

ADDING VALUE AS A LITIGATION PARALEGAL: *BEST PRACTICES*

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Legal services professionals operate in a highly competitive environment, especially legal assistants. The dynamics of service delivery, driven primarily by consumers' evolving needs and expectations, have changed significantly since the 2008 financial crisis. While the billable hour model for lawyers and legal assistants alike has long been the subject of considerable debate, the accelerated pace of change occurring over the last decade has resulted in profound shifts in the landscape for legal services. Among the most notable issues for clients is a renewed emphasis on leveraging legal spending to get the best service at the lowest cost.

Clients now routinely insist that the framework for legal services delivery reflect consideration of the most efficient means of project completion. This insistence takes on added significance in the context of litigation, given the difficulties inherent in predicting how a lawsuit will proceed and how expensive it might ultimately be. Additionally, emerging technologies, designed to enhance productivity and streamline costs, have fed expectations that lawyers will consistently provide faster, lower-cost services. These technologies, from increasingly sophisticated document management platforms to data analytics, have gradually altered what legal service professionals do day-to-day to serve their clients.

In this rapidly evolving market, legal assistants need to constantly evaluate how to continue to add value to the people they serve, be it in a law firm or in-house legal department. This concept has special relevance for litigation paralegals who are challenged to add value not only to clients but also to supervising lawyers in the management of litigation. While new technology-based tools enhance efficiencies in the delivery of legal services,

they do not offer a substitute for the core skills necessary to serve clients. Like lawyers, paralegals add value, in short, primarily through inquisitiveness, foresight, and the exercise of good judgment – skills that technology cannot replace. There are a couple of areas in which paralegals can bring these intangibles to bear, and be of significant value to both lawyers and clients.

One area in which a litigation paralegal plays an especially important role is in helping to manage the e-discovery process. The volume of data involved in an average lawsuit has grown exponentially over the years, requiring careful planning at the inception of a case to avoid pitfalls during the discovery process. While existing technologies have made compiling and organizing vast amounts of data easier, process management and the means by which documents are identified, organized, and produced during discovery remain critical. Lawyers often need assistance with this process, and look to paralegals to help ensure that efforts to retrieve, organize, and produce vast amounts of data in litigation are both comprehensive and consistent.

A key concern in this area relates to the risk associated with inadvertent spoliation of electronic data, which is now among the most common sources of information. Framing this issue is the court's seminal opinion in *Zubalake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) and its progeny. The central focus of *Zubalake* rests on whether requests for the production of electronic information can be deemed unduly burdensome depending upon whether data is accessible or inaccessible, and the appropriate framework for cost-sharing associated with such production. The *Zubalake* cases also addresses a litigant's duty to preserve evidence likely to be relevant to future litigation, and the potential consequences arising from the destruction of electronic data. »

Paralegals can provide meaningful assistance with document preservation by embracing several key tasks. First, paralegals can play a unique role in cataloging and helping lawyers understand a client's document management and retention systems, particularly large corporate clients with a number of affiliates. Second, paralegals can be more cost-effective than lawyers or third-party service providers in framing, for any given client, how potentially relevant electronic information is organized and maintained. This effort is informed by understanding at a high level of the client's document retention policy, especially as it relates to electronic information. Third, given the risks associated with spoliation with large corporate clients, paralegals can drive not only preparation of document "hold notices" and appropriately identify persons and departments, but assist lawyers in implementing document holds in coordination with each targeted document custodian. In that vein, paralegals can provide lower cost services in conducting custodian interviews, including outlining those areas of inquiry likely to yield the most useful information to ensure compliance with the client's document retention obligation.

These skills also carry over to another area of critical importance: assisting counsel in the careful management of case-determinative deadlines. Litigation is a deadline-driven practice, which implicates not only the interests of the client but the professional standing of the lawyers serving the client. A reluctance to be acutely sensitive to deadlines, and court rules and orders setting such deadlines, can negatively impact a case and may reflect negatively on the paralegals working on a case. One recent case, which briefly garnered national attention, brought these concepts into sharp relief. *Two-Way Media, LLC v. AT&T Operations, Inc. et al.*, No. 5:09-cv-00476, United States District Court for the Western District of Texas.

In *Two-Way Media*, a patent infringement case was tried to verdict, resulting in the subsequent entry of a judgment for \$40 million. The defendants filed a series of substantive post-trial motions, including, but not limited to, various

motions for leave to file sealed documents, a motion for judgment as a matter of law on damages, a Rule 59 motion for new trial and a motion for judgment as a matter of law based on invalidity. The court issued orders on November 22, 2013 disposing of all of the pending motions. The court also issued an order on plaintiff's bill of costs that same day. The court clerk first issued an Electronic Case Filing (ECF) notice to all parties on November 25, 2013, noting only that the court has granted the defendants' motion for leave. The ECF did not mention the disposition of the post-trial motions. The defendants otherwise received an email regarding the court's order on plaintiff's bill of costs and the denial of at least two post-trial motions. The clerk's docket entry was subsequently modified on that same day to reflect the disposition of the remaining post-trial motions, but no new ECF was issued.

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Based on the foregoing, the defendants did not file a timely notice of appeal, but moved the court for an extension of time to file an appeal. The trial court denied the motion, noting that "it is every attorney's responsibility to read the substance of each order issued by the court, and to read the order in its entirety... Defense counsel admits that the orders were 'downloaded and stored' by litigation assistants in two different firms representing Defendants; yet, it appears that nobody actually read the orders." *Id.* [Doc. 633 at 5]. Additionally, the court observed, "for almost 52 days after entry of the orders, none of the at least eighteen

counsel that received the [ECFs]... even after admittedly having their assistant download and file such orders, bothered...to check on the status of the case." *Id.* at 6.

One can only imagine standing in the shoes of the paralegals who not only downloaded the final dispositive orders, but discovered that they had not brought the orders to the assigning partners' attention until after the appellate deadline after the holidays – in a \$40 million case. Any number of circumstances, apart from the competencies of the professionals involved, may have led to this result. However, there are significant lessons to be drawn from this extreme example, lessons which inform best practices and ensure that litigation paralegals consistently add value. Algorithmic and related AI-driven solutions, at least »

currently, cannot perform the diligence necessary to ensure that critical deadlines are communicated and met in a way that only a paralegal can. Paralegals cannot merely play subordinate roles on legal teams in highly complex cases; instead, litigation paralegals form an essential part of a comprehensive whole providing services to the client. The most sought-after paralegals are relentlessly proactive in assisting lawyers in managing cases, which includes verifying deadlines. These professionals never assume that a senior associate or partner is omniscient, and never shy away from communicating concerns and recommendations as the circumstances dictate.



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Innovations in the legal industry continue to develop at a rapid clip, and may eventually displace many of the tasks traditionally delegated to paralegals. In this ever-changing market, it is of paramount importance that legal professionals continue not only to hone their practical skills, but also leverage those soft skills that consistently inspire confidence in lawyers and clients alike.



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