



Law in Motion

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Message from the President...
By Debbie Reber

A huge

, huge thanks goes out to all of our members for coming forth and either volunteering or being “quietly coerced” into putting their name out there as a candidate for a Board position for the 2010 SBPA year!! It was not without trepidation that the current Board thought long and hard about SBPA’s future, arriving at the decision that we did --- that was, to disband the organization because of our inability to fill a slate of officers --- was one of our most difficult discussions and resolutions that I’ve had to witness in my two years as President --- and certainly, it was just as difficult, if not more so for the rest of the Board as well.

The task of convincing individuals to believe in themselves, their ability and their willingness to part with some of the valuable and cherished “time away from work” was a mountain before us, but we found that it was not insurmountable! All of the worry and nail biting has paid off --- with the enthusiasm and interest that we all knew was there all along. **Our Nominations committee has announced that we have a “full slate” of candidates on which the membership will vote at our next meeting on October 29th.** If you have not already seen the email from our VP of Programs, Tommie Josephson, regarding this upcoming program (for which you will obtain one of those elusive “ethics”

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Message from the President...

By Debbie Reber

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credits), please contact her.

Those of you whose names are on the ballot should be very proud of that fact. And...for those of you who will be elected, you will have challenging and interesting times ahead of you. We all look forward to your new ideas, new thoughts and the ever evolving face of the SBPA. We've been around for a lot of years now, and with this renewed energy, I am pleased to say that I believe we'll be around for many, many more years. All of the outgoing Board members will be here to assist in whatever supervisory/advisory roles that are needed. It's exciting for me to hand over the reins, so to speak, to an incoming President.

It goes without saying:

The SBPA is only as strong as its members.

The SBPA is only as vital as its members.

The SBPA is only as important as its members' interest in it.

The SBPA can only exist if the members are committed to keeping it alive.

The SBPA must change and evolve into a stronger organization to stay vital --- and that requires the involvement of each member and their willingness to help make it so.

The upcoming October program will be our second to the last program of the year and I want to take this opportunity to thank each

and every one of you who have attended and supported these meetings. They are for your benefit and to have as many as we have had in attendance, only enforces the tenets of the B&PC 6450 that continuing legal education is expected, warranted and required of all paralegals practicing in the State of California. Additionally, many of you have already met the minimum of your requirements for the year --- and I dare say, many of you probably already have met the requirements for the *two-year period* – but yet, you still show up for our meetings. That gives credence to the fact that our meetings have been interesting, on point, and of benefit to each and every one of us, even if the topic may not have been in your own particular “niche” in which you find yourself practicing. Education is so vital to our profession that we need to broaden our interests to include those areas of law that we don't normally work in, because you just never know in what area of law you might find yourself practicing in the future! We cannot allow ourselves to get too comfortable --- too set in our ways --- not to view and understand the many facets of law practice.

I attended a “virtual meeting” recently with the UCSB Paralegal Advisory Board, Program Director, Craig Smith regarding the UCSB Paralegal Program. It was very informative and exciting as they are looking very carefully at the present economic situation and will be offering courses to address current issues. Please check out their website: <http://paralegal.els.ucsb.edu> for the latest class offerings as well as current job postings.

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Message from the President...
By Debbie Reber

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Additionally, several members of the Board, in addition to our CAPA Representatives, Josefina Martinez and Debra Wheels, will be attending CAPA's *Annual Leadership Conference* in San Diego in November. It's an excellent way to view the CAPA organization and get a better idea of just how this organization has strived very hard to work for all the paralegal organizations throughout the state.

**Remember to mark your calendars for:

* October 29th meeting presented by Lynn Conner, President of Parasec who will speak on: Legal Ethics & Corporate Officer Fraud"; and

* November 17th meeting presented by Herb Fox, Attorney at Law, on Preserving Your Client's Right to Appeal.

As this year winds down, my service as President comes to a close. I have had this unique opportunity to have been afforded a great honor in being President of this organization for the past two years. As you all know, I was a transplant from the State of Missouri and in this short time, I have come to realize just how different things "work" in each state. If it had not been for this Board and many paralegals with whom I work on a daily basis, I don't believe I could have done my job as a paralegal nor as the President of the

SBPA without their constant assistance. I owe many of you deep thanks for your time, talents, patience, humor and most of all, your friendship. I am indeed very grateful to all of you.

We're looking forward to another year of interesting programs, more networking opportunities, more reaching out to other organizations and causes to aid and assist where we can, and to more involvement in the community in which we live and in which we participate through the Santa Barbara Paralegal Association! Thanks to you all for keeping the SBPA alive and well!!!!

By Debbie Reber, President

2009 C A L E N D A R

<p>JANUARY</p> <p style="font-size: 2em; font-weight: bold; text-align: center;">X</p>	<p>FEBRUARY</p> <p style="font-size: 2em; font-weight: bold; text-align: center;">X</p>	<p>MARCH</p> <p style="font-size: 2em; font-weight: bold; text-align: center;">X</p>
<p>APRIL</p> <p style="font-size: 2em; font-weight: bold; text-align: center;">X</p>	<p>MAY</p> <p style="font-size: 2em; font-weight: bold; text-align: center;">X</p>	<p>JUNE</p> <p style="font-size: 2em; font-weight: bold; text-align: center;">X</p>
<p>JULY</p> <p style="font-size: 2em; font-weight: bold; text-align: center;">X</p>	<p>AUGUST</p> <p style="font-size: 2em; font-weight: bold; text-align: center;">X</p>	<p>SEPTEMBER</p> <p style="font-size: 2em; font-weight: bold; text-align: center;">X</p>
<p>OCTOBER</p> <p>12- Columbus Day (Court Holiday)</p> <p>29- SBPA Luncheon—Lynn Conner, President of Parasec on Legal Ethics and Corporate Officer Fraud (Ethics MCLE) and Election of 2010 Officers</p>	<p>NOVEMBER</p> <p>1- End of Daylight Saving Time</p> <p>7- THE 7TH BI-ANNUAL LEADERSHIP CONFERENCE (CAPA, San Diego)</p> <p>11- Veteran's Day (Court Holiday)</p> <p>17—SBPA Luncheon—Herb Fox on Preserving Your Client's Right to Appeal</p> <p>26- Thanksgiving (Court Holiday)</p> <p>27 - Day after Thanksgiving (Court Holiday)</p>	<p>DECEMBER</p> <p>25- Christmas (Court Holiday)</p>

CALIFORNIA ALLIANCE OF PARALEGAL
ASSOCIATIONS

PRESENTS

THE 7TH BI-ANNUAL LEADERSHIP CONFERENCE

Surf, Sun and Sand

Making Waves With Strong Leadership

Hosted by the San Diego Paralegal Association

SATURDAY, NOVEMBER 7, 2009

7:45 a.m. – 4:30 p.m.

Hotel Accommodations

BAHIA RESORT

Rate: \$139 per night plus tax
Free parking

Hotel and conference easily accessible from airports via public transportation

This presentation is approved for 5.0 hours of MCLE credit.

PROGRAM

Morning Session

7:45 – 8:30 a.m.

Registration and continental breakfast

8:30 – 8:45 a.m.

Welcome and introduction

8:45 – 9:45 a.m.

Team Building – Darlene McLellan and Amy Shillingburg

9:45 a.m. – 10:00 a.m.

BREAK

10:00 a.m. – 11:00 a.m.*

Parliamentary Procedures/Robert's Rules

Parliamentarians from California State Association of Parliamentarians

11:00 a.m. – 12:00 a.m.*

"Accountability for Non Profits" – Karen Kaseno CPA/ABVICFF,CVA,CFE,CFFA

12:00 a.m. – 1:00 p.m.*

LUNCH SPEAKER – "Tips for a More Effective Board Meeting" - Douglas Gordon, Esq.

Afternoon Session

1:00 - 2:00 p.m.*

"The Conflict Resolution Solution"– Dr. Deena Stacer

2:00 – 3:00 p.m.*

"Literature and the Law"–Author Ona Russell

3:00 – 3:15 p.m.

BREAK

3:15 – 3:45 p.m.

"How to Boost and Keep Members and Sustaining Membership"– Blaine McCafferty, Treva Cutts

3:45 - 4:15 p.m.

"Social Networking" - Carla Haney

4:15 – 4:30 p.m. -Closing remarks

*This presentation is approved for a total of 5.0 hours of MCLE credit.

MORNING SESSIONS**TEAM BUILDING**

Darlene McLellan



Darlene McLellan began her career in the legal world in January 1986 with the County of San Diego and subsequently the Superior Court. In 1990, she commenced work in the private sector. She currently works for a family law specialist and is very involved in the legal community. Ms. McLellan serves as a director on Southwestern College Paralegal's Program Advisory Board. Ms. McLellan was SDPA's VP of Programs and Education Chair for 2007 and 2008. Ms. McLellan was named 2009 Paralegal Superstar by ParalegalGateway.com. She currently volunteers on numerous committees for SDPA.

AMY SHILLINGBURG

Amy Shillingburg is the President of the San Diego County Court Employees Association (SDCCEA). She has worked for the San Diego Superior Court since 1994 in various capacities. She currently holds the position of Courtroom Clerk II for the Honorable Lisa Foster in the Family Law Division of the San Diego Superior Court. Ms. Shillingburg sits on the negotiating team, the executive committee and has testified in public hearings before the Senate Judiciary Committee and other forums on behalf of San Diego's public employees. She has lobbied in Sacramento for over 7 years in favor of legislation that supports the County's dedicated public servants and has fought against legislation that would have negatively impacted public employees. During the 8 years Ms. Shillingburg has been a member of the SDCCEA, she has served as an officer, advocate, employee representative, coalition builder, lobbyist, director, and has served as the President since 2005. Amy has obtained her Paralegal/AA Degree in Paralegal Studies and is a Notary Public.

PARLIAMENTARY PROCEDURES/ROBERT'S RULES

Parliamentarians from San Diego County division of the California State Association of Parliamentarians. The California State Association of Parliamentarians (CSAP) assists individuals in learning to protect their rights as members of an organization. This study includes practical exercises on a multitude of situations including when and how to make a motion, skills on debating a motion, and rules of voting. Additionally, CSAP is a statewide organization, which individuals who wish to develop their skills as a parliamentarian may join. Members learn how to become convention parliamentarians, bylaws

consultants, parliamentary procedure instructors, presiding officers, and much more.

ACCOUNTABILITY FOR NON-PROFITS

Karen Kaseno, CPA, ABV, CFF, CAV, CFE, CFFA

Karen Kaseno graduated from California State University at Los Angeles in 1985 with a Bachelor of Science, Bachelor of Arts Degree in Accounting. She is the founding partner of the firm and has been practicing in the area of litigation services since 1989. Ms. Kaseno specializes in family law and fraud investigations. She has been appointed by the family law court as an Evidence Code §730 Special Master on numerous occasions. Ms. Kaseno has also conducted several forensic investigations on fraud-related matters for both criminal and civil matters. She has been named as an expert witness on dozens of commercial litigation matters involving loss of earnings on a variety of legal matters.

Over the past decade, Ms. Kaseno has been extremely active in developing and teaching within the accounting and legal professions. Ms. Kaseno has developed and taught over a half dozen courses covering many aspects of forensic accounting including the *FraudSAFE™ Fraud Prevention and Investigation Five Day Training Program for CPAs*. Ms. Kaseno is a founding member and instructor in NACVA's National Matrimonial Litigation Workshop. Ms. Kaseno has been a presenter at conferences and continuing education programs throughout the United States for both CPAs and attorneys covering topics including numerous issues in family law litigation, business valuation, fraud investigations, and providing expert witness testimony. Her presentations have also been made directly to judges. In addition, Ms. Kaseno has been an adjunct professor at the University of California, San Diego, Extension.

Ms. Kaseno has been a member in good standing of the California Society of Certified Public Accountants litigation services steering committee for over ten years. She is also the former Chair of the Fraud Section of the litigation services committee. Ms. Kaseno has chaired and been on the planning committees for numerous conferences for the California Society of Certified Public Accountants Education Foundation, American Institute of Certified Public Accountants, and the National Association of Certified Valuation Analysts. Ms. Kaseno has also served as a Board Member for the California State Board of Accountancy, Rule 69 Committee and Qualifications Committee.

LUNCH**TIPS FOR A MORE EFFECTIVE BOARD MEETING**

Douglas Gordon, Esq.

Douglas Gordon is a corporate governance attorney with a unique combination of more than 30 years experience as a board member, senior corporate executive, entrepreneur, and private practice and corporate attorney in both public and private companies. His clients have included the likes of NYSE listed Gordon Jewelry Corporation, formerly the nation's second largest retail jeweler with more than 600 stores in 44 states. He has presented informative seminars such as the "Buck Stops in the Boardroom" seminar to various NYSE and Nasdaq listed companies, and has been interviewed by the Wall Street Journal and Dow Jones Newswire, along with CBS and NBC TV.

AFTERNOON SESSIONS**THE CONFLICT RESOLUTION SOLUTION**

Dr. Deena Stacer

Dr. Deena has a doctorate in psychology, with a specialization in high conflict intervention strategies, a master's degree in counseling, teaching credentials ranging from pre-kindergarten through college and a Bachelor of Science Degree in child development. Dr. Deena has been professionally speaking since 1983. She traveled nationwide as a parent educator. She also trained teachers on topics such as positive discipline, successful stepfamily strategies, stress and anger management, self-esteem, goal setting skills and conflict resolution techniques. Dr. Deena is the Founder and Director for the San Diego High Conflict Intervention Program, (1997).

LITERATURE AND THE LAW

Ona Russell



Ona Russell holds an M.A. in English from Clark University and a Ph.D. in literature from the University of California, San Diego. Teaching for years in various colleges and universities, she developed courses that combined her interdisciplinary interests, including "Poetry and the Workplace," "Truth of Historical Fiction," and "Literature and the Law," a topic on which she also writes and speaks extensively. A regular contributor to *Orange County Lawyer Magazine*, she also has been published in newspapers, scholarly journals, and anthologies. Russell was born in Los Angeles and now resides with her husband in Solana Beach, California. She is currently at work on her third Sarah Kaufman mystery, set against the backdrop of the 1920s Los Angeles oil boom.

HOW TO BOOST AND KEEP YOUR MEMBERS AND SUSTAINING MEMBERS

Blaine McCafferty

Blaine McCafferty has more than 20 years of experience as a litigation paralegal specializing in environmental recovery actions, insurance coverage litigation, and state and federal appellate matters. She also has over eight years of non-profit management experience, having served as Director of Development and Public Relations for the San Diego Armed Services YMCA, and Executive Director of the Poway Senior Center. Ms. McCafferty graduated from the University of San Francisco with a degree in Management, and received her paralegal certificate from Santa Ana College. Ms. McCafferty is currently a Director for the San Diego Paralegal Association and chair of the PR Committee and also serves as the President of the Poway Lion's Club.

Trevia A. Cutts

Trevia Cutts is the President of the San Diego Paralegal Association, and served as SDPA's membership director for three years. Ms. Cutts also serves as SPDA's Primary representative for CAPA and CAPA's Recap editor. Ms. Cutts began working in the legal field as a receptionist in December 1985. From August 1986 to November 2002, she worked as a paralegal for Martin P. Elwood. Since November 2002, Ms. Cutts has worked for Laura H. Miller, a certified family law specialist.

SOCIAL NETWORKING

Carla Haney, CP



Carla S. Haney, C.P., has worked in the legal field for over a decade, including over six years as a paralegal. She received her BA in Criminal Justice Administration from Sonoma State University in 1998, and started her paralegal career at the San Diego District Attorney's Office in 2001. Carla completed UCSD Extension's accelerated paralegal certificate program in spring 2004 and obtained the Certified Paralegal designation from NALA in July of the same year. Between October 2004 and December 2006, Carla was a Litigation Paralegal and trainer in the Consumer Litigation group of a large San Diego-based plaintiffs law firm. Carla has worked for Midland Credit Management, Inc., a wholly owned subsidiary of Encore Capital Group, Inc., since January 2006, where she currently manages the non-attorney legal and compliance staff as the Legal & Compliance Manager. Carla also attends San Diego State University, and expects to graduate with an MBA this summer. Carla is currently the Employment Chair for the San Diego Paralegal Association.

CALIFORNIA ALLIANCE OF PARALEGAL ASSOCIATIONS

7TH BI-ANNUAL LEADERSHIP CONFERENCE

BRING YOUR BOARD TO THE SURF

Saturday, November 7th from 7:45am until 4:30pm

Register online for the conference through Acteva at www.caparalegal.org or by mailing this form with a check or money order made out to CAPA for \$65.00 to:

CAPA
POST OFFICE BOX 1055
SAN LEANDRO, CA 94577-0126

See below for information on making your hotel reservation. Rooms are blocked at our special rate until **October 7th** only, so don't delay!

<p>Seminars Include:</p> <ul style="list-style-type: none"> • Leadership • Team Building • Working Through Conflicts • Understanding Board Financials • Legal Responsibilities / Liabilities of Board Members • Maintaining & Growing Membership • Social Networking <p>This presentation is approved for a total of 5.0 hours of MCLE credit.</p>	<p>REGISTRATION FEES: \$65.00</p> <p>Conference will be held at</p> <p>Bahia Resort 998 W. Mission Bay Drive San Diego, CA 92109 (858) 539-7700</p> <p>Breakfast and Lunch Included</p> <p>Name: _____</p> <p>Firm: _____</p> <p>Address: _____</p> <p>City, State, Zip: _____</p> <p>Email Address: _____</p> <p>Phone: _____</p>
<p>Make your hotel reservation <u>ONLINE NOW</u> or by calling 1-800-576-4229</p> <p>Rate: \$139.00 per night plus tax Rooms have 2 double beds</p> <p>Hotel has gym, business center, and free Wireless internet</p> <p>Free parking</p>	



NALA Campus LIVE! The fall 2009 schedule continues through November. These courses offer real-time instruction by acknowledged educators on various topics ranging from CLA/CP review courses to advanced courses in substantive law areas. Don't forget the phone call is TOLL FREE.

- Intermediate Evidence on Tuesday, September 22nd at 3 p.m. Central Time presented by Karen Sanders-West, ACP, JD
- Real Estate Title Searches on Wednesday, September 23rd at Noon Central Time presented by Glenn Leier, Attorney
- Blue Book Review of Citing on Friday, September 25th at Noon Central Time presented by Mary Kubichek, BS, MA, JD
- Advanced Evidence on Tuesday, September 29th at 3 p.m. Central Time presented by Karen Sanders-West, ACP, JD
- Advanced Ethics on Thursday, October 1st at Noon Central Time presented by Vicki Voisin, ACP
- American Legal System: Part 1 on Tuesday, October 6th at 3 p.m. Central Time presented by Karen Sanders-West, ACP, JD
- Estate Planning: General Skipping Transfers on Wednesday, October 7th at Noon Central Time presented by Ed Armstrong, Attorney
- Intellectual Property Law on Thursday, October 8th at Noon Central Time presented by Nevin Shaffer, Attorney
- American Legal System: Part 2 on Thursday, October 8th at 3 p.m. Central Time presented by Karen Sanders-West, ACP, JD
- Basic Business Organizations on Friday, October 9th at 11 a.m. Central Time presented by Kelly LaGrave, ACP

For a more complete schedule, course information, and registration links please visit <http://nala.org/Fall2009Schedule.aspx>. The cost of a NALA Campus LIVE! course is \$80 for NALA members. REMEMBER to use your special member discount coupon!

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Discount for Group Registrations – A minimum of two people from the same site is required to qualify as a group. Group members must use the same telephone line and same computer. The first registrant is full price (\$80 for NALA members and \$105 for non-NALA members) and each additional registrant is \$45. To register your group or if you have questions concerning group registration contact Mariah Williams (mwilliams@nala.org) at NALA Headquarters.

CLE Credit – Many of these courses are approved by the NALA Certifying Board toward maintaining the CLA/CP credential. Most courses have also been approved by the Texas Board of Legal Specialization, Montana State Bar, State Bar of California, the North Carolina State Bar, and for Florida Registered Paralegals. For more information please visit www.nala.org or contact NALA at 918-587-6828 or nalanet@nala.org.

NALA Campus LIVE! Archive

Recordings of previous NALA Campus LIVE! courses may be purchased from the NALA web site. For more information on these courses please visit http://nala.org/NCL_Archive.aspx.

NALA Headquarters

This program is designed so that a reply to this message ends up in never-never land. To contact us about this newsletter, write to nalanet@nala.org or call NALA Headquarters. We are interested in hearing from you and your comments on how you like this means of communication. Also, let us know if you do not want to receive these newsletters or would like them directed to an alternate e-mail address.



California Enters the Digital Age: Assembly Bill 5 and what it means to you

By Doug Kaminski

Assembly Bill 5 passed both the House and Senate in California and was signed by the Governor on June 29, 2009 (<http://tinyurl.com/nzl727>). It went into effect immediately as an urgency measure. Why the rush? Simply because AB 5 amends the Civil Discovery Act to address electronically stored information (ESI) and will *potentially* drive down the cost of discovery involving ESI and reduce disputes.

The Civil Discovery Act (CDA) covered discovery rather broadly by referring to documents, tangible things, land, or other property. Recognizing that discovery involving ESI presents some unique challenges, the Act is being changed to reflect this and to bring it more in line with the Federal Rules of Civil Procedure and the Uniform Rules relating to Discovery of ESI developed by the National Conference of Commissioners on Uniform State Laws. The changes set forth in AB 5 are collectively known as The Electronic Discovery Act (the "Act").

New Definitions

One of the biggest changes relates to definitions of discovery. Prior to these changes, the CDA never addressed ESI specifically, relying on the broad "writings, documents, tangible things, and land or other property, in the possession of any other party to the action." It now adds the FRCP-friendly "electronically stored information" to that list. Also, it defines ESI as "information that is stored in an electronic medium" and further defines "electronic" broadly as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." This wide net of definitions allows for backup tapes and other archival media to be considered as well.

The next change relates to what you can do with the ESI. Previously, the CDA only specified "inspection" and left it to the parties to agree on what that meant (and everyone gets along, right?). The new language calls for the addition of "copy, test, or sample ESI in the possession, custody, or control of any other party to the action" to the already familiar "inspection". This tracks closer to the FRCP language and is also meant to open the door for data sampling and testing, which is becoming more prevalent in the wake of *Victor Stanley* and other notable decisions related to searching and the growing bulk of ESI. Though it does raise the question of right to directly access the systems on which the ESI is stored, the new language isn't meant to subvert existing rights of confidentiality or privacy.

Rule 26(f) and Cooperation

One major departure in the Act from the FRCP is the lack of a requirement for a "meet and confer" pre-trial conference to discuss discovery issues including production format, data and preservation issues, and protection of privilege for inadvertent production (a "clawback" agreement). In the absence of this requirement, counsel will have to proactively engage each other and cooperate to self-impose the meet and confer requirement or be prepared to seek and/or respond to protective orders. There is some relief on the horizon as the proposed amendments to the California Rules of Court on electronic discovery expressly provide that parties must meet

California Enters the Digital Age: Assembly Bill 5 and what it means to you (Continued)

and confer about electronic discovery issues (essentially the same as the FRCP requirement). The Judicial Counsel is expected to approve the amendments soon.*

When responding to a demand for production of ESI, if the responding party objects to the specified form, they can respond with the form in which they intend to produce. Further, if the demand has NO specified form of production, the responding party is required to produce in the form in which the ESI is normally kept or in a "reasonably usable form", but need not produce the same ESI in more than one form. Sound ambiguous? It may prove to be, so to avoid a volley of motions back and forth, it may be wise to go the cooperative route and have the meet and confer.

Accessibility and Burden

The inclusion of ESI into the Act, the broad definitions used, and the nature of ESI itself may lead to questions of accessibility and burden for the producing party. Also, the less accessible the data is, the more it costs to produce. The Act addresses these issues with back-up media specifically covered in 2031.280(e).

Before you object to a production demand as "unduly burdensome" or "not accessible", you should know that you'll be required to explain WHY. The section of the Act that deals with these objections, 2031.210(d), basically says that the responding party must identify in their response the types or categories of sources of ESI that are not reasonably accessible or they waive "any objections...relating to that electronically stored information." To help ensure that the legal process doesn't devolve into an exercise where responding party objects and opposing files a motion to compel, the court will still retain discretion to order production if the requesting party shows good cause and the court could limit scope and even allocate costs.

Generic or boilerplate objections won't put you in a judge's good graces, doesn't foster cooperation, and could drive up costs due to possible increased need for motions and potential sanctions. More judges are following the trend set in *Mancia, et al. v. Mayflower Textile Services Co., et al.*, USDMD No. 1:08-CV-00273-CCB (decided Oct. 15, 2008), so the possibility of a sanction from the bench is increased.

This part of the Act is actually a good thing as it would require counsel to know more about their clients' data storage and processes before responding. Since this also ties into the duty to preserve and other facets of the "Zubulake duties", it's generally in everyone's best interest.

Privilege and Safe Harbor

With the amount of ESI growing every day, privileged data is sometimes produced inadvertently. Under the Act, the producing party would be able to notify the receiving party that that the information is privileged or protected information and would specify the basis for the claim of privilege. After being notified, the receiving party would be required to either immediately return the specified information and any copies, or present the information to the court conditionally under seal for determination of the claim and whether privilege was waived. The receiving party would not be able to disclose that information until

California Enters the Digital Age: Assembly Bill 5 and what it means to you (Continued)

the claim was resolved. This adds more weight to the value of the meet and confer, particularly as it relates to clawback agreements.

What about data that is no longer available due to loss? Similar to the FRCP, there is a provision that protects against discovery sanctions (not statutory sanctions) in the event of loss of data during the routine, good faith operation of IT systems. The Act broadens that description by calling it "lost, damaged, altered, or overwritten" data as the result of "routine, good faith operation of an electronic information system." Bear in mind, this doesn't change the duty to preserve discoverable information on notice of pending or threatened litigation, but it does help in cases where a change in the data's status is the result of properly functioning records and data retention systems. Future cases (and opinions) will decide how this applies to data deletion processes that execute automatically.

Conclusion

The signing of AB5 was an important step in addressing the special requirements for dealing with ESI as a way to potentially reduce the overall costs of electronic discovery in California. This overview is just the first step for you in helping bring this goal into reality. Read more, watch the courts and opinions for guidance, and embrace the "new" digital age of discovery.

Doug Kaminski is Director of Sales for Océ Business Services, Inc., a 4-time Top Provider in e-discovery services. His articles have been published in Corporate Counsel Magazine, Metropolitan Corporate Counsel, and many other legal industry journals. He can be reached at doug.kaminski@casedata.com

* On August 14th, 2009, the Judicial Council amended the California Rules of Court 3.724 Duty to Meet and Confer to include the following language:

Unless the court orders another time period, no later than 30 calendar days before the date set for the *initial* case management conference, the parties must meet and confer, in person or by telephone, to consider each of the issues identified in rule 3.727 and, in addition, to consider the following:

- (8) Any issues relating to the discovery of electronically stored information, including:
 - (A) Issues relating to the preservation of discoverable electronically stored information;
 - (B) The form or forms in which information will be produced;
 - (C) The time within which the information will be produced;
 - (D) The scope of discovery of the information;
 - (E) The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;
 - (F) The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings;
 - (G) How the cost of production of electronically stored information is to be allocated among the parties;
 - (H) Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information; and
- (9) Other relevant matters

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Doug Kaminski

Director of Sales, Western Region

Océ Business Services, Inc.

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Office: 801 951 2400; Mobile: 312 342 7370
Fax: 801 951 2404; www.obs-innovation.com

Liar Liar

The Many Ways Humans Reveal True Intent

By Joan A. Scanlon

The message someone sends you may not be what it seems. Ever see someone say “no” while they are nodding “yes”? It’s all about body language.

About ten

years ago, a large insurance company decided to cut costs. It began requiring its investigators to interview claimants and witnesses by telephone rather than pay hefty travel expenses associated with live interviews. After implementing this procedure, the insurance company did save roughly \$1,700-\$2,300 in travel-related expenses with each new claim. But why did the company's settlements and payouts suddenly skyrocket by millions of dollars? Simple. By being limited to only phone interviews, the investigators could no longer gauge the truthfulness of claimants or effectively determine whether a claim was fraudulent.

"To save a few bucks, they cost themselves millions," said Joe Navarro, ex-FBI agent and author of *What Every Body is Saying* (Harper Collins, 2008). "Seventy percent of all information communicated is non-verbal. If you cannot see the person on the other end of the line, you cannot see if they are rubbing their hands. Are they blinking their eyes? Yawning? Are they pursing their lips? These nonverbal clues are critical."

Paralegals in the Trenches

Paralegals are often asked to meet with clients to screen potential cases, obtain information in face-to-face client meetings, or interview witnesses about an incident. As a result, attorneys are reliant upon paralegals to not only keep an accurate record of what is said, but to accurately convey any sense of urgency, nervousness, lack of cooperation or fear the person might have displayed.

When meeting with or interviewing a witness or client, paralegals should first establish a comfort zone, even if small talk with an unknown person is difficult. People will likely not open up unless they feel comfortable with the interviewer.

"Be as neutral as possible, and professional and polite always," recommended David J. Lieberman, Ph.D., human behavior specialist and author of *You Can Read Anyone* (Viter Press, 2007) and the upcoming *Executive Power* (Wiley Publishers, 2009). Lieberman has also devoted much of his career to helping FBI and law enforcement in developing effective interviewing practices.

"Always err on the side of respect because you will find that you are going to be able to pivot in each direction," advised Lieberman, "You can always dial it down."

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Liar Liar

The Many Ways Humans Reveal True Intent

By Joan A. Scanlon

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The way a person treats others in the room is a good indicator of whether they may be prone to lying, according to Lieberman. Someone who is rude or treats others with disrespect indicates that the person has a large ego. Coupled with low self-esteem, this can indicate someone who is more willing to dilute the truth to reflect favorably upon themselves, or someone with fuzzy ethics.

Oh, Bother! Where Art Thou?

When questioning someone about an important matter, Navarro typically watches for three important things: Is the person bothered:

1. by the question?
2. by thinking and coming up with an answer?
3. when answering questions?

If the person seems stressed or bothered by these things, the issue needs further exploration. While this does not automatically mean that the person is lying, it is an excellent indicator that all is not as it seems. Perhaps the person does not want to reveal a troubling secret, such as past abuse or rape. Maybe the person doesn't want to implicate a long-time friend.

"Lying is a tool of social survival," said Navarro, who has interviewed thousands of individuals and now teaches what he has learned as a

private consultant to lawyers, insurance companies and even poker players.

"As humans, we have to lie all the time and we become proficient at it. If someone asks what happened this week and you say 'nothing much,' this is a lie of convenience.

We don't carry a lot of guilt about a lie like that. But if it involves a grievous event, such as an accident, then we will typically be bothered by questions about that event and will show signs of stress."

Pacifying Behaviors

When humans are confronted by stress, the limbic system kicks into action and people exhibit certain behaviors in an effort to comfort themselves. These behaviors are known as "pacifying behaviors." For example, if you are trying to recall frightening details, you might subconsciously rub your hands together, smooth your own hair, or touch your neck in an effort to calm yourself.

These pacifying behaviors are classic indicators of discomfort. One common pacifying behavior is the covering the substernal notch (the hollow space just above the breastbone) with the hand. This behavior is seen more often in women than

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men, according to Navarro. A series or cluster of pacifying behaviors can be a red flag that the person is significantly troubled by the subject of inquiry.

Signs of the Eyes, Lips and Tongue

Another classic sign of distress can be pursing of the lips. For example, if the office petty cash keeps disappearing from the lock box, the office accountant might start asking employees (in a non-accusatory way) if they know anything about what might be happening to the money. If the person questioned begins to purse, bite or pucker their lips, this could indicate that the matter is troublesome to that person. Even if the eyes and facial expression remain calm, retracted or disappearing lips can indicate the person is distressed. Of course, this does not mean the person is guilty of stealing, but it does mean that they might know or suspect something more.

Lip licking, throat clearing and hard swallowing are additional pacifying behaviors of the mouth sometimes demonstrated by people under stress, such as witnesses testifying against someone during trial.

Spontaneous eye closing or blocking is a common reaction to stressful questions. The human brain is actually trying to block the person from seeing the images associated with

the stressful situation. In a legal setting, eye blocking can often be seen during depositions when a deponent does not want to talk about something, such as the death of a loved one or the circumstances surrounding a horrific accident. However, the eyes do not actually need to close to be considered "eye blocking." Even the involuntary dilation of the pupils with slight squinting can be deemed eye blocking.

Give Me a Hand

When it comes to conveying information, the hands provide a wealth of information (see Sidebar).

"When conducting jury surveys," said Navarro in *What Every Body is Saying*, "one thing [that] stands out is how much juries dislike it when attorneys hide behind the lectern. Jurors want to see the attorney's hands so they can gauge the presentation more accurately."

The same thinking applies to witnesses on the witness stand. Jurors prefer witnesses to show their hands while speaking. "While these behaviors have nothing to do with deception per se," said Navarro, "the perception of the jurors is significant, reminding us that concealment of the hands should be avoided."

Leave Emotions at the Door

Human emotions can influence how we interpret or read people in any given situation.

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How we feel about ourselves can very much determine how we are going to read situations and people. Our desire to hear what we want to hear often overwhelms our ability to see things objectively, according to Lieberman. In other words, if you really want to believe that someone is not cheating or lying, you will often convince yourself despite the overwhelming body language or verbal indicators pointing to the contrary.

"The less emotional you are, the more clearly you are going to see what is going on," said Lieberman. "If you lead with intellect, you will then use your emotions to reinforce what you are seeing. Leading with emotion will lead us astray."

Case of Nerves

The female suspect gripped the arms of her chair while the seasoned FBI agent interrogated her about her knowledge of a fraud scheme. The suspect was so tense in her chair, she looked as if she were bracing for impact. She repeatedly bit her lip and closed her eyes when the agent asked key questions. She couldn't help herself from fidgeting or her hands from shaking as the minutes ticked on. The FBI agent finally asked her if she had something she'd like to get off her chest. She took a deep breath. "Yes," she told him. "I only have four quarters and I'm afraid my car will get towed if I don't feed the meter." The exasperated agent let her take care of the meter and when she

returned, the suspect was a new person - - cooperative and calm. It became clear that she was not involved in the scheme.

"This actually happened to me," said Navarro. "You should always be careful not to assume that nervous behavior is deception."

Only the Beginning

This article provides only a brief snapshot of how to read people and interpret body language. Paralegals should practice their observation skills, acquaint themselves with the latest academic literature and books on the subject, and test and re-test their ability to accurately read those around them. A paralegal who can accurately read others is a paralegal with job security.

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Ten Telltale Signs of the Hands

The following non-verbal behaviors of the hands may indicate deception, discomfort or trouble:

1. Hiding hands - Covering hands or keeping them underneath a table, may indicate something to hide.
2. Sweaty hands - Clammy, moist hands may give away an otherwise cool-appearing person.
3. Biting fingernails - This is a well-known sign of nervousness or distress.
4. Arm Splaying. - A person leaning on the ticket counter, with hands pointed down and arms splayed apart - the wider the arms, the more trouble on the horizon. Some airlines recognize this territorial display as classic threatening behavior.
5. Hand shaking or twitching. - It is difficult to control the hands when a person is afraid of being discovered or when a person is overly nervous about something.
6. Lack of touching or frozen hands - Contrary to popular belief, a deceptive person may avoid enthusiastic gestures and physical contact when lying. In the face of threat (being caught), our limbic response causes us to move less to attract less attention.
7. Stroking of the hands - This pacifying behavior of interlacing and stroking your hands is often the body's way of trying to calm itself down when faced with a stressful situation.
8. Sudden or gradual hand withdrawals -This may indicate dislike of a particular topic of conversation or distaste for another person in the room.
9. Subtly giving the bird - Really! Picture someone pushing their glasses up by using their middle finger. Surprisingly, people really can do this when feelings of aversion arise toward another person.
10. Neck touching - When someone covers their neck (especially the vulnerable spot known as the substernal notch located just above the breastbone), this can indicate that they are trying to protect themselves from what is being asked or discussed. Women have a tendency to their neck touch more than men.

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All luncheon membership meetings are held at Santa Barbara Bank & Trust, located at 1021 Anacapa Street, Santa Barbara. The cost of the catered buffet luncheon is \$18 for members and \$20 for non-members.

Please note that the cost of the luncheon is for the CLE credit and the food is gratuitous. If you would like to attend the meeting, please RSVP to Tommie (tjosephson@hardincoffin.com). Every person in attendance must pay the member or non-member fee, whether you wish to eat or not. When you make your reservation, please indicate if you would like to eat lunch.

SBPA

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