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Who's next? Junior lawyers and pre-trial practice, Part 2

By: Douglas H. Wilkins and Daniel I. Small February 8, 2019

In our last column, we discussed some strategic financial and professional benefits of increasing the personal and active involvement of junior attorneys in court proceedings, including trials. We pointed out that self-interest and sound strategy support increasing that involvement. There is much work to do if we are to develop the next generation of trial lawyers in an era of vanishing jury trials.

It is a frustrating situation for all concerned. Among judges, one of the most common complaints heard at judicial gatherings is the decline in experienced high-quality trial lawyers.

For senior lawyers, it is a challenge to find ways to develop competent co-counsel or replacement counsel.

For young lawyers, it's a classic "Catch 22": If clients want experienced lawyers, how do they get the necessary experience?

Even jurors are at least puzzled when they see one or more lawyers sitting at counsel table but doing nothing. Moreover, they enjoy a little variety among counsel and are eager to root for an inexperienced lawyer giving it his or her best effort.

However, much as judges and experienced in-house and outside lawyers complain about this, how many are actually doing something about it? Not necessarily on a grand or formal scale, but in smaller day-to-day ways, by keeping the challenge in the back of their mind and finding ways to help?

It may take some creativity and flexibility — and some diplomacy — to convince all those involved that it's a good idea (judges, lawyers, clients and more). However, the results can be beneficial for all those players and for the quality of justice in our courts.

What follows are some ideas for ways to give younger lawyers some of the experience they so badly need and want in the pre-trial and alternative dispute resolution environment (we'll talk about trials in our next column).

This is not meant to be a definitive or exhaustive list. It is simply an attempt to spur some creative thinking about small ways to help solve a big problem.

Hearings: "Mini-clinics." Legal clinics that give young lawyers experience can be built by construction workers out of bricks and mortar, or by lawyers out of an idea. Aggregating a larger number of smaller cases can create opportunities for experience, collaboration and learning. One might call them "mini-clinics."

For example, a favorite in-house lawyer basically made this proposal to one of her outside counsel: "We have a number of arbitration cases. Every case is important, but these are relatively smaller dollar, and less downside risk. Here's a package of 20 of them: Assemble a diverse team of young associates who want litigation experience and give them the cases. You oversee it as the partner, but they do the work. I don't want to see your name on the bills much."

Remarkable. Such a simple idea, and it's win-win-win. She and her company get necessary work done inexpensively and a growing "bench" of familiar folks for more important cases down the road. The firm gets some business and valuable training for its rising associates. And the young lawyers get that most precious commodity of all: experience, in a collaborative, real-life, but lower-risk environment. Meanwhile, everyone builds relationships with each other.

It doesn't have to be arbitration, it doesn't have to be 20 cases, but the packaging idea allows for a cohesive, collaborative program. No bricklayers are needed.

Hearings: Opportunity knocks. Many motions are decided without a hearing, despite a request to be heard. What if the request stated — conspicuously — that a new lawyer would argue the motion?

Some judges might not notice or care (hint: call the clerk, who might notice and care). However, some judges might see it as a good opportunity for all, and weigh it as a point in favor of holding a hearing, instead of deciding the motion on the pleadings.

If more lawyers did this, maybe the word would spread, and more judges would notice.

Hearings: Step up puppet master. Certainly, there are important hearings at which senior counsel needs to do all or part of the talking. But judges were lawyers once; they know that sometimes it's the junior lawyer who really did the research and really knows the cases. Why not let them argue?

It can be frustrating to a judge to ask a question about a legal issue or case, and then wait for the senior lawyer to consult with (or read a note from) the junior lawyer, who clearly would be the best person to answer.

Sometimes it can get almost comical, with the junior lawyer essentially acting as the puppet master for the senior lawyer doing the argument. Except it's not funny. And everybody loses: The senior lawyer loses face and misses an opportunity to look like a good person; the junior lawyer loses experience; and the client loses the most knowledgeable (and least expensive) spokesperson.

Conferences: Speed dating. Scheduling conferences, trial assignment conferences, final pre-trial, and other such gatherings are good ways to get new lawyers opportunities to speak in court. They still need to have necessary authority and access to all relevant witness and attorney schedules, and you may need to seek the court's approval if lead counsel is not attending. Don't use it as a shield to avoid responsibility and commitment.

But judges really only need an attorney with information and authority to efficiently commit to dates and other details. Age and experience are not required. Top billing rate is unnecessary and wasteful. Sure, it's not brain surgery, but it requires some planning and thinking about the case and offers an opportunity to get used to standing up in court and thinking on those feet.

Pre-trial and ADR proceedings provide many valuable opportunities for experience for younger lawyers. It's up to judges and senior lawyers to look, create and encourage.

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