



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

BigLaw Hits Training Snag With Kirkland Benchslap

By **Aebra Coe**

Law360, New York (September 27, 2016, 8:26 PM EDT) -- A judge may have dealt a setback to a BigLaw effort to train the next generation of litigators when he scolded Kirkland & Ellis LLP last week for sending an associate and not a partner to handle a terrorism case against Facebook, experts say.

U.S. District Judge Nicholas G. Garaufis' **sentiment** has elicited concern among some litigation partners, judges and consultants who say that allowing junior attorneys to gain experience in court is vital to the future success of the legal profession as trial work has slowed and opportunities to get hands-on action are, at times, limited.

"Whether it's trying a case or arguing an appeal, there is no better way to learn than by doing. It's a little like being thrown into a pool as a kid and learning, by necessity, how to swim," Third Circuit Judge D. Brooks Smith told Law360 on Monday.

There are numerous examples of a recent movement among judges toward encouraging the participation of junior attorneys at trial. In March, U.S. Magistrate Judge Paul S. Grewal **urged veteran trial counsel** in a trade secrets suit over memory chip designs to allow younger attorneys to argue in a slew of post-trial motions, saying that the associates who had "contributed mightily to this difficult case" deserved a chance to develop their skills.

And U.S. District Judge James Donato on Tuesday called out Morrison & Foerster LLP for offering only eighth-year associates to argue an issue in a proposed class action over the alleged inaccuracy of Fitbit Inc. heart rate monitors after he'd invited the parties to have counsel in their first six years of practice argue the matter to promote their professional development.

Other judges who have issued similar orders in recent months, encouraging law firms to grant junior attorneys an important role at trial, include U.S. District Judges Andrew J. Guilford in the Central District of California, Lucy H. Koh in the Northern District of California and Barbara M.G. Lynn in the Northern District of Texas.

But in the Facebook Inc. case, Judge Garaufis eviscerated Kirkland for sending an associate to the pre-motion conference and ordered the firm to send a partner to the parties' next hearing.

"Personally, having experience both as a trial judge and an appellate judge, what I am most concerned about is preparation," Judge Smith said. "A well-prepared young lawyer can often go toe-to-toe with a highly experienced advocate simply by having dug into the case and doing his or her homework."

Of course, Judge Smith pointed out, there may be practical considerations for a judge, such as whether the young lawyer has settlement authority or the relationship with a client that might foster settlement. But in general, he said the Third Circuit encourages young lawyers to participate in court.

Beth Devlin, a trial consultant for Edge Litigation Consulting LLC, said that while there are holdouts, federal judges appear to be increasingly open to having junior associates play a role in cases, an openness she calls a "very good thing" for young attorneys' abilities to flourish.

But there are often many other factors that do get in the way of green lawyers developing their expertise, she said.

"In my experience, any barriers faced are more attributable to corporate clients putting pressure on senior partners to take the lead roles in cases or to lead lawyers who are stingy about giving junior lawyers valuable opportunities," she said. "I suspect that a slowdown in litigation has made this worse, not better."

Fish & Richardson PC principal and former litigation group leader Kathi Vidal explained that she too has seen a trend toward judges not only wanting to see more junior lawyers in court but also actively encouraging and, in some cases, incentivizing law firms and parties to give more junior lawyers speaking roles.

Vidal is a lead committee member for Next Generation Lawyers — a subgroup of ChIPs, a nonprofit dedicated to advancing women in law — that pushes for more courtroom experience for young attorneys, a factor that it says helps promote gender diversity in the profession.

She said that the slowdown in litigation, combined with judges ruling from the papers, is part of what encouraged the movement she joined to actively work to create more opportunities for junior lawyers.

"With court orders [incentivizing] behavior, this not only encourages law firm lawyers to do the right thing and train the next generation in court but also gives them and their in-house counterparts cover when deciding to have a more junior person argue," she said.

Vidal explained that there can sometimes be a misperception among judges that if firms ask junior lawyers to argue, they don't care about the motions or hearings.

"This is often not the case. I often choose opportunities — for example, in a case I had for eBay, where I believed that, though important, the motion was strong enough on the papers, and the associate was the most knowledgeable about the record," Vidal said.

She said she has found success by addressing the misperception by communicating directly with judges. In a case before Judge Koh, she said she sent a notice to the court in advance, explaining that although the summary judgment motion was very important, Fish & Richardson was asking first- and second-year lawyers to argue because of its desire to train its lawyers.

"In the same notice, I advised the court that more senior counsel would also appear and be able to assist as necessary," she said. "Holly Victorson — who is now clerking for Judge Kimberly Moore at the Federal Circuit — and Emily Petersen Garff won that motion."

If too many judges fail to be open to conducting cases with young attorneys at bat, law firms will be tasked with the monumental and perhaps expensive task of finding other ways to train future litigation leaders, according to Sherry Salmons of Salmons Communications Consulting, which advises law firms on litigation.

"We know firsthand through our work on advocacy-related training that even litigators at a partner level don't always have enough opportunity to play a larger role in the courtroom," Salmons said. "Given the dearth of exposure for even more senior lawyers, it is not surprising that law firms would look for any occasion for associates to gain experience in the courtroom."

She said that rather than risking the ire of their clients or the judge, many trial teams opt to find other ways to train their litigators. One example is through mock trials, which allows them to examine witnesses, present damages arguments and then later receive feedback on their performance.

Salmons encouraged law firms that do choose to throw junior attorneys into the mix at trial to work closely with local counsel to understand the specific culture and protocol of each courtroom.

"If, for instance, it is important for a particular judge to have lead counsel attend all morning

conferences as a sign of respect to the court, or to ensure that the representative has appropriate authority to speak for the client, the trial team should obviously make that a priority," Salmons said.

But if the judge is simply a stickler for local rules in witness examinations, the trial team can help ensure that younger partners or associates are successful by making sure they are well-versed in those rules and preferences, she said.

--Additional reporting by Kat Greene. Editing by Katherine Rautenberg and Christine Chun.

All Content © 2003-2016, Portfolio Media, Inc.