Training the Next Generation: Do it! Get Out There – Be an Advocate
An Ever-Mounting Need

Since the 1940s, opinion polls in the United States have consistently shown that our federal courts rank very high on the public confidence scale, second only to the Supreme Court. This is because, I submit, our cases are decided on the merits — without regard to whether someone is rich or poor. No lobbying. No bags of money. No politics. Both sides are heard out, and the verdict is on the merits. The same is true for our state court systems, especially here in California.

The success of our merits-based system depends critically on effective advocacy. Advocates must excel in the give and take of arguments and the rough and tumble of witness examinations. To maintain public confidence in the nation’s court system, we must continue to produce superb oral advocates, not just “litigators.”

But are we? Shouldn’t we be doing a better job in training the next generation of courtroom advocates?

Attorney Fee Awards In Mixed Result Cases

By the time an action reaches judgment after trial, the reality of fee-shifting can mightily affect the risk assessment for each side going forward. Each side has accrued substantial attorneys’ fees and hopes to recover them from the other side and dreads being forced to pay its adversary’s fees. Looking forward to an appeal, parties often assess fee-shifting as an all-or-nothing proposition but the reality is not so simple.

Many cases do not result in an unqualified victory for either side, either at trial or after appeal, leading to difficult determinations of who, if anyone, should be considered the prevailing party and what amount of fees should be awarded in light of a mixed result. When we dealt with this recently in the post-appeal context, we found the treatises and case law to present an unhelpful tangle regarding how to assess mixed-result cases. In this article, we share some lessons we learned after grappling with a complicated body of fact-specific decisions.

The Basics

California courts follow a three-step process to decide whether to award contractual attorneys’ fees and, if so, in what amount. The court first determines if there is a prevailing party on the contract. If so, the second step is determining the prevailing party’s “lodestar,” i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate.” PLCM Grp. v. Drexler, 22 Cal. 4th 1084, 1095 (2000). The third step is to “consider whether...
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At the center of this issue rest our preeminent law firms. Not only do they tend to have the largest number of young lawyers, they also tend, regrettably, to provide the least advocacy experience to young lawyers. A main reason is that they concentrate on “bet-the-company” cases where clients seem reluctant to see young attorneys handle anything. This reluctance stems from high billing rates assigned to associates and the perceived need to have a partner handle everything in a bet-the-company case. The problem rates less severe at smaller law firms because their business model and their clients’ economics often encourage them to turn over more court appearances to young attorneys.

What to Do?

For many decades, we have had a shortage of trials. But in the last twenty years, a new shortage has emerged — a shortage of opportunities for young lawyers even to argue motions in court and to take depositions. Again, this is due, in large part, to clients insisting on partners taking depositions and appearing in court.

In the 1970s and 1980s, our leading law firms remained vigilant in giving opportunities to young lawyers and insisting to clients that young lawyers could handle important responsibilities in court. They also took on smaller commercial matters as training opportunities for associates, even at the cost of write downs. This vigilance has gone slack. Firms should reinvigorate this tradition, writing down associate time to accommodate client reluctance to pay the high billing rates assigned to young associates. They should impress upon their clients the wisdom of providing these opportunities.

It helps when a judge affirmatively encourages lead counsel to turn over court arguments, depositions, and witnesses at trial to newer lawyers. When the judge affirmatively encourages the participation of young lawyers, the responsible partner has a further argument to make to the client in support of sending young lawyers forward. It also removes the suggestion that the judge somehow views it as a concession of weakness when a young lawyer argues a motion.

For the last sixteen years, my own stated practice has been to guarantee oral argument on any matter (rather than submit it on the papers) when a lawyer within her first four years of practice will perform. At least one hundred young lawyers have had an opportunity to argue in court or try cases as a result of this encouragement. Although I never insist that a young lawyer must perform, I affirmatively encourage it. Without question, partners may need to handle key dispositive motions, but young attorneys can do some of them and can routinely handle non-dispositive motions. In my experience, young lawyers have performed at least satisfactory and, more commonly, very well during oral argument because they have typically prepared the papers (and, if the truth be told, may know the record and the case law better than their seniors).

What Should Young Lawyers Do?

Fight for opportunities. Young lawyers should go to mentors and partners in charge of their caseload and insist on front-line opportunities. During their first year of practice, I tell my departing clerks, young attorneys should carry out all assignments, not complain, and do them cheerfully, including reading many thousands of pages of documents in a cold warehouse in Chicago. But, in their second year of practice, young lawyers should explain to the partners that they also want front-line opportunities and that they want to develop as advocates.

Young lawyers should also form and be a part of associate committees that set training and experience milestones. For example, an associate committee might set a milestone such as “Associates should have taken a minimum of two depositions and argued at least two motions in court by the end of their second year of practice.” The milestones should be calibrated to what is required to make partner so that associates can qualify on schedule. The committee should regularly remind management of the need to send associates forward.

What Should Law Firms Do?

Taking pro bono cases from the Federal Pro Bono Project or other sources of pro bono work can provide much-needed experience for young lawyers (and earn the gratitude of our judges for helping on a different problem — providing representation to the poor). To sign up as a volunteer for the Federal Pro Bono Project in the San Francisco and Oakland divisions please contact Manjari Chawla, Supervising Attorney, at (415) 626-6917 or mchawla@sfbar.org. For volunteer opportunities in the San Jose division, contact Kevin Knestrick, Legal Help Center Attorney, at (408) 297-1480 or kevin.knestrick@lawfoundation.org.

But associates also must excel in the “bread-and-butter” work of their firms, such as commercial cases, patent cases, and class actions. Firms should assign young lawyers to front-line opportunities within their core, paying work and avoiding reliance on pro bono work as the main training ground. This is important — very important — to professional development.

Shouldn’t a young lawyer who works on a motion be permitted and encouraged to come to court to sit at counsel table, even if she only observes? This would give her the opportunity to learn from partners’ performance. And shouldn’t the young lawyer’s time be written off to training — not charged to the client?

By encouraging contact between clients and young lawyers, clients will be more receptive to letting young lawyers carry their banner into court.

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To be sure, I recognize that young lawyers must work on many cases in which they get no client contact, no courtroom experience, no deposition experience, and all will be limited to research and writing. But if young lawyers become tethered to laptops, as seems to be the trend, they will never make partner, much less learn the skills public confidence requires.

What Should Our Media Do?

Shouldn’t our law-related media shine a light on this problem? Shouldn’t the media in California conduct regular surveys to rate various law firms on how well they train junior associates? To encourage law firms and to assist young lawyers in choosing a firm, our California legal newspapers, I propose, should conduct periodic surveys of law firms to facilitate comparison as to how well they train young lawyers. (This is just as important, isn’t it, as publicizing and comparing profits per partner?) I recommend questions such as the following:

- By what associate year can associates in your firm expect to have argued two motions in court and examined two witnesses (either in deposition or in court) for paying clients?
- How many hours of training count towards an associate’s billable hour credits per year?
- To what extent does your firm provide full billable credit for all pro bono hours worked?
- In what associate year does your firm offer deposition and trial training?
- Does your firm have an associate development committee, and if so, what does it do with respect to training?

Our legal press could enlist the aid of associate committees in framing survey questions designed to elicit probative and comparative information. Then, the surveys could be directed to management as well as associate committees for answers.

The American Lawyer conducts an excellent annual survey of job satisfaction among mid-level associates at 100 firms across America. My proposal, however, focuses exclusively on professional development. The goal of my proposed survey is to learn how well we are doing in training the next generation of lawyers, putting aside factors such as compensation, total hours worked, and prospects for joining the firm’s partnership. And, it would look beyond just mid-level associates.

Our Attitude on Our Bench

For this article, I conducted an informal survey of our district judges within the Northern District of California and received responses from about ten district judges. All of the responding district judges expressed enthusiasm about young lawyers arguing motions. One way in which the judges differed is the extent to which judges

Jury Pools: The Obstacles to Diversity

Without a doubt cause and peremptory challenges impact the final composition of a trial jury, but long before these challenges are exercised other factors shape the composition of the pool and determine who actually enters the jury box for voir dire. In a “minority-majority” state like California, and in an increasingly diverse nation, jury pools often do not adequately reflect the population. This article will focus on jury pool composition — not on the final jury empaneled after voir dire and the exercise of peremptory challenges. Jury pool composition is impacted by five factors: the qualifications for jury service; the source lists used and how often they are updated; the economic burden of jury service and the inadequacy of juror compensation; English language requirements; and the disproportionate impact of felon disfranchisement.

Source Lists

Illustrations of the 1925 jury in The State of Tennessee v. John Scopes, commonly known as the Scopes Monkey Trial, show an all-white, all-male jury, and certainly since those days when jury pools were assemblies of white, male property owners, most American juries are now more diverse. The Jury Selection and Service Act of 1968 put an end to the “key man” and “blue ribbon” juries in which jury commissioners typically hand-selected names of “key men” in the community. As late as 1967, a majority of federal courts still used the key man system.

While most state court jury selection systems require the use of particular source lists, four states have no mandatory list requirement (Indiana, Massachusetts, Nevada, and Utah). Typically the mandatory lists start with voter registration, and certainly since those days when jury pools were assemblies of white, male property owners, most American juries are now more diverse. The Jury Selection and Service Act of 1968 put an end to the “key man” and “blue ribbon” juries in which jury commissioners typically hand-selected names of “key men” in the community. As late as 1967, a majority of federal courts still used the key man system.

While most state court jury selection systems require the use of particular source lists, four states have no mandatory list requirement (Indiana, Massachusetts, Nevada, and Utah). Typically the mandatory lists start with voter registration, and most states and many federal courts now supplement this with DMV lists of holders of drivers’ licenses and state-issued identification cards for non-drivers. The addition of DMV lists to voter registration lists (so-called “Motor-Voter” lists) is a step toward broader inclusion. However, research has shown that these two sources alone systematically under-represent minorities.

Some state courts have made significant improvements by utilizing additional source lists such as income tax filers, unemployment and/or public assistance benefit recipients, and utility records (in New York, Connecticut, Rhode Island, Vermont, North Dakota and the District of
glimpse into the arguments it will raise.

First, Samsung will question whether a party asserting a design patent is entitled to a damage award based on the infringer’s “total profit” from the product, even if only a particular feature of the product is infringing. This limitation, known as apportionment, has significantly altered the damages landscape for utility patents in recent years. Not so for design patents, because the federal statute currently provides that the infringer of a design patent “shall be liable to the owner to the extent of his total profit.” 35 U.S.C. § 289.

Second, Samsung will argue that unlike the district court, which instructed the jury to compare the “ornamental design” claimed in Apple’s design patents to Samsung’s phones, a court must, through claim construction and jury instructions, explicitly exclude any and all functional elements from the comparison of design patent to product to determine whether infringement has occurred.

Whither Design Patents and Trade Dress?

There is no question that the district court decision dramatically raised the profile of trade dress and design patents, and incited a marked increase in applications for and assertions of those rights. But what now, after the Federal Circuit opinion, and if the Supreme Court takes up Samsung’s appeal?

The answer appears different for trade dress and design patents. The Federal Circuit opinion slammed the door on an expansive view of trade dress rights, especially as related to “product configuration” rather than packaging. As for design patents, much depends on whether the Supreme Court limits damages in some manner. That seems unlikely given the express language of the statute, and we can expect a continued increase in design patent infringement claims from parties seeking the purported infringer’s “total profits.”

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should or should not be proactive in encouraging lead counsel to provide young lawyers with stand-up opportunities. Some judges (like me) are proactive. Others merely wish that young lawyers would argue more motions in court but do not view it as their role to so suggest.

With possibly one exception, all of the judges who responded to the survey rejected the idea that it was a sign of weakness when a young lawyer argues a motion in court. Instead, they viewed it as a sign that the young lawyer did the majority of work on the motion. For example, Judge William H. Orrick III stated: “I enjoy it when young lawyers argue. I never see it as a sign of weakness. I see it as a sign that they did most of the work on the motion, and I prefer it when the person who has done the work makes the argument.” In addition, the judges expressed that young lawyers seem to be more prepared than at least some seasoned lawyers because the young lawyers know the record and the law, having prepared the motion or opposition.

The judges also offered several ideas about ways to further increase a young lawyer’s opportunities for oral argument. One judge encouraged participation in the Federal Pro Bono Project and said it is a “fantastic experience.” Another, Judge Vince Chhabria, recommended working for the government to gain oral argument experience. Judge Chhabria further said: “If the younger lawyer who actually wrote the brief is allowed to argue, I consider that a sign of wisdom, not weakness. But if you are a junior lawyer and you really want to get argument experience, go work for the government.” Another judge recommended opening up her own shop as a way for a young lawyer to get oral argument and deposition experience.

Regarding depositions, however, one judge offered a word of caution. Unlike at law and motion, young lawyers may not have enough experience to follow up adequately on points of inquiry at depositions (and the judge sometimes saw the shortfalls in the record as a result). Therefore, a young lawyer should not attend her first or second deposition alone. Instead, the junior lawyer should be accompanied by a more senior attorney who can provide guidance during deposition breaks or notes as to what further questions to ask.

The main takeaway from the survey is this: Whether they proactively encourage it or not, judges in our district remain very receptive to young lawyers arguing motions in court and taking depositions.

Kudos to my excellent former law clerk Laura Hurtado, now at Pillsbury Winthrop Shaw Pittman LLP, for her assistance in preparing this article.

The Honorable William Alsup is a District Judge of the United States District Court, Northern District of California.