141. See [www.nystla.cust.servlets.net/index.jspa?categoryID=1](http://www.nystla.cust.servlets.net/index.jspa?categoryID=1).

when posting on listservs than are other listserv participants because of lawyers' heightened sensitivity to confidentiality or liability issues.

When considering legal listservs, in particular, other questions include: Why do only some lawyers participate in these listservs while others do not? What role does office size play in lawyers' participation in legal listservs? What role does experience in practice play? How good is the information and advice legal listservs provide? Do lawyers who have come to rely on listservs now rely less on face-to-face (or voice-to-voice) communications with colleagues and if so, do they tend not to seek advice about more complicated questions? Do some types of posts—or some listserv participants—receive more answers than others? Does gender or ethnicity matter in this regard? What impact, if any, does the open nature of a listserv have on advice-giving? Is the advice on ethical issues understood by participants to reflect the values and norms of the trial lawyer community? Even if it is, what actual impact does the ethical advice have on the conduct of listserv members? And if the advice does not reflect community norms, does the listserv advice have the power to alter those norms? Do lawyers who participate in the listserv have a greater sensitivity to the formal rules of the profession than lawyers who do not?

Another important area of inquiry is whether equally successful legal listservs can be found or replicated within other legal organizations. For example, could such a listserv work within a large law firm or would the hierarchical nature of large law firms and the tournament nature of promotion discourage the types of questions that occur on the NYSTList? Do such listservs work as effectively within other specialty bar associations or is there something unique about the history and the culture of the trial lawyers that makes its listserv unusually successful? Could such a listserv work among a group of unaffiliated lawyers who have never met, or is the fact that there are physical places where NYSTLA lawyers can come together (e.g., at CLE courses, in courts and at NYSTLA conventions) critical to the success of the listserv?

Whatever the answers to these questions, it appears that legal listservs are likely to become an important means of socializing and educating attorneys. They hold the potential for creating supportive work networks, especially for lawyers who cannot find or develop mentors and advice networks in "real life." The support provided in legal listservs may not only assist lawyers as they learn the skills needed to practice law, but may also promote feelings of community that will help increase lawyer satisfaction with law practice. Listservs hold the power to form cohesion within groups and to alienate group members from "outsiders." In other words, the power and potential of these listservs are enormous. Further study is needed to

determine more clearly the effect of legal listservs on the professional development and ethical decisionmaking of lawyers.