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How Case Management Orders Can Support New Attorneys

By **Megan Jones and Halli Spraggins** (February 22, 2021, 2:10 PM EST)

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"Not yet" or "maybe next time" are phrases almost every young litigation associate has heard when asking to do an argument in court, even when they wrote the brief that underlies the argument itself.

New attorneys often struggle to get the opportunity to argue in court for a variety of reasons. This is even more so in complex class actions, which are often staffed by multiple law firms on both sides, involve significant damages, and where litigation strategy is a multiyear chess match.

Given these circumstances, as well as the pandemic's effect on trials and hearings, these oral argument experiences for newer attorneys, which are foundational, can be rare and hard to come by.

It is, however, every attorney's responsibility to provide substantive training of the next generation of attorneys, and for litigators, that must include speaking or so-called stand-up engagements.

Courts recognize this and are leading the way, with innovative language in a variety of court orders that set aside arguments specifically for such newer attorneys — typically defined as less than seven years' experience.[1]

This is where opportunity lies. Attorneys can and should incorporate similar model language into case management orders. Parties from both sides could agree to include such language that set out rules of the road that encourage newer attorneys to argue motions and take depositions.

In the U.S. District Court for the District of Massachusetts, U.S. District Judges Indira Talwani, F. Dennis Saylor, Denise Casper and Timothy Hillman "strongly [encourage] the participation of relatively inexperienced attorneys in all court proceedings including but not limited to initial scheduling conferences, status conferences, hearings on discovery motions and dispositive motions, and examination of witnesses at trial."[2]

Set forth below are some concepts that could be used in case management orders to put more seats at the table and increase the amount of stand-up opportunities for newer attorneys.

Make a Plan

At the onset of any case, and especially a class action, case teams make plans for virtually every phase: discovery, depositions, expert work and everything in between. But rarely do teams take the time to make a plan for how they will incorporate junior attorneys throughout the case.

A plan made at the beginning of a case to incorporate newer attorneys will help ensure that doing so becomes a priority.

For example, U.S. District Judge William Alsup of the U.S. District Court for the Northern District of California requires parties' initial case management conference statements to include "a specific plan for how it intends, in this case, to provide opportunities to junior lawyers ... to argue motions in court, to take depositions, and to examine witnesses at trial."[3]

Permit More Than One Attorney to Argue for a Party

To bridge the experience gap in important arguments as well as to protect client interests, U.S. District Judge Edward Chen in the Northern District of California permits more than one person to argue the motion. In his standing order, he sets forth that the court "is amenable to permitting a number of lawyers to argue for one party if this creates an opportunity for such attorneys to participate."[4]

Judge Douglas Woodlock in the District of Massachusetts similarly recommends that "relatively inexperienced attorneys who participate in evidentiary hearings of substantial complexity, such as examining a witness at trial, should be accompanied and supervised by a more experienced attorney, unless leave of Court is granted to proceed otherwise."[5]

Under such rules, a more senior partner and a younger associate could team up to handle a single argument or examination, making room at the table for more than one attorney to argue. Private attorneys could easily adopt such language in a case management order.

Notify the Court When a Newer Attorney Will Handle a Motion

If either party is interested in having a newer attorney argue a motion, after the motion is ripe, they could agree to contact chambers to request oral argument and inform chambers that a newer attorney will argue the motion or a portion of the motion. This lets the court know of the parties' decision, and may have an impact on whether oral argument will be scheduled.

For example, U.S. District Judge Barry Ted Moskowitz in the U.S. District Court for the Southern District of California has committed to holding oral argument on civil motions as follows:

> (1) where the motion will be argued by attorneys with less than 5 years of admission to the bar for at least two opposing sides; or (2) where the motion will be argued by an attorney with less than 5 years of admission to the bar on one side and the opposing attorney, irrespective of his or her experience, also requests oral argument. While the decision as to who should argue is for the lead attorney to make, the Court encourages the lead attorney to allow the junior attorney writing the motion papers to argue the matter. In those circumstances, the Court will allow the lead attorney to also participate in the argument.[6]

Case management orders that adopted similar language would give courts the liberty to decide whether such motions would be set for oral argument.

Permit Depositions Over and Above the Limits If They Are Taken by Newer Attorneys

Most class actions end up with a negotiated number of permitted depositions. However, parties could include language in case management orders that permit a certain number of depositions to proceed despite the limits if they are taken by a newer attorney.

For example, language like the following could be included: "The parties may exceed the agreed upon deposition limit by up to five depositions if such a deposition is taken by a Newer Attorney."

Give Credit Where Credit Is Due

The work of newer attorneys can often be behind the scenes, such that the court or other parties are unaware of those attorneys' contributions.

Case management orders could rectify this problem and include language that ensures junior attorneys are recognized for their contributions in a case, as required last year by U.S. District Judge Robin Rosenberg in In re: Zantac (Ranitidine) Products Liability Litigation, a multidistrict litigation in the U.S. District Court for the Southern District of Florida."[7]

More broadly, and borrowing from Judge Rosenberg's pretrial order, parties could include language in a case management order that "the attorneys actually negotiating a particular issue, drafting a brief or proposed order, or dealing with a specific matter be available to speak to that matter in court," which will provide a structure that will "facilitate opportunities for counsel at all levels."[8]

Acknowledge Litigation Realities

Despite all the foregoing, there are circumstances where it is not appropriate or feasible for a newer attorney to argue a motion. U.S. Magistrate Judge Kimberly Priest Johnson of the U.S. District Court for the Eastern District of Texas therefore includes language to this effect:

> The Court also recognizes that there may be many different circumstances in which it is not appropriate for a Newer Attorney to argue a motion. Thus, the Court emphasizes that it draws no inference from a party's decision not to have a Newer Attorney argue any particular motion before the Court.[9]

Also, parties should be mindful of judicial resources and make sure that newer attorneys appearing before the court "must have authority to bind the party they represent consistent with the proceedings (for example, by agreeing to a discovery or briefing schedule), and should be prepared to address any matters likely to arise at the proceeding," as U.S. District Judge Mary Kay Vyskocil in the U.S. District Court for the Southern District of New York has written.[10]

Attorneys could include similar language in case management orders that acknowledges these litigation realities.

Conclusion

The zeal brought by a newer attorney is often overlooked and underestimated, and should instead be channeled for clients. In doing so, everybody wins: Newer attorneys get trained in essential skills, courts get to hear from a more diverse slate of newer attorneys, and clients are represented by zealous advocates.

Simple, straightforward language in case management orders, like the above, can not only help get more seats at the table, it can help fill them with the next generation of advocates.

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[1] Next Generation Lawyers has collected judicial orders from CA, GA, IL, MA, NY, and OR, among others. https://nextgenlawyers.com/judicial-orders-promoting-next-gen/

[2] https://www.mad.uscourts.gov/boston/pdf/talwani/Standing%20Order%20Young%20Attorneys.pdf

[3] https://www.cand.uscourts.gov/wp-content/uploads/judges/alsup-wha/WHA-Supplemental-CMC-Order.pdf.

[4] https://www.cand.uscourts.gov/wp-content/uploads/judges/chen-emc/EMC_Standing_Order_Civil_8-7-2020.pdf

[5] https://www.mad.uscourts.gov/boston/pdf/WoodlockInitialScheduling.pdf

[6] https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2018/how-judiciary-is-helping-younger-lawyers-close-the-experience-gap/

[7] In re: Zantac (Ranitidine) Products Liability Litigation , Case 9:20-md-02924-RLR, Document No. 685 (May 8, 2020).

[8] Id.

[9] http://www.txed.uscourts.gov/sites/default/files/judgeFiles/STANDING%20ORDER%20REGARDING%20COURTROOM%20OPPORTUNITIES%20FOR%20NEWEF

[10] https://nysd.uscourts.gov/sites/default/files/practice_documents/MKV%20Vyskocil%20updated%20Civil%20Practice%20Rules%20-%20March%2016.pdf

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