



Points and Authorities

Member California Alliance of Paralegal Associations
October, 2005 Issue
www.fresnoparalegal.org

PRESIDENT'S MESSAGE

I am packed and ready to go. I do not know what I will be facing, nor do I know if I will be able to handle the heartbreak of those affected. But whatever is put in front of me, I just hope I will be able to provide some sort of help and/or console to those who have been displaced by Hurricane Katrina. I leave shortly for Baton Rouge.

As I am unsure of exactly how long I will be gone - and I will try to stay as long as they can put up with me - FPA's Vice-President Donna Johnston will be taking over the reigns until my return. I thank you Donna for stepping up to the plate at this time.

As this excruciatingly hot Summer winds down, a very welcomed Fall is sprinkled with many activities for us to have fun, and obtain that ever elusive continuing education which we keep meaning to get early on in the year, but procrastinate about until the last minute.

On November 4th and 5th, CAPA will be hosting the bi-annual Leadership Conference in Redondo Beach this year at the Portofino Yacht Club. This conference is designed to inspire and assist those involved in paralegal associations to meet the challenges they face in striving to meet the needs of their membership and goals of the professional association. Get your dice ready for Casino Night on Friday with the Conference on Saturday at a very reasonable cost. See page 2 for further information.

Along with attending our September general membership meeting on "Forensics and the Paralegal" with speaker Jim Flynn of J2 Engineering, we hope you will attend our Holiday Social that is now in the planning stage (yes, I know it is hard to think of Christmas already, but we have to plan ahead). We will be providing you with details shortly.

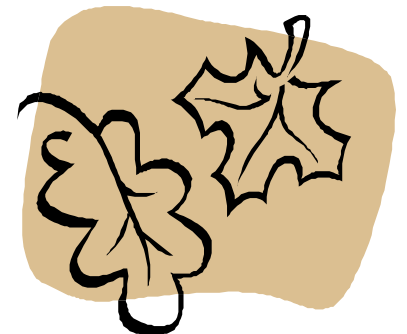
It is also the time of year that we look forward to the election of next year's Board of Directors and the filling of committee positions. Please consider actively participating in FPA - your professional organization.

I hope you take the opportunity to attend at least one professional function in the remainder of the year and participate in your organization. Until my return,

Deborah Badigian, President

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FUN MORNING IN THE PARK - LAWYERS HAVE HEART

by Tracy Stephens

Saturday, September 17, 2005, was the 7th Annual Lawyers Have Heart event at Woodward Park. Each year, the Fresno legal community takes part in a nationwide campaign to raise awareness of cardiovascular disease and empower men and women with the knowledge that they need to take charge of their health. This event emphasizes the importance of walking as a heart healthy exercise while raising funds to help the American Heart Association in its fight against heart disease and stroke - the leading cause of death among men and women. Saturday morning proved to be a gorgeous, sunny day in Woodward Park. FPA did not officially participate in this year's event, but several of us attended the walk/run by joining teams within our individual law firms and related businesses. Myself and several other members of FPA walked the 4-mile course. In general, this event was attended by members of the legal community and their various family members and pets. It was such a joy to see an entire family - mom, dad and children - participating in this event. I really got a kick out of seeing parents pushing a baby stroller or other individuals walking their dog on a leash - all for such a great cause.

There were numerous categories of runs and walks for persons of all ages to participate in. Following the exercise portion of the event, there were raffle drawings and several wonderful prizes were given out. As is typical with these types of events, there was lots of complimentary food available for the participants: Fresh fruit, pistachios, almonds, Subway sandwiches, water, juice, etc. Something unusual and certainly enjoyable was watching volunteers make homemade pancakes right on the griddle; fresh, hot and ready to eat. There were also lots of goodies for the kids - including free coloring books and teddy bears. I took advantage of the free blood pressure and body fat testing.

I also took the opportunity to speak with some of the Go Red for Women heart disease volunteers that were present, and discovered some shocking and interesting facts about heart disease specifically

concerning women: Coronary heart disease, which causes heart attacks, is the leading cause of death for American women. According to the American Heart Association, the more risk factors a woman has, the greater her risk of a heart attack or stroke. While some of these risk factors are uncontrollable, some are not and there are things that each of us can control to give us better optimum health. Risk factors include increasing age; heredity; previous heart attack, stroke or TIA; exposure to tobacco smoke; excessive alcohol intake; high blood cholesterol; high triglyceride levels; high blood pressure; individual response to stress; physical inactivity; obesity/overweight; and diabetes mellitus. The more risk factors you have, the higher your chances of having a stroke. This information is definitely something that all persons need to be aware of and should be shared with our mothers, daughters, sisters, neighbors and of course, our coworkers.

For more information on this important topic, please visit www.americanheart.org. Attending the 7th Annual Lawyers Have Heart event was not only enjoyable, but highly educational. This is a wonderful cause that I will certainly plan to participate in again next year. I hope to see all you there as well.

EVENT CALENDAR

Saturday, October 8, 2005 - Los Angeles Paralegal Association's 29th Annual October Conference "Education is Your Safety Net" Visit www.lapa.org for more information.

Saturday, October 15, 2005 - Paralegal Association of Santa Clara County, Educational Conference at The Fairmont, San Jose, California. Visit www.sccparalegal.org for more information.

Friday & Saturday, November 4-5, 2005 - CAPA's 5th Bi-Annual Leadership Conference & Casino Night at the Portofino Hotel & Yacht Club, Redondo Beach, California. Visit www.caparalegal.org for more information.

EXPANDING ROLE OF LITIGATION PARALEGALS

by Donna Johnston

Recently I was asked by a colleague how a litigation paralegal could expand her/his role. So I did a little internet research, a little thinking, a little brain storming with my friends and co-workers and came up with the following:

The one thing that seemed to up over and over again in conversation was paralegals need to assume greater responsibility, obtain more recognition for their contributions, and improve their standing in the workplace. Most paralegals would agree that paralegals are often underutilized by attorneys. How could one overcome this situation?

Discovery Style

Through my experience the role of the paralegal often expands to fit his or her abilities. It is most important to know the "discovery style" of the attorney. For instance, does the attorney like to produce everything up front or wait until the other side asks for it? The paralegal should be thoroughly familiar with the facts, the attorney's law memos, the pleadings, and the motions in the case. These provide the paralegal with a framework of what is important, enabling him or her to define the parameters of the case and bring only relevant issues to the attention of the attorney.

Developing the Case "Backbone"

Paralegals can develop the "backbone" of a case as an effective way to organize discovery materials. The "backbone" consists of:

- A timeline of events, meetings, and key correspondence
- A cast of characters, and the roles and key events in which they participated (especially helpful when preparing for depositions).
- A list of significant events, organized by subject or content as opposed to chronology

Taking the Initiative on Rule 26

Paralegals by addressing the "automatic disclosure" requirement early in federal litigation can allow the paralegal to positively affect the outcome of the case. According to Rule 26 of the Federal Rules of Civil Procedure, attorneys must make a "reasonable," good-faith effort to find and disclose all relevant documents and potential witnesses in the first 90 to 120 days of the lawsuit. Unfortunately, many attorneys procrastinate until two weeks before the Rule 26(f) conference to research and organize their clients' documents, creating an impossible situation for themselves and their paralegals.

Paralegals can get a jump on the situation by reviewing the documents early and presenting the attorney with a draft "automatic disclosure" statement before he or she asks for it. The paralegal cannot complete all of the disclosure, but having the documents gathered and reviewed in the required time frame gives the attorney a tremendous advantage.

Pre-Suit and Post-Judgment Asset Discovery

Another place the litigation paralegal can make a difference is in asset discovery. By doing some simple research for credit reports, property ownership, etc., the paralegal can help the attorney decide whether or not to take a case. And often, determining the financial status and net worth of a defendant makes a tremendous difference in the amount of the damage award if the case goes to trial. Asset discovery is a relatively easy process if one is skilled with electronic databases. The best way to learn about an individual defendant is to obtain his or her social security number, which can lead to information on real estate holdings, auto records, tax records, etc. Business intelligence, including detailed financial information, the names of officers and directors, and complex business interrelationships, is available on such databases as Dun & Bradstreet and ABI/Inform.

(continued)

EXPANDING ROLE OF LITIGATION PARALEGALS (cont.)

Ending a Case Before It Starts

A paralegal can prevent a case from ever going to trial by helping with the summary judgment proceedings. During document review, the paralegal should keep in mind what the law requires to take a case to court (the prima facie case) and the elements of the defense, and create a statement of undisputed facts.

Here, a paralegal's responsibilities come close to knowing the letter of the law. If the paralegal and attorney have worked carefully together in creating the "backbone" of the case, they should be able to outline the factual issues the paralegal will seek in the documents and deposition testimony.

How to Optimize the Attorney-Paralegal Relationship
When dealing with a procrastinating attorney, a paralegal can keep track of ongoing case needs and scheduling, and ask the attorney for regular updates and assignment drafts.

Paralegals can also increase their own involvement on a case by offering their assistance. It may seem simple, but many paralegals don't realize that asking the attorney for more complex assignments is often the first step toward greater responsibility.

CP CERTIFICATION MARK SUCCESSFULLY REGISTERED TO NALA

The "CP" certification mark, signifying Certified Paralegal, has been registered by the U. S Patent and Trademark Office. The mark was registered to NALA on July 20, 2004.

The mark itself is: **CP®**

The mark may be used instead of the CLA certification mark for those who prefer the term "paralegal" instead of "legal assistant."

The certification mark is a distinctive visual symbol that indicates that an individual is qualified to provide paralegal services by virtue of having completed the

education, and examination requirements for national certification by NALA, agreed to adhere to the Code of Ethics and Professional Responsibility of NALA; and agreed to continuing education requirements to maintain the national certification.

The certification mark is awarded by NALA to paralegals who have met these requirements and its use may be revoked for failure to comply with ethical standards and recertification requirements. Unauthorized use of the mark is strictly forbidden.

Legal Assistant or Paralegal. NALA filed in 2003 to protect the CP certification mark for those who prefer the term "paralegal," rather than "legal assistant." Since the terms are synonymous, choice of which certification credential (CLA or CP) to use is purely a matter of personal preference. Registration of the CP mark by NALA ensures the integrity of the credential earned by those who pass the rigorous certification examination.

The Certified Legal assistant program was established by NALA in 1976, and more than 12,000 paralegals have earned the distinction of using the CLA designation-or the CP if they prefer-as a means of identifying their professional proficiency. A CP pin is now available at NALA Headquarters, and the CLA certificate has been redesigned to use either the CLA or CP credential

For instructions regarding proper use of the CLA and CP certification marks, visit www.NALA.org



NOMINATIONS FOR THE 2006 BOARD OF DIRECTORS

It is that time of year again! If you are interested in holding any position on the Board of Directors or think someone else would make a great candidate for a board position, please complete the following nomination form and either print it out and mail it to FPA, or you can just email your nominations to Donna Johnston at dzinnia@sbcglobal.net.

All nominations will be discussed with the nominees for their approval before being placed on the official ballot. This is the perfect opportunity to actively participate in your paralegal association.

Nominations for FPA Board of Directors 2006

President _____

Vice President _____

Secretary _____

Treasurer _____

Board Member at Large _____

CAPA Primary _____

NALA Representative _____

Only voting members are eligible to hold office.
Please nominate officers from the list of voting members on page 6
Please mail your ballots or email your nominations no later than 10/21/05
Fresno Paralegal Association
P.O. Box 28515, Fresno, CA 93729-8515

FPA Purpose:

- To promote, encourage and expand the paralegal profession.
To serve as a forum for the interchange of ideas among paralegals.
To sponsor professional activities and offer continuing education for paralegals.
To educate employers and consumers regarding the role of paralegals in the delivery of legal services.
To maintain mutual beneficial working relationships with local, state and national bar associations.



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Job Bank

DID YOU KNOW

the Fresno Paralegal Association Job Bank is becoming THE place for paralegals to look for employment opportunities? With rising costs on every front, employers are taking advantage of the FREE advertising on the FPA website. For example the last two out of three paralegals hired at McCormick Barstow learned about the job openings at the FPA Job Bank.

And if you're not looking for a new job, remind your employer of the FPA FREE Job Bank. The money your attorney will save in FREE advertising is reason enough for your attorney to pay your yearly membership dues to belong to Fresno Paralegal Association.

Listing a job on the FPA Job Bank is easy. Just contact Holly Silver at Holly.Silver@mccormickbarstow.com.



EASY SPEECH TIPS FOR SPEAKERS

Some speakers leave you with a message that resonates in your memory long after the speech is over. These speakers have the ability to grab your attention and hold your interest in the palm of their hand. This gift seems to come easily to those who have "it." These people make public speaking seem effortless. There are no stumbles, lapses of memory, or trembling voices.

And then there are the multitudes who shudder at the very thought of making presentations, leading seminars, or simply speaking to work groups of a few people. Many share this common stress called "stage fright," or the fear of speaking in public. It is not really stage fright, however, because most of the stress occurs before ever stepping onto a "stage."

If you are among the people who would prefer to entirely avoid speaking in public, you need to understand that professional success is often influenced by your ability to speak in a presentation fashion to other people, either in small or large groups. Whether directing a job, delegating responsibility, or coordinating the tasks, the need to speak "publicly" cannot be avoided by a true professional.

Another truth about public speaking is that it does not have to be stressful. When you understand the causes of public speaking stress, keep a few key principles in mind, and employ some useful techniques. Then speaking in public can become easier, and perhaps even fun. This approach entails 10 tips to help overcome anxiety about speaking in public. Each of these tips working together spells "Easy Speech."

Ease your way into speaking

Acknowledge the true stress

Select appropriate techniques

Yield to the audience

Start strong

Prepare (but be reasonable)

Educate your audience

Expect to make mistakes

Consider the possibilities

Have humor and humility

Ease Your Way Into Speaking

There are many different and valid opinions on what makes a good speaker. At the heart of the matter, however, most people would agree that good speakers exude confidence. It follows that being a successful public speaker requires being like those confident and successful speakers.

Believe it or not, most great speakers are just being themselves. They give themselves permission to be natural in front of other people. This dramatically changes the entire stress equation. By being yourself and acting naturally, you eliminate much of the pressure that you otherwise put on yourself to be "great."

By being yourself and acting naturally, you eliminate much of the pressure to be "great."

Think of public speaking as talking with friends—you are acting naturally, right? When acting naturally with friends, you are at ease, so it makes sense to be yourself and act naturally when you speak in public.

Most great speakers did not start out speaking every week of their lives. They eased their way into speaking by accepting opportunities as they came along or by creating their own opportunities by volunteering. Many start by writing their presentations in the form of articles.

Volunteering to speak at a local college paralegal program is a good way for legal assistants to ease into public speaking. Attending a conference, then presenting some of the things you learned to other members at the office is also a good way to provide positive possibilities beyond gaining confidence in speaking.



EASY SPEECH TIPS FOR SPEAKERS (cont.)

Regardless of the approach you take, practice is key to building confidence and to gaining the ability to act naturally in what is usually felt to be an unnatural situation. Work on improving speech writing skills and voice modulation. Be unique. Be unusual. Be uncommon. But, above all, be yourself to ease your way into speaking.

Acknowledge the True Stress

Public speaking, in and of itself, is not stressful. It is the self-induced pressure . . . that causes the stress.

Public speaking, in and of itself, is not stressful. It is the self-induced pressure from unreasonable self expectations, or unfounded and unrealistic expectations of audiences, that causes the stress.

A perfect presentation and 100 percent approval from the audience are simply not realistic expectations. The reality is that stuff happens, and very few speakers ever give a perfect presentation. Rarely will 100 percent of an audience believe a speaker is good, let alone great.

Realizing that absolute perfection is an unrealistic expectation is the first step toward avoiding this kind of stress. Follow up by acknowledging that it is okay that neither you, nor the audience, are perfect.

The next step is obvious: know. . .your. . .material! Confidence increases in direct proportion to your familiarity and mastery of your material. As confidence increases, it "exudes" itself in the presentation.

Then, concentrate on giving the audience something worthwhile. If every person in the audience takes something with them, they will appreciate the time they have given in listening to you. Their collective appreciation will show through applause and feedback.

Select Appropriate Techniques

Knowing your material is crucial, but creating a successful presentation is more than just droning on and on about a subject near and dear to your heart. A successful presentation can be about your favorite subject, but it needs to be presented with pizzazz. What you do, just as what you say, should have a purpose. Employing the wrong techniques can alter how your speech is received. If you incorporate a few quality delivery techniques, your audience will follow you from beginning to end.

Never become an immobile, monotonous entity behind a podium-also known as a bore. Step away to make a point, or move toward the audience (in a non-threatening manner, please) to engage their attention. Use gestures to show how big or small, wide or tall the object is that you are describing. Indicate how the subject works or moves as you describe it.

Use inflection and intonation as you speak. Change the pace of your speech to match the content, and pause occasionally for effect. Be animated-smile when talking about something pleasant, and let your face show other emotions as you tell about an event or activity.

There are a variety of techniques that work, including these:

- Practice
- Arrive early at your engagement; never put yourself in a rush mode
- Double check everything (sound system, room layout, audio/visuals, etc.)
- Anticipate hard/easy questions and be prepared to field anything
- Talk with the early arrivals (talking on a one-to-one level is relaxing)
- Make eye contact with two or three "friendly" souls and go to those people during your speech if you get nervous

Whatever you do to create pizzazz, be interested in the truth.

(continued)

EASY SPEECH TIPS FOR SPEAKERS (cont.)

Yield to the Audience

This concept may seem counterintuitive, but keep in mind that your audience does not want to see you fail. Remember that most people share the stage fright anxiety, and will be inclined to admire your courage in speaking. Most of them expect to hear something useful to take with them (or they wouldn't be there), and they appreciate the time and effort you are giving them.

Start Strong

The speech must start strong while most of the audience is listening. Begin with something to grab attention—a startling statement, a powerful statistic, or your own dramatic story.

Prepare

It is important to prepare for any public speaking engagement, but be reasonable. If you over-rehearse your talk, you can do more damage than if you walk into a room with no preparation at all. Know the subject well enough that you need to remember only two or three key points, and provide several good examples, and/or supporting facts to highlight those points.

Educate Your Audience

While the goal should be to educate the audience, this does not mean deluging them with mountains of facts or details. Make two or three main points that serve the purpose of actually teaching and imparting wisdom and, in addition, provide some handout materials to ensure that you have given attendees something of value to take away.

Expect to Make Mistakes

One big reason for stressing over public speaking is the mistaken belief that the presentation must be perfect. Perfection is an admirable goal, as long as you remember that it is unattainable. The good speaker is confident enough to carry on without missing a beat, or uses the mistake to show the audience that speakers are also human.

Consider the Possibilities

Many possibilities exist when you engage in public speaking. Some are in your control—preparing your material, being yourself, giving to the audience, and being confident enough to go with the flow. Some are not; you cannot control the audience.

Keep in mind that nothing truly bad is likely to happen to you when you are speaking in public.

Keep in mind that nothing truly bad is likely to happen to you when you are speaking in public. If you assume that nothing truly bad could happen, you will be amazed at how well you can relate to events beyond your control, and how often you can use them to your advantage. When you realize that you can handle virtually anything that comes along, anxiety about public speaking will fade.

Have Humor and Humility

These are the techniques saved for last on the list, not only because this is where the "H" falls, but also to emphasize that humor and humility are very powerful. They help make presentations more enjoyable and entertaining.

Speakers learn when and how to incorporate humor into their presentations. For the most part, humor usually works when it is appropriate, and you do not have to be a standup comedian to make it effective.

Humility is a little different. It means standing in front of others and sharing your own human frailties. Everyone has weaknesses and makes mistakes. Admitting personal foibles creates a safe and intimate climate where others can be comfortable with their personal shortcomings as well. This is the time in a presentation when a lot of learning takes place because people connect with the speaker who becomes part of the group instead of the "leader." Authentic humility generates credibility, believability, and respectability.

SOME PROGRESS MADE. . . PARALEGAL SCREENING REVISITED

by Kent D. Kauffman, Esq.

In the days of Alexander the Great, it was considered sound policy for a new leader to kill all the possible family heirs of the former - or dead - leader in order to prevent a "who's in charge around here" controversy. And, during the plagues of the Middle Ages, children of those with the deadly disease might have been banished from any contact, including receiving food, because of fear that the contagion would spread.

Such is the nature of relationship liability. The legal system has its own, less deadly, form of shunning called "imputed disqualification". This doctrine generally holds that when a lawyer is prevented from representing a client no one else at the law firm may represent the client. Imputed disqualification is based on the doctrine of shared confidences; the idea that all lawyers in the firm have access to and share in the confidential information of all the clients.

Imputed disqualification gets uglier when a lawyer switches employers, ending up at the law firm of an opponent of a former client of the attorney's former law firm. Furthermore, most jurisdictions' ethics

rules only allow for the device of a screen that can avoid imputed disqualification. Such a screen is sometimes called a "Chinese wall," to be used for those lawyers who move from government to private practice employment.

A few states, such as Michigan, Pennsylvania, and Oregon, have amended their imputed disqualification rules, allowing private practice lawyers to be screened (see Mich. Rules of Professional Conduct, Rule 1.10(b); Pa. Rules of Prof. Conduct, Rule 1.10(b); Or Code of Prof. Responsibilities, DR 5-I-5(I).

Despite the lack of allowance in most ethics rules for screening, many Courts have approved of timely screens as a way to avoid imputed disqualification. The first significant case where screening was approved for private practice lawyers switching firms was *Schiessle v. Stephens*, 717 E2d 417 (7th Cir. 1983). The following internal mechanisms put in place by the firm with the "tainted" lawyer can help demonstrate that the tainted lawyer has been effectively screened:

(continued)



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PARALEGAL SCREENING (cont.)

1. The lawyer is prevented from having any involvement in the controversial case.
2. The lawyer is prevented from having any access to the files of the case.
3. The lawyer declares under oath that he or she did not, and will not, disclose any information of the former client to any other lawyer in the firm.
4. The lawyer is prevented from sharing in the fees from the case.

Nonlawyer Screens

Since paralegals are also likely to find themselves in similar job-switching conflicts, the use of screens has been extended to nonlawyer employees is better received across the country than screens for lawyers.

The American Bar Association issued an ethics opinion in 1988 that approved the use of screens for nonlawyer employees moving between firms representing opposing clients-as long as the nonlawyer employees did not work on both sides of the same matter. The concern expressed by the ABA opinion was to protect client confidences, and to protect the employability of highly skilled nonlawyer employees, who would otherwise lose their chance of being hired at other firms if held to the same imputed disqualification standards as lawyers (ABA Comm. On Ethics and Professional Responsibility, Informal Op. 88-1526 (1988)).

Following suit, some state bar associations have have issued their own ethics opinions approving screens for secretaries and legal assistants. These include Alabama, Michigan, Missouri, Nebraska, New Jersey, North Carolina, North Dakota, Pennsylvania, and Vermont.

Many Courts Approve

There is much case law indicating approval of screens for legal assistants or secretaries as a way of avoiding disqualification of the paralegal's new firm. Some factors that courts tend to find significant for law firms trying to avoid imputed disqualification include the following:

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PARALEGAL SCREENING (cont.)

Size of the firm-the larger the firm, the better the chances that a screen will prevent the tainted lawyer or nonlawyer employee from having contact with members of the firm working on the matter which is the subject of the disqualification motion. This is true especially if the tainted employee works at an office location other than where the matter is being represented by the firm.

Level of departmentalization-the brighter the lines of distinction between different departments of the firm, the more believable it is that a screen will prevent the tainted employee from having contact with members of the department working on the matter.

Methods employed in creating the screen-generally accepted methods include a memo to all employees informing them of the screening measure in place for the affected employee, a letter to the former client of the affected employee informing that person the screening measures taken, and an affidavit of the affected employee affirming, under oath, that he or she will work within constraints of the screen and keep confidential all information of the former client.

Important Recent Changes

Three recent cases show the trend of appellate courts approving of paralegal screens, or reversing earlier decisions prohibiting them. These watershed cases were:

Hayes v. Central States Orthopedic Specialists, Inc., 51 P.3d 562 (Okla. 2002). In this case, the Oklahoma Supreme Court dealt with an appeal involving a plaintiff who disqualified the defendant's law firm because it employed a secretary whose prior employment was at the plaintiff's law firm.

Reversing the decision of the trial court, Oklahoma's highest court concluded the plaintiff had waived the right to disqualify the defendant's firm because of waiting longer than eight months before objecting to the secretary's employment move. The court also opined that the use of a "Chinese Wall" screening device could be an effective way to prevent a firm's disqualification after hiring a nonlawyer who

formerly worked at the opposing party's law firm.

Specifically, the court applied the logic of screens for government lawyers in allowing screens for nonlawyers at private law firms. They noted that legal assistants, like government lawyers, do not have a financial stake in the outcome of the cases on which they work, and they cannot choose their clients. In its decision, the Oklahoma Supreme Court acknowledged the amicus curiae brief filed by the National Association of Legal Assistants in support of screens for nonlawyers.

Leibowitz v. The Eighth Judicial Court of the State of Nevada, 78 P.3d 515 (Nev. 2003). The Nevada Supreme Court overruled itself in this case, coming down on the side of using paralegal screens. The court had held six years earlier in the famous *Ciaffone v. District Court*, 945 P.2d 950 anti-screening case, that nonlawyer employees were subject to the same imputed disqualification rules as lawyers. Since private practice lawyers couldn't be screened, the court originally reasoned, neither could nonlawyer employees.

In *Leibowitz*, a case where both the paralegal of the firm representing a divorcing husband, and the paralegal of the firm representing the wife switched law firms, the court concluded that automatically applying the imputed disqualification standard for lawyers to legal assistants was inappropriate. Instead, the use of a screen was mandated when a firm discovers that its newly hired paralegal had access to confidential information while at the opposing party's law firm. Furthermore, the court concluded that evidence of the effectiveness of the screen could then be used to rebut a motion to disqualify that law firm (*Leibowitz*, at 522).

(continued)



PARALEGAL SCREENING (cont.)

Mulhern v. Calder, 763 N.Y.S2d 741 (Sup. Ct. 2003). Dealing with the case of a secretary and imputed disqualification, the court disagreed with an earlier decision from the New York Supreme Court, Appellate Division, which had disqualified a law firm because it hired a paralegal who previously worked on the same case for the opposing law firm.

The earlier decision (*Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.*, 514 N.Y.S.2d 440 [App. Div. 1987]) disapproved of paralegal screening for reasons similar to those cases disapproving of lawyer screening. But the court in *Mulhern* concluded such a harsh position in New York on paralegal screening was no longer relevant since the strict standard on lawyer screening had been modified by later cases. *Mulhern* then found the screening measures placed around the secretary prevented the disqualification of her present law firm (*Mulhern*, at 745).

Not All Courts Approve

When courts approve of legal assistant screening, they usually do so in one of three possible stances:

1. Screening is approved, despite the fact that lawyer screening is not approved, as shown in *Smart Industries v. Superior Court*, 876 P.2d 1176, (Ariz. Ct. App. 1994)
2. Screening is approved because lawyer screening is already approved, as shown in *Kapco Mfg. Co., Inc. v. C & O Enterprises, Inc.*, 637 F. Supp. 1231 (N.D. Ill. 19845)
3. Screening is approved at a level beyond that allowed for lawyer screening, as shown in *Green v. Toledo Hospital*, 764 N. E.2d 979 (Ohio 2002).

Approval of nonlawyer screening in a jurisdiction does not necessarily mean that one of its courts won't refuse to disqualify a law firm that has hired a legal assistant from the opposing party's firm. The screen must be real - not simply claimed - and it must be in effect as soon as possible. Its effect must be demonstrable to the opposing firm, as well as to the trial court at the disqualification hearing.

An excellent and well written case on a law firm that

shot itself in the foot is in *In re Complex Asbestos Litigation*, 283 Cal Rptr. 732 (Cal. App. 1991). The firm was disqualified from nine lucrative asbestos cases because of an ill timed and clumsily placed screen around a deceitful paralegal.

However, not all jurisdictions approve of nonlawyer screening measures as a way of avoiding disqualification when the firm has hired a nonlawyer formerly employed at the opposing party's firm. Some ethics opinions, such as one by the Kansas Bar Association, expressly reject the screening of tainted nonlawyer employees. And, by judicial decision, certain jurisdictions disapprove of nonlawyer screening (See *Zimmerman v. Mahaska Bottling Co.*, 19 P.3d 784 (Kan. 2001); *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.*, 514 N.Y.S.2d 440 (N.Y. Sup. Ct. 1987) [mentioned earlier]; *Williams v. Trans World Airlines*, 588 F. Supp. 1037 [W.D. Mo. 1984]).

Disapproving courts apply the following logic when rejecting nonlawyer screens: If legal assistants work on behalf of lawyers, and if the professional responsibility rules make the lawyer responsible for ensuring that the conduct of their nonlawyer employees is compatible with the professional obligations of the lawyer (Rule 5.3 of the ABA Model Rules of Professional Conduct, and also in a way, DR 4-101(D) of the ABA Model Code of Professional Responsibility), then, since the jurisdiction does not approve of screens for lawyers, it could not approve of screens for nonlawyers under some general theory of leniency or employability.

The irony is that equating legal assistants to lawyers in an area such as imputed disqualification, while professionally laudable, places equal employability limitations on legal assistants who are paid considerably less than their lawyer counterparts.



(continued)

PARALEGAL SCREENING (cont.)

Final Thoughts

Even in jurisdictions where nonlawyer screening is not allowed, there are two ways to avoid law firm disqualifications when a paralegal switches sides.

1. If the nonlawyer employee acquired no confidential information at his or her former law firm, then whether the jurisdiction approves of screens is usually moot since screens are generally thought necessary only if confidential information was acquired.

The presumption of shared confidence - which applies to lawyers switching firms - does not necessarily apply to nonlawyer employees simply because they used to work at the firm of an opposing client of their new firm. In fact, in the overruled Ciaffone case, which took a strict position forbidding paralegal screening and refused to allow the tainted secretary to be screened, thereby disqualifying her present lawyer/law firm, the court mentioned that disqualification was necessary because she was, "in possession of privileged information."

2. Even if a legal assistant acquired confidential information, the new firm does not have to be disqualified if the former client consents to waive the disqualification. Just because a jurisdiction does not allow for the unilaterally imposed screening of a paralegal does not prevent a screen from being used when both sides agree. Such consent would obviously be contingent on demonstrable measures that show the effective screening of the legal assistant.

Remember that the lawyer screening controversy involves lawyers moving between private firms. Paralegals and other nonlawyer employees of government agencies need not worry whether their jurisdiction approves of screening for lawyers or nonlawyers. Such screens are explicitly accepted in the ethics rules as a safety device for lawyers and nonlawyers moving from government work to private employment.

Finally, when the ABA revamped its Model Rules of Professional Conduct a few years ago through the process called Ethics 2000, the subject of paralegal screening was included. Although the proposal advocating the screening of private practice lawyers was rejected by the ABA House of Delegates, they did adopt an official comment to the corresponding imputed disqualification rule which approved of screening nonlawyer employees. That could be called progress.

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