

Uldaho Law

## Digital Commons @ Uldaho Law

---

Articles

Faculty Works

---

1992

### Interviewing in a Changing World: How to Conduct a Pre-Employment Interview Within the Bounds of the Law

Maureen Laflin

*University of Idaho College of Law, mlaflin@uidaho.edu*

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/faculty\\_scholarship](https://digitalcommons.law.uidaho.edu/faculty_scholarship)



Part of the [Labor and Employment Law Commons](#)

---

#### Recommended Citation

35(12) Advocate 12 (1992)

This Article is brought to you for free and open access by the Faculty Works at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Articles by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

---

---

# Interviewing in a Changing World:

## How to Conduct a Pre-employment Interview within the Bounds of the Law

By Maureen E. Laflin  
Visiting Associate Professor, University of Idaho College of Law

Imagine your law firm is fortunate enough to hire two of the University of Idaho's most promising law students as summer associates. Both have excellent academic credentials, come with superior recommendations, demonstrate exceptional writing and analytical abilities, are mature, and possess the qualities which allow them to fit into your firm. At the end of the summer both learn that they will soon be parents. Each expresses an interest in obtaining a full time position with your firm upon graduation. All things being equal, who would you select and why?

The firm faced with this situation handled it as follows: During the formal fall interviewing process, the partners spoke with both summer interns. They told one of the interns, a male, that they were happy that his wife was expecting in the spring, that a wife and child create stability and reinforce the family values they think are so important. They asked him no questions about child care arrangements, his wife's future plans, or how the presence of a child would impact his work schedule. In contrast, they grilled the other intern, who was female, about child care arrangements and her husband's future plans. The male received an offer and the female received a letter stating, "We have no position to offer you."

The attorneys who made these inquiries, whether well intentioned or not, asked questions which were illegal and discriminatory. This conduct not only subjects law firms

to liability, but could possibly scare away some of the best applicants who would not accept employment with a firm which made them feel unwelcome or offended their principles.

---

---

**The attorneys who made these inquiries, asked questions which were illegal and discriminatory.**

---

---

This article attempts to assist law firms in both hiring the best, most competent lawyers for their firm, and in complying with Title VII, the Age Discrimination in Employment Act (ADEA), and the Idaho Human Rights Act (IHRA).<sup>1</sup>

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §200e et seq. (1988), prohibits discrimination on the basis of race, color, sex (including pregnancy), national origin, and religion. Employers who employ 15 or more employees are subject to Title VII.

ADEA, 29 U.S.C. §621 et seq. (1988), prohibits discrimination against individuals age 40 and over.<sup>2</sup> Employers who employ 20 or more employees are subject to the ADEA.

IHRA, Idaho Code §67-5901 et seq. (1992), prohibits employment discrimination for all individuals within the state because of race, color, religion, sex, national origin, age, or handicap. Employers with five or more employees are subject to the IHRA.

Together, Title VII, the ADEA, and the IHRA make it unlawful to discriminate against any individual

with respect to his/her "compensation, terms, conditions, or privileges of employment" and to "limit, segregate, or classify" employees or applicants in such a manner as to adversely affect their status or deny them employment opportunities. 42 U.S.C. §2000e-2(a); 29 U.S.C. §623(a); I.C. §67-5909(1). So what does that mean?

The intent of Congress and the State legislature was not to list specific discriminatory practices, nor to set out definitively the scope of the activities covered. Congress and the State did intend, however, that the statutes be read in the broadest possible terms. For example courts have held that partnership at a law firm can qualify as a term, condition, or privilege of an associate's employment; as such, partnership consideration must be

---

---

**... courts have held that partnership at a law firm can qualify as a term, condition, or privilege of an associate's employment ...**

---

---

without regard to race, color, sex, religion, national origin, age, or handicap. e.g. *Hishon v. King & Spalding*, 467 U.S. 69 (1984)(sex); *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 758 F. Supp. 303 (E.D. Pa. 1991)(statements made during the initial interview were used as evidence of sex discrimination); *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977)(national origin and religion).

These cases show that the anti-discrimination laws fully apply to

## Interviewing in a Changing World:

law firms. Thus attorneys must carefully read Title VII, the ADEA, and the IHRA and their regulations, study the existing case law, and review their own hiring practices in light of the existing law on a case by case basis. Several general categories of concern can be identified in which law firms can attempt to limit liability.

These guides to pre-employment inquiries include the following:

1. **Decide the appropriate selection criteria for a position in advance and uniformly apply it.** Prepare questions ahead of time, and stick to them. Avoid ad hoc questioning. Uniformity makes it more difficult for stereotyping to creep into the process. Tell each applicant what the job entails, what constitutes effective performance, and what additional duties are expected, for example entertaining clients, bringing in new business, etc. Individuals must be judged as

individuals and not on the basis of stereotypical characteristics. Many of the problems in the opening example could have been avoided if the attorney had asked all applicants the same questions and applied the same selection criteria.

2. **Advise all members of the firm that race, sex, religion, national origin, age, and handicap are inappropriate factors in the selection of employees and in job assignments and duties.** Look at how job assignments and duties are assigned in the firm. Employers who assign members of a protected class to less desirable jobs or duties, give stereotypical assignments or duties, or make assignments or duties based upon prohibited factors, violate Title VII, the ADEA, and the IHRA. Examples of this include assuming that women are better at domestic relations matters, that only men should entertain corporate clients, that older

associates will resist being supervised by younger partners, and that clients of a particular religious persuasion should be serviced by attorneys of the same religious persuasion.

3. **Client preference is not a legitimate basis for discriminatory assignments.** The Fifth Circuit addressed this issue early on in *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950(1971). The court recognized that while "the public's expectation of finding one sex in a particular role [flight attendants] may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether sex discrimination was valid." *Id.* at 389. In order to overcome clients' reluctance to someone "different," firms will need to sell their associates to their clients. A well

# MEDICAL MALPRACTICE

## CASE EVALUATION • EXPERT TESTIMONY

- Addiction Medicine
- Allergy
- Anesthesiology
- Blood Banking
- Cardiology
- Cardiovascular Surgery
- Clinical Nutrition
- Colorectal Surgery
- Critical Care
- Dentistry
- Dermatology
- Dermatological Surgery
- Dysmorphology
- Electrophysiology
- Emergency Medicine
- Endocrinology
- Epidemiology
- Family Practice
- Forensic Odontology
- Gastroenterology
- General Surgery
- Geriatric Medicine
- Gynecologic Oncology
- Gynecologic Urology
- Gynecology
- Hand Surgery
- Hematology
- Immunology
- Infectious Diseases
- Internal Medicine
- Interventional Radiology
- Mammography
- Medical Genetics
- Neonatology
- Nephrology
- Neurology
- Neuropathology
- Neuropsychology
- Neuroradiology
- Neurosurgery
- Nursing
- Obstetrics
- Occupational Medicine
- Oncology
- Ophthalmic Pathology
- Ophthalmology
- Orthodontics
- Orthopaedic Surgery
- Otolaryngology
- Pain Management
- Pathology
- Pediatrics
- Pediatric Allergy
- Pediatric Anesthesiology
- Pediatric Cardiology
- Pediatric Cardiovascular Surgery
- Pediatric Critical Care
- Pediatric Dermatology
- Pediatric Emergency Medicine
- Pediatric Endocrinology
- Pediatric Gastroenterology
- Pediatric Hematology
- Pediatric Infectious Diseases
- Pediatric Immunology
- Pediatric Intensive Care
- Pediatric Nephrology
- Pediatric Neurology
- Pediatric Oncology
- Pediatric Otolaryngology
- Pediatric Urology
- Pediatric Surgery
- Periodontics
- Pharmacy
- Pharmacology
- Physical Medicine
- Plastic Surgery
- Podiatric Surgery
- Psychiatry
- Psychopharmacology
- Public Health
- Pulmonary Medicine
- Quality Assurance
- Radiation Oncology
- Radiology
- Reconstructive Surgery
- Renal Transplantation Surgery
- Rheumatology
- Thoracic Surgery
- Toxicology
- Trauma and Stress Management
- Urology
- Vascular Surgery
- Weight Management

All physician specialists are board-certified medical school faculty members or are of medical school faculty caliber. Experience in over 5,000 medical and hospital malpractice, personal injury and product liability cases for plaintiff and defendant. Specialist's curriculum vitae and complete fee schedule based on hourly rate provided upon initial inquiry. Approximately three weeks after receipt of record specialist will contact attorney with oral opinion. If requested the specialist will then prepare and sign a written report and be available for testimony.

### DR. STEVEN E. LERNER & ASSOCIATES

Honolulu  
San Francisco  
San Rafael

(808) 947-8400  
(415) 861-8787  
(415) 453-6900

Houston  
Chicago  
Washington, D.C.

(713) 799-1010  
(312) 631-3900  
(202) 628-8697

## Interviewing in a Changing World:

---

respected senior partner's enthusiastic endorsement of an associate carries a lot of weight.

4. **Avoid questions regarding pregnancy, marital status, number of children, and child care arrangements.** Law firms' legitimate concerns regarding stability, poor attendance records, and commitment to careers must be faced. However employers must be careful not to generalize these concerns to a group. An assumption that women are less stable, have poor attendance records, and are not committed to careers could lead to discriminatory treatment of women. Rather, if the firm is concerned about an applicant's work habits and whether s/he will stay with the firm for a long time, ask the candidate, "If you were hired, could the firm expect you to be punctual and have good attendance?" Follow up this line of inquiry with the applicant's references. Similarly with respect to longevity, tell all candidates that the firm is looking for a long-term employee. Then ask each applicant if there is any reason, barring unforeseen events, why s/he will not stay with the firm.

Issues of pregnancy, child care, and family responsibilities are difficult ones for both employees and employers. The elimination of sex discrimination requires the adoption of policies which enable workers of both sexes to combine their work and personal lives.

One of the causes of dissatisfaction cited by male as well as female attorneys is the difficulty of combining work with child rearing. Reducing this reason for discontentment may benefit firms by reducing the number of attorneys who choose to transfer to other areas of practice or leave the profession entirely. See Suzannah Bex Wilson, *Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Reform*, 67 Ind. L.Rev. 817, 843

(1992). My personal experience has been that more male than female law students have approached me with questions about combining family and law.

5. **Review the firm's pay and benefits packages for unexplainable differences.** A law student recently reported that she interviewed for a part time research position with an attorney. During the interview, she was asked if she could type and whether she would be willing to accept \$10.00 per hour for research time and \$8.00 per hour for typing her research. She was surprised at the question. She subsequently learned that her male colleagues, who had also interviewed with this attorney, had not been asked about typing skills and had not been asked to accept less money for clerical work. This situation could have been avoided if the attorney had asked all applicants the same questions and had adopted an equitable pay policy and applied it

**It is also critical to adopt a pension plan which is nondiscriminatory.**

uniformly. It is also critical to adopt a pension plan which is nondiscriminatory, e.g. *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) (the practice of an employer in offering retirement benefits which pay women lower amounts than men constitutes discrimination in violation of Title VII); *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978) (an employer cannot use gender-based actuarial tables to calculate the contribution amount for a pension plan).

6. **Use common sense and avoid unnecessarily uncomfortable situations.** A single male associate

was asked to take a married female applicant to dinner after her interview. Before going to the restaurant, the associate decided to stop by his favorite singles bar for about an hour. The applicant was so turned off by the experience, she turned down the firm's offer of employment and accepted a position with the firm's major competitor. While the associate's conduct may not have been discriminatory, it was clearly in poor taste. Firms need to take the opportunity during the interviewing process to make everyone in the applicant pool feel welcome.

7. **Follow the Idaho Human Rights Commission's three rules of thumb.**

- Ask only for information you intend to use in making a hiring decision.
- Know how you will use the information to make that decision.
- Recognize that it is difficult to defend the practice of seeking information which is not used.

In sum, the basic rule of pre-employment inquiries is to avoid asking for information which will not be used, and to determine before a question becomes part of the firm's hiring process whether use of the information sought would be lawful. □

### ENDNOTES

<sup>1</sup> I will not address the requirements of the Americans with Disabilities Act as it relates to pre-employment inquiries, as that topic is too lengthy for this short article.

<sup>2</sup> The 1986 amendments to the Act eliminated the age 70 upper limit on protection.