

BRIDGING THE GAP: PREPARING TODAY'S IP ASSOCIATES TO TRY TOMORROW'S CASES

BY STEPHANIE E. O'BYRNE



Introduction

I attended a retirement party for a prominent trial lawyer last month, and his stories of practicing law in years past were the stuff of fairy tales. There were fewer lawyers. Westlaw's

search engines were rivaled by a chat with the local law librarian and discussions with colleagues in the stacks. Practicing law was a club – the bar, a brotherhood of tradesmen. Mentoring abounded. The practice of law was about *practicing law*. Law was less of a business, and there was less client hoarding, less pressure to settle. And most critically, opportunities to try cases abounded at all levels of experience.

Never has there been a time where the trial experience of patent lawyers is more important, yet traditional opportunities for associates to acquire them so few. Since 2010, 62% of patent cases that have reached trial have been tried to a jury, resulting in a successful verdict for the patent holder in 74% of cases tried between 2010 and 2013.¹ While 64% of cases tried to the bench were also successful, the median damages awarded by juries (\$15 million) dwarfs those awarded by judges (\$400,000).² In short, while patent cases average 2.5 years to trial (and many do not reach a trial),³ trial skills are critical, and jury trials are likely to remain a critical component of patent litigation for years to come. At the same time, today's young IP litigators face exceptional challenges in acquiring courtroom experience.

Seeking to head off a generational divide, one prominent patent court—the District of Delaware—has stepped up to assist up-and-coming litigators gain trial experience. There is perhaps no better opportunity for other jurisdictions, organizations and/or local bar association chapters to follow suit. The older and younger generations must both advocate for opportunities for

hands-on training, as apprenticeship is critical to the development of today's young lawyers and, ultimately, the future of the profession.

Heading off a Skill Gap

When IP litigation exploded in the late 1990s and early 2000s, many lawyers were drawn to the practice who were experienced in other areas of complex civil litigation, such as asbestos litigation. The Associated Press was reporting on the novelty of the influx of scientists-turned-litigators on the scene as late as 2007.⁴ Some IP firms recruit non-technical laterals with litigation chops, such as attorneys general, district attorneys, and personal injury/insurance defense associates, to name a few. But because an affinity for the technology in suit is often critical in the preparation of the case, today's IP associates typically have a strong scientific background—a BS, MA or even Ph.D. in their technical field—before attending law school and vying for positions at elite IP firms. Some are fortunate enough to clerk at the district court or circuit court level. Competition is fierce, and these associates are recruited early with focus on their technical skills and writing abilities. They acquire courtroom experience only to the extent the opportunities are available through their firms. While many lawyers are involved in coordinating all of the many working parts of the typical patent case, even the best IP associates must wait many years to earn a talking role in a patent trial.

The demographic of law firms has also changed in a way that restricts courtroom opportunities for young IP lawyers. Patent boutiques and large general litigation firms typically do not have small or local matters to which associates may be assigned as the primary attorney—the basic tort and contract cases lawyers in generations past routinely cut their teeth on.

IP firms appreciate that the best training in preparing a case occurs through partner-associate mentoring relationships. Today, as in eras past, apprenticeship is crucial to associates' professional development. Shadowing lead trial counsel is especially crucial to the

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extent associates are not ready to be integrated into a trial team, or to the extent such opportunities are scarce. Eventually, however, associates must progress from passengers to drivers in order to learn the nuances of trying a case to the jury that are so critical in today's IP landscape. Only the most prepared will be offered the wheel, and in today's settlement-driven litigation environment, it can be hard to get a space even in the passenger seat. To truly get ahead, associates must seek and seize outside opportunities offering litigation and trial experience—to *practice* trying cases—and not allow high billable hour requirements and the *business* of law to act as countermeasures in this regard.

A Bench Steps Up: The District of Delaware's Federal Trial Practice Seminar

The bar at large recognizes that young patent lawyers have far fewer opportunities to hone their courtroom skills. The busiest patent judges in the nation decided to do something about it. Spearheaded by now-Magistrate Judge Christopher J. Burke, the United States Court for the District of Delaware held its inaugural Federal Trial Practice Seminar ("FTPS") in 2010. Through the bi-annual FTPS, eight lawyers—each with fewer than ten years of practice experience and an interest in regularly litigating cases in the Delaware federal court—participate in a day-long mock trial before an actual jury, presided over by a federal district judge. The FTPS provides a unique venue in which IP associates "can practice federal trial skills and learn from experienced practitioners in order to hone those skills," and also provides "an opportunity for the Court to educate the participants as to what is expected of those who practice in federal court in the District."⁵

The FTPS is an eight-week course in total, consisting of five speaker-driven sessions led by nationally acclaimed litigators, and district judges, on a variety of topics relevant to effective trial advocacy. Two sessions are practicum sessions, in which the participants engage in presentations to the program mentors and district judges and receive constructive criticism on their efforts. As an alumnus of the 2013 FTPS, I can attest that there is nothing quite like the experience of delivering your first opening and closing arguments to multiple district judges and hearing each of their critiques. After the mock trial, participants are able to watch the jury deliberate on closed-circuit television. It is a once-in-a-

lifetime opportunity to hear actual jurors not only deliberate the strengths and weaknesses of your case, but the persuasiveness of your trial presentation.

The FTPS sets a high standard as a model for hands-on learning. Whether or not other courts follow Delaware's lead, the IP bar should encourage similar initiatives at the local level, for example, through intellectual property sections of local Federal Bar Association chapters, or in-house programs at law firms. The benefits to program mentors rival those of the seminar participants. Through active mentoring, senior practitioners benefit from fostering relationships between the bench and bar, forging relationships with future colleagues, and building human capital in their own firms.

Creativity Counts: Courtroom Skills Through Pro Bono Opportunities

Pro bono projects provide opportunities for IP associates to serve the public while also gaining invaluable experience taking depositions, arguing at hearings, and trying cases—even appearing before Federal judges in many of the top patent districts. For example, the Northern District of California's Federal Pro Bono Project arranges pro bono counsel in employment discrimination, police misconduct, and foreclosure cases in which counsel may participate in mediation before the federal magistrate judges and trials in the district court.⁶ The Pro Bono Civil Rights Panel in the Central District of California offers federal trial experience in § 1983 (usually prisoner civil rights) actions.⁷ As additional examples, the Southern District of California, Northern District of Illinois, District of Delaware, District of New Jersey, and Eastern District of Michigan each have a federal civil pro bono panel appointing counsel to try Title VII, § 1983, and other civil matters.⁸ Still other volunteer opportunities exist nationally in the areas of federal civil rights litigation through, for example, local branches of the America Civil Liberties Union and the Lawyers' Committee for Civil Rights Under the Law.⁹

IP associates should not be hesitant to take on matters outside of their area of expertise or in a court in which they do not practice. Two patent-heavy districts offer pro bono opportunities in the area of criminal defense. In the Eastern District of Virginia, counsel can participate in the Pro Bono Counsel Program of the Federal Public

Defender's office,¹⁰ and the Eastern District of Texas appoints counsel through their Criminal Justice Act panel of volunteer attorneys.¹¹ As a result of budget cuts and furloughs, more volunteer opportunities exist nationally through Federal Public Defenders' offices today than ever before, and young lawyers should strongly consider their training potential. Volunteer opportunities abound at the state level in a wide range of subject areas, including consumer law, family law, elder law, personal injury, domestic violence, bankruptcy, foreclosure, and workers compensation to name a few—and such opportunities are collected in the ABA's state-by-state directory.¹² By embracing pro bono opportunities outside of their comfort zone of federal civil litigation, IP associates can expand their skill sets and gain the courtroom confidence necessary to succeed.

In addition to courtroom experience, pro bono programs also provide opportunities for mentoring and individualized assistance from other members of the bar through the referring organization. Often, judges offer

advice and assistance to pro bono counsel, as the bench is especially thankful for counsel's pro bono service. Through forging new relationships, the legal community feels smaller, and the practice of law less ominous.

The Path Forward

As IP litigation continues to heat up, there is no better time to re-assess the training of young IP lawyers. The creation of new mock trial programs like the FTSP, with or without the assistance of the federal bench, may be the best way for today's IP associates to obtain hands-on experience in preparing and trying cases. There is no limit to the creativity that may be employed by local bar associations in fashioning their own trial advocacy courses. Through old-fashioned mentoring and hands-on learning opportunities, we can ensure that tomorrow's lead patent counsel have the necessary skills to both prepare *and* try the issues before them. In the process, we may all feel a little more connected—like a brotherhood of lawyer.

¹ Chris Barry, et al., *2014 PricewaterhouseCoopers Patent Litigation Study*, July 2014, at 8.

² *Id.* at 8, 9. The success rate in ANDA cases (brought by a patentee against a potential generic pharmaceutical drug entrant) is slightly lower, at 50%. *Id.* at 21.

³ *Id.* at 16.

⁴ See Associated Press, *Scientists Turned Patent Lawyers*, USA TODAY, (May 20, 2007), http://usatoday30.usatoday.com/tech/science/2007-05-20-patentlawyers_N.htm (last accessed August 26, 2014).

⁵ See <http://www.ded.uscourts.gov/sites/default/files/FBA/PDF/2013FTSP.pdf> (2013 Seminar Description), last accessed August 19, 2014. The FTSP is not limited to IP associates, although IP associates typically make up the majority of FTSP classes given the predominance of IP cases in Delaware. Patent cases make up 63% of the district's overall caseload. See <http://news.uscourts.gov/patent-cases-rise-two-courts-leading-nation>.

⁶ See <http://www.cand.uscourts.gov/probono>.

⁷ See <http://www.cacd.uscourts.gov/attorneys/pro-bono>.

⁸ See <https://www.casd.uscourts.gov/Attorneys/CJAAppointments/SitePages/Home.aspx> (S.D. Cal.); <http://www.ded.uscourts.gov/federal-civil-panel> (D. Del.); <http://www.mied.uscourts.gov/Rules/Plans/probono3.pdf> (E.D. Mich.); <http://www.njd.uscourts.gov/pro-bono> (D.N.J.). Just this August, the Northern District of Illinois has bolstered its successful civil pro bono program with the creation of a Pro Bono Advisory Committee to assist the Court. See <http://www.ilnd.uscourts.gov/home/assets/news/PR%20-%202008-11-2014%20Pro%20Bono%20Committee.pdf>.

⁹ See http://www.lawyerscommittee.org/pro_bono_opportunities/.

¹⁰ See <http://www.vaefpd.org/probono.html>.

¹¹ See <http://www.txed.uscourts.gov/page1.shtml?location=cja>. Outside of the Eastern District, the Texas Civil Rights Project offers pro bono counsel experience in civil matters, specifically, litigating discrimination, disability rights, and § 1983 cases. See <http://www.texascivilrightsproject.org/volunteer/pro-bono-lawyers/>.

¹² See http://www.probono.net/aba_oppsguide/.