

Who's next? Junior lawyers and trial practice, Part 3

By: Douglas H. Wilkins and Daniel I. Small ◉ February 22, 2019

In this third article in our series on ways for upcoming litigators to get experience, we focus on the ultimate litigation experience: trials. Experience opportunities should not be limited to pre-trial or other proceedings. Giving trial experience to young lawyers can be “win-win-win” all around.

Sharing the stage. Shouldn't we wonder what the jury is thinking when one or two senior lawyers do all the speaking at trial while one or more associates sit there without saying anything? One could argue that it appears ungenerous, at the least.

It's simply not natural for anyone — including jurors — to sit in a room for days with someone, even a big room like a courtroom, and never hear the person speak. Silence naturally makes people curious, and thus juries are curious to hear from the silent ones. Obviously, the impression is much worse when the silent associates are female or persons of color, and the attorney who speaks is not.

We know the jurors talk about the lawyers during breaks; it's one of the few things they have in common in the trial experience that we allow them to discuss before deliberations. If a lawyer appears ungenerous to his or her own team members, jurors will talk about it, and it makes it that much harder for counsel to generate goodwill.

Moreover, hearing from different examiners has other benefits. At a minimum, it allows for a change of pace and voice, which enhances the attention span of jurors and prevents them from getting tired of hearing from the same person, witness after witness, unable to differentiate when a critical witness takes a stand. After all, trials are theater, in part, so use your cast members appropriately.

If a junior lawyer takes a witness, the jurors may pay more attention than they otherwise would just to hear the lawyer talk, even though they also may understand that this is likely to be a more straightforward witness. When the senior lawyer then appears again, it will give some drama and a sense that something deeper is about to happen.

Style and experience can convey a message about how the jury might look at things: skeptically or straightforward. Some trial teams assign witnesses based on themes: simple or complex, favorable or challenging, truthful or lying, etc. Another approach is to assign witnesses based on patterns or issues in the case: Someone gets the bank witnesses, someone gets the eyewitnesses, etc.

If a witness is not too difficult or challenging, new attorneys are likely to do just as good a job with a basic direct or cross. They may even do better, because they can and will focus intensely on what the senior lawyer may view as not worth the preparation time. Giving such a witness to a junior lawyer will also free up the senior lawyer's time and energy to follow up on witnesses and arguments that present challenges requiring more experience.

Clients are often cited as a reason for demanding senior counsel's participation at all stages. However, it is the senior counsel's job to point out the benefits of other approaches to the client's case. That's an important part of the role as counselor. Don't blame the client; it is the rare case when good counsel would consist of keeping junior counsel entirely from the jury. To paraphrase an old saying: If the new lawyer is seen, he or she should also be heard.

Trial and error. We all learn from our mistakes — and from the mistakes of others. Most trial lawyers have memories of the little incidents that helped form them as lawyers, whether funny or embarrassing, painful or triumphant. But without opportunities for trial experience, those learning experiences can't happen.

Judge Wilkins remembers as a young associate being allowed to examine a witness in a multi-week antitrust trial. When he used the word “indicate” in a question, the judge jumped on him: “That's a weasel word. Only lawyers use

that word!" The judge went on to explain: "You can 'indicate' by talking, yelling, jumping, dancing, pointing and more. Don't use weasel words in my courtroom!"

Lessons learned: 1) use words of clarity and power; and 2) perhaps more important, understand that you can, in fact, survive the occasional judicial onslaught.

Trials: watch and learn. Young lawyers can learn by the successes and mistakes of others, but only if they are given a chance to see them. The late great Irving Younger, master teacher of evidence and trial practice, said that you are not a real trial lawyer until you have tried 25 jury trials. However, he admitted that that could be a rarefied and challenging goal, and offered ways to cheat on that number a little, including by watching other lawyers try cases.

He's right, and too few lawyers take advantage of that. Despite the pressure of clients, work and the billable hour, senior lawyers need to find ways to encourage younger colleagues to take time to watch — to spend an hour, a morning or a day in court watching others. Any time a young lawyer has to go to court for any purpose, he or she should go early and stay late. Watch and learn.

In each of these areas, the responsibility and opportunity for the senior lawyer does not end with the assignment. The key is to leverage that event by using it to teach. Senior lawyers should invest in these opportunities by debriefing and quizzing the junior lawyers in detail afterward about the options taken, strategic handling of sidebar and other interactions, and all the little things that go on, in addition to the actual arguments or questioning.

Pro bono. There are so many people who need legal services but cannot afford them. And so many young lawyers who want and need legal experience. Senior lawyers have to help connect those two needs. If it is in an area of law similar to the young lawyer's professional focus, that can be a plus, but it is certainly not a requirement. The idea is to provide a service, while giving experience in the real skills of being a lawyer. The further outside of a lawyer's comfort zone, the more powerful the experience can be.

There isn't room here to list all the great organizations that offer pro bono opportunities, but look around. If your office doesn't have a pro bono program, there are plenty of resources to ask. Just a couple: Lawyersclearinghouse.org and Massprobono.org.

There are, of course, other ways for young lawyers to learn and gain experience. The idea here is to recognize the need, suggest a few opportunities, and encourage more senior lawyers to take the initiative to help this important process.

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