FIRST CHAIR WANTED: HOW DO WE GET THERE?

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I. Identifying the Issue: The Decline in First Chair Trial Opportunities

"The days of the trial lawyer are essentially gone"[1] – and the fact that there has been a "steady, steep, decades-long decline in the number of trials" in the United States likely comes as no surprise to practicing litigators.[2] However, an examination of the statistics behind the decrease in trials is quite staggering: For example, from 1985 to 2002, the number of federal civil trials decreased 64 percent – from 12,529 to 4,569 annually.[3] As of 2017, only 1 percent (approximately) of all Federal civil cases were resolved by trial,[4] representing a consistent decline over the last 50 years.[5] While the data from state court dispositions does not have similar expansive temporal span, what data does exist suggests that disposition of civil actions by trial is even more limited in those forums. In 2015, Pennsylvania reported the highest civil jury trial disposition rate of any state: 0.53 percent. Other large states reporting their statistics had similarly low civil jury trial rates – including California (0.21 percent), Texas (0.47 percent), Florida (0.18 percent), and New Jersey (0.12 percent).[6] Indicating an even greater limitation on trial opportunities is the broad definition used for "trial work," which is opaque for the states, and far more expansive than the popular visage of presenting to a jury in the Federal statistics. The Administrative Office of the United States Courts, which compiles the Federal judicial statistics, defines a "trial" as "a contested proceeding where evidence is introduced." According to one commentator, this definition overstates the number of "trials" by "as much as" one third, because it embraces any hearing where evidence is adduced by live testimony, such as *Daubert* motions, temporary restraining orders and preliminary injunctions.[7]

Even more startling are the federal trial statistics from 2019-2021 which reflect that, on average, only 10 trials (civil and criminal) were completed per judgeship in 2020 and only 15 trials (civil and criminal) were completed per judgeship in 2021.[8] Overall, the declining trend in trials

has become such a mainstay that "[t]he legal profession has been talking about 'the vanishing jury trial' for at least the last 20 years."[9] Today, less than two percent of civil cases make it to trial, and of that two percent, those civil trials are weighted heavily towards cases such as divorce and personal injury.[10] While the authors could not find confirming statistics, we believe the percentage of construction law cases going to trial is likely less than two percent. The percentage of complex, multi-party construction law cases going to trial is even smaller.

A. Why Are Trial Opportunities Disappearing?

The ultimate catalyst for the precipitous decline in civil jury trials is somewhat amorphous, but factors that have been identified as contributing to the drop-off include (1) escalating pretrial expense and delay, (2) jury unpredictability, (3) increase in alternative dispute resolution procedures (both mediation and arbitration), (4) changes in substantive and procedural law, and (5) lack of experienced trial counsel.[11] Regarding Factor 5, the decrease in trial opportunities results in less experienced trial lawyers, who are then potentially more hesitant to try cases. In other words, the problem of declining trial opportunities appears to be compounding and further preventing the solution, which is to foster trial experience in younger lawyers. Additionally, pandemic-related closures and the rise of video trials and hearings from March 2020 to present have railroaded almost every trial lawyer's attempt to get a case to trial at the courthouse, and the authors believe this backlog has resulted in even fewer trial opportunities for young lawyers who began practicing around the onset of the COVID-19 pandemic.

B. The Compounding Effect of Decreasing Trial Opportunities on Young Lawyers

As noted above, a significant consequence of having fewer jury trials is fewer experienced trial attorneys, and it is becoming more difficult for younger litigation attorneys to acquire substantive trial experience, especially first-chair experience. Lloyd Liu noted in his article "A

Call to Action for More Junior Trial Lawyers":

> The hallmark of a good trial attorney is judgment. Judgment is a mix of a lot of things, but one critical ingredient is experience. It is experience that transforms knowledge into wisdom. And with fewer opportunities to gain trial experience, you might wonder: How many attorneys in firms are litigators who have never stood up in a courtroom . . . ? Trial competence or excellence is not simply a matter of innate talent. Much of it is a question of repetition.[12]

Put simply, no amount of CLE, seminars, or written articles can act as a substitute for actual trial experience, and without trial experience, young lawyers are at risk of not having the comprehensive perspective necessary to successfully work up and try a case. "In other words, if you've never tried a case, you don't know what truly matters and what is simply a distraction."[13]

The lack of trial experience therefore can impact an attorney's ability to successfully litigate a case overall in the sense that an inexperienced trial attorney does not have an able ability to work backward from an understanding of the end-result verdict to guide strategy more adequately on pre-trial matters such as written discovery and depositions. In fact, a litigator's lack of trial experience can potentially affect his or her ability to best advise on all phases of litigation, from determining whether to pursue a trial or arbitration forum to effectively assessing and negotiating the best possible settlement offer for a client.[14]

Additionally, at least one author has suggested that "young lawyers who lack perspective are contributing to a general lack of civility and decorum in litigation," such as engaging in unnecessary and unproductive discovery disputes.[15] In short, there is no circumventing the central fact that trials are needed for young attorneys to obtain the trial experience necessary to make them actual "trial lawyers" as opposed to "litigators."[16]

C. The Ethical Impact on Young Lawyers Due to Decreasing Trial Opportunities

The effect of decreasing trial opportunities for young lawyers raises an ethical competency

consideration: If an opportunity for first chair comes knocking – especially on a complex construction litigation matter – is a younger attorney competent to take on the first chair role if the younger attorney does not have any significant prior courtroom experience? The American Bar Association *Model Rules of Professional Conduct* Rule 1.1 ("Competence") provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Regarding the interrelatedness of prior experience with competence, Comment 1 to Model Rule 1 provides that factors "[i]n determining whether a lawyer employs the requisite knowledge and skill in a particular matter" is "the lawyer's general *experience*" and the "lawyer's training and *experience* in the field in question"; however, Comment 2 to Model Rule 1.1 specifically notes, "[a] lawyer need not necessarily have special training or *prior experience* to handle legal problems of a type with which the lawyer is unfamiliar." (emphasis added).

Using the Model Rule 1.1 framework, what level of prior trial experience, if any, is required before a younger attorney accepts a first-chair position, especially a first-chair position for a complex, multi-party and multi-issue construction case? Of course, like every pilot's first solo flight, every lawyer must have a "first time" getting in the cockpit and taking the controls as lead counsel in the courtroom. However, is a lawyer competent to do so if the lawyer has never previously acted as second or third chair? Or, more drastically, if the lawyer has never appeared in court or argued substantive motions? While this article does not attempt to answer these questions, the authors believe the ethical competency question certainly must be considered for younger lawyers who want to fast-track their trip to first chair.

Another ethical consideration implicated by decreasing trial experience is that of attorney disclosure obligations to clients. Specifically, does an attorney have an ethical duty to disclose

lack of substantive trial experience to a potential client? Model Rule 1.4 imposes the following obligation: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Furthermore, Model Rule 7.1 provides that lawyers must "not make false or misleading communications about the . . . lawyer's services," including omissions of fact necessary to make statements as a whole not materially misleading. Clearly, an attorney cannot affirmatively represent to a client that the attorney has trial experience that he or she does not actually have, but what about the more nuanced question of affirmative disclosure to a client when a litigator does not have any actual substantive courtroom experience? These questions are beyond the scope of this paper but are certainly worth considering, especially since some legal scholars have concluded that "lack of trial experience must be disclosed to prospective clients" and failure to disclose this lack of experience "should be considered actionable conduct."[17]

D. Developing the Critical Ingredient of Experience – Getting to First Chair

Given the drastic decline in trial opportunities for young lawyers, the essential question thus becomes: How do we provide young lawyers with the experience and competency needed to get to the first chair? The sections below draw from the authors' collective experience to explore ideas for both the newer lawyer and the seasoned practitioner relative to identifying opportunities and promoting ways for fresher faces to take the lead on substantive matters in the courtroom.

II. Gaining First Chair Experience

The authors first want to examine the first-chair question from the viewpoint of the younger attorney to answer the often-asked question: How do younger attorneys get trial experience? There are a myriad of varied paths to first-chair trial experience. In the presentation on the subject, the panelists will each tell you theirs – sharing their experiences, and detailing how they made the leap

from supporting actor to the above-the-line headliner in the trial show. Their path may not be yours – there are many ways in which other attorneys were able to make that leap in their careers, and each of our careers is unique.

Many attorneys had few choices in how they obtained trial experience, as their opportunities were born of necessity. Often, those attorneys generated clients who had smaller cases, justifying only one attorney managing and performing all substantive legal work on the case – and thus, there simply was no other chair to fill besides the first. Some attorneys gained first-chair trial experience in other areas of law where trials occur more frequently. For example, working in a smaller firm practicing family law or smaller-figure general liability / personal injury work early in their career. Many attorneys also worked initially in criminal law, either for the district attorney, public defender or the Judicial Advocate General ("JAG"), where the larger number of contested matters and more constrictive time requirements generated more opportunities to be in the coveted first chair. Most attorneys do not have these enviable trial opportunities for first-chair experience and must find their own way to grab the brass ring of experience as their careers progress within the structure of an established law firm. Here are some paths to the first chair that we have seen be effective in gaining first-chair experience.

A. The Golden Ticket - Mentoring Partners

One simple formula for getting into the first chair is to find partner who can serve as a mentor and who is both able and willing to guide you to gaining that experience. There is simply no better way to learn trial work than by sitting in the second chair, observing and assisting with the details of the proceedings from openings, closings and examinations to the minutiae of how the day-to-day trial procedure operates. Initially, it is critical to serve as the second chair to these mentors, so you can learn from watching and assisting the partner overseeing the conduct of the

trial. *Any* chance an associate can get to have that experience should be taken, whether the trial is in "your area" or not. But most importantly, finding a mentor that wants to teach you how to conduct trials as a part of your development is crucially important. The greater the partner's investment in you and your development, including moving into first-chair work, the more likely it is to happen.

Mentoring partners can not only provide this educational opportunity, but can also advocate to their clients to have you more involved in the overarching trial process, and not just toiling as the uncredited character actor. This is because at as fundamental level, trial work is personal work – normally a client hires a specific attorney to represent and advocate for them at trial. Thus, when that attorney is your mentor, they are in a unique position with the client to advocate for you to be more involved in trial from early on in the process – including potentially examining specific witnesses (or categories of witnesses), or even presenting opening statements or closing arguments. With a partner's recommendation, clients will feel comfortable with you acting in greater responsibilities at trial. Once you have shown you can handle those responsibilities, many times a truly mentoring partner will advocate that you handle another matter, maybe a smaller matter but in a higher responsibility role, thus putting you in the best position to be in the first chair if the matter ends up requiring trial.

Finding partners who will not only mentor but advocate for you with their existing clients is the proverbial "golden ticket" to advancing your career in trial work. In sum, having a partner advocating your increased responsibility in trial work is a wonderful path to eventually finding yourself in the first chair seat. Also being paired with clients with multiple matters and long-term relationships allows for you to develop trust from that client who in turn, hopefully, will trust the associate to have a greater role at trial. Finally, the mentoring relationship allows both clients and

client-relationship partners to discuss succession planning regarding the first chair position, i.e., who will take over the first chair role after the experienced lead counsel retires.

B. Becoming the Indispensable Associate

Another path to a obtaining a greater role in trial is to take on a role before trial that no one else is doing. Associates can make themselves valuable, and often times indispensable, by becoming the "subject matter expert" on a particular fact issue or areas of issues (such as design, delay, specific defect, etc.) or on specific procedural issues at trial (jury instructions, verdict forms, motions in limine). Once the associate is "the go-to" on a particular subject, fact or procedure, it is usually easier for that associate to take the lead on advocating or defending those issues at trial. For example, if the action involves multiple specific aspects that are in dispute, then the associate can take on one of those areas, becoming the maestro of the related facts, issues, and documents in that area. Usually that associate would also prepare the experts in that area so by the time the trial comes around, there really is no better person to examine witnesses in the case but that associate.

This is also an enormous benefit to the first-chair attorney, particularly in complex matters, because "the go-to" allows the lead attorney to focus on other aspects of trial, including presenting a cohesive theme and story for the client's positions. So not only does taking the lead on an issue (factually or procedurally) put you in position to have greater trial responsibility, it also endears you to the lead attorney who, as noted above, can advocate and mentor you to take the next step to first-chair trial work.

III. Gaining First Chair Experience – Other Opportunities & Ideas

As noted above, there are many different paths for younger lawyers to utilize when seeking more trial experience, but attorneys at all levels must take a vested interest in identifying,

promoting, and utilizing these opportunities in order to develop and increase trial skills.

A. Federal Court Standing Orders Promote Roles for Newer Attorneys in the Courtroom

Across the nation, the federal judiciary is recognizing that it can play a role in reversing the trend in which young lawyers have declining opportunities to practice oral argument in court and gain valuable trial experience. To this end, many federal district judges have created standards encouraging inclusion of and opportunities for younger lawyers. For example, some courts have issued separate standing orders outlining detailed policies and highly specific procedures to encourage more seasoned attorneys to allow the newer and less experienced lawyers on their team an opportunity for substantive opportunities in court. Other courts have incorporated simple statements into their individual court procedures and practices that highlight their intention or goal to provide younger attorneys with opportunities for oral argument. A "young lawyer" is typically defined across these many orders as practicing for fewer than four to seven years. Though these orders are all slightly different, their overall goal is the same: to counteract a decline in opportunities for young lawyers and encourage the participation of newer attorneys in all court proceedings. The next portion of this paper summarizes some of the applicable federal court standing orders across the nation.

i. Texas

Starting in Texas, United States District Court for the Southern District of Texas Judge Alfred H. Bennett simply added a "Young Lawyers" section to his Court Procedures and Practices:

> "[t]he Court strongly encourages litigants to be mindful of opportunities for young lawyers (i.e., lawyers practicing for fewer than seven (7) years) to conduct hearings before the Court, particularly when the young lawyer drafted or contributed significantly to the underlying motion or response."[18]

Judge Bennett observes "that it is crucial to provide substantive speaking opportunities to

young lawyers and that the benefits of doing so will accrue to young lawyers, to clients, and to the profession generally."[19] Therefore, he encourages all lawyers to keep this particular goal in mind while in his court.[20]

As opposed to other judges who include a small – and perhaps slightly vague – paragraph with a general statement of intention regarding this matter within their general court practices and procedures, Magistrate Judge Kimberly Priest Johnson for the United States District Court for the Eastern District of Texas issued a separate standing order specifically addressing courtroom opportunities for Newer Attorneys (defined as attorneys practicing for less than seven years) and providing detailed instructions on the process.[21] The standing orders state, "[t]he court strongly encourages litigants to be mindful of opportunities for Newer Attorneys to conduct oral argument before the court, particularly for motions where the newer attorney drafted or contributed significantly to the underlying motion or response."[22] Judge Priest further elaborates that if a party is interested in having a Newer Attorney argue a motion, that party should contact chambers to request oral argument and inform them that a Newer Attorney will argue the motion or a portion of the motion.[23] After such a request is made, the court will grant the request for oral argument on the motion even if the court would not normally permit oral argument.[24] In other words, in the instance where the Court is inclined to rule on the papers, the court will weigh the hearing request in favor of oral argument if the argument is handled by a Newer Attorney. Judge Priest Johnson's orders also state that she will strongly consider allocating additional time for oral argument beyond what the court may otherwise allow, and also permit more experienced counsel to speak on the motion as well where a newer attorney is arguing the motion.[25] Finally, the court will notify the opposing counsel if this request is granted, and invite the opposing counsel to reciprocate in permitting a newer attorney to make its argument on the motion. [26]

Judges for the United States District Court for the Western District of Texas (Judge Gilliland of the Waco Division and Judges Hightower and Howell of the Austin Division) all have the exact same standing order issued at different times between 2020-2022, which is also remarkably similar to Judge Priest Johnson's standing order. All four standing orders follow the same style of outlining the background behind the issuance of the standing order, then proceed through similar procedures regarding requests for younger attorneys that must be followed in order for them to be permitted to conduct oral argument.[27] Judges Hightower, Gilliland, and Howell's standing orders all conclude with a statement demanding that all attorneys, including newer attorneys, be held to the highest professional standards and that the court will draw no inferences from a party's decision not to have a newer attorney argue a motion.[28]

The United States District Court for the Northern District of Texas Chief District Judge Barbara M.G. Lynn lays out her requirements in a tab labeled "Judge Specific Requirements" on her home website.[29] Under "Opportunities for Young Lawyers" in the "Motion Practice" area she states plainly that she is "aware of a trend today in which fewer cases go to trial, and in which there are generally fewer speaking or 'stand-up' opportunities in court, particularly for young lawyers (*i.e.*, lawyers practicing for less than seven years)."[30] She reminds litigants to be mindful of providing opportunities for young lawyers, "particularly for motions where the young lawyer drafted or contributed significantly to the underlying motion or response."[31] She continues that if attorneys stipulate that a less experienced lawyer will be handling the argument, then this will weigh in favor of actually having a hearing.[32] Judge Lynn concludes by saying, "it is crucial to provide substantive speaking opportunities to young lawyers, and that the benefits of doing so will accrue to young lawyers, to clients, and to the profession generally."[33]

ii. California

California District Courts have provided succinct but powerful additions to their general standing orders for civil cases. Judge Jacqueline Scott Corley for the United States District Court of the Northern District of California simply states, "[t]he court strongly encourages parties to permit less experienced attorneys to actively participate in the proceedings by presenting argument at motion hearings or examining witnesses at trial. The Court permits more than one attorney to argue for a party at a motion hearing or case management conference if this creates an opportunity for less experienced attorneys to participate."[34] United States District Court for the Northern District of California Magistrate Judge Virginia Demarchi gets right down to business in her Standing Order for Civil Cases under "Other Matters" with a succinct one-liner: "the court welcomes and encourages oral argument by less experienced attorneys on any matters argued before the court."[35] Finally, United States District Court for the Northern District of California Judge Jon S. Tigar generally states, "[t]he [c]ourt strongly encourages the parties to permit junior lawyers to examine witnesses and to have an important role at trial."[36]

United States District Court for the Northern District of California Judge James Donato also has a short statement in his standing order for civil cases. He concludes that, "... the court will typically guarantee oral argument on any motion handled by a lawyer with 6 or fewer years experience [and] the court should be advised that a newer lawyer is doing the argument will in advance of the hearing date."[37] While Judge Donato classifies a "newer lawyer" as having practiced for six or fewer years, United States District Court of the Northern District of California Senior Judge William Alsup and United States District Court for the Eastern District of California Chief Judge Kimberley J. Mueller both stipulate that they will only consider an individual as a "newer lawyer" if they have been practicing four years or less.[38] Judge Alsup states, "if... a written request for oral argument is filed by any side before a ruling stating that a lawyer of four or fewer

years out of law school will conduct the oral argument or at least the lions share, then the judge will hear oral argument, believing that young lawyers need more opportunities for appearances than they usually receive." [39] Finally, United States District Court for the Southern District of California Judge Barry Ted Moskowitz determines a newer attorney is someone practicing less than five years.[40] Judge Moskowitz concludes, "while the decision as to who should argue is for the lead attorney to make, the [c]ourt encourages the lead attorney to allow the junior attorney writing the motion papers to argue [and Judge Moskowitz] … will allow the lead attorney to also participate in the argument."[41]

Northern District of California Judge Edward M. Chen's orders are notable because they specifically mention that historically under-represented groups should in essence be prioritized to participate in proceedings.[42] Judge Chen's standing orders states, " the [c]ourt strongly encourages parties to permit less experienced lawyers, including lawyers from historically under-represented groups, to actively participate in the proceedings by presenting argument at motion hearings or examining witnesses at trial [and] [t]he [c]ourt is amenable to permitting a number of lawyers to argue for one party if this creates an opportunity for such attorneys to participate."[43]

iii. Georgia

In Georgia, Judges Mark H. Cohen, Timothy Batten, and Leigh Martin May of the United States District Court for the Northern District of Georgia agree in their Civil Standing Orders that the court will grant requests for oral argument on contested substantive motions if the request is made by a newer, less experienced attorney.[44] However, Judge Cohen states that a newer attorney is someone "who is less than (7) years out of law school," while Judge Batten and Judge Martin May stipulates that a newer lawyer is someone "less than five years out of law school."[45]

iv. Massachusetts

Many of the Massachusetts United States District Court Judges have adopted specific standing orders regarding courtroom opportunities for relatively inexperienced attorneys. They all seem to be based on Judge F. Dennis Saylor's 2005 standing order – issued almost twenty years ago – that "strongly encourage[es] the participation of relatively inexperienced attorneys in all court proceedings."[46] It seems that Judge Saylor was on the forefront of the movement by federal court judges to issue standing orders to address the problem of inexperienced junior lawyers. Judge Timothy Hillman, Judge Indira Talwani, and Judge F. Dennis Saylor all stipulate generally that all attorneys appearing in their courts, even the inexperienced lawyers, shall be held to the highest professional standards, meaning that – regardless of experience – attorneys need to be prepared and knowledgeable about the case and the law.[47] Additionally, the orders state that attorneys in their courts must also have a degree of authority commensurate with the proceeding.[48] Finally, the orders agree that inexperienced lawyers should be supervised by a lead attorney unless the court gives them leave to do otherwise.[49] Judges Saylor and Hillman also mention in particular their reasoning for these standing orders.[50] They state, "[c]ourtroom opportunities for relatively inexperienced attorneys, particularly those who practice at larger firms, have declined precipitously across the nation in recent years.[51] That decline is due to a variety of factors, but has been exacerbated by the proliferation of rules and orders requiring the appearance of "lead" counsel in many court proceedings."[52] The orders all conclude that counsel should seek additional guidance from the court in the application of this policy.[53]

District of Massachusetts Judge Denise Casper includes all of the same stipulations that Judges Talwani, Saylor and Hillman have in their standing orders, but Judge Casper has additions tweaking the template that Judge Saylor laid out in 2005.[54] Judge Casper seems to bring attention to the fact that implementing these orders is actually working for those who are taking advantage

of this policy.[55] She begins her standing order by stating, "anecdotal information indicates that [Judge Saylor and Hillman's] order[s] have had the desired effect of having more well prepared junior attorneys attend status conferences, argue motions to the [c]ourt, and, under appropriate supervision, examine witnesses at trial."[56] She also provides background information about a Massachusetts Task Force focused on analyzing the declining rate of jury trials. Judge Casper notes that the task force "called upon 'judges presiding over pre-trial conferences and related matters to identify and encourage opportunities for a junior attorney to participate in the examination of witnesses or other significant trial work.'"[57] She concludes, after stipulating the same court rules as the other Massachusetts judges, that the "standing order is not self-executing [and]... it is [the] more experienced, supervising colleagues who must effectuate the policy articulated in this standing order."[58]

v. Oregon

In Oregon, Judge Michael McShane has a section titled "Opportunities for Young Lawyers" directly on his website rather than in a standing order of any kind.[59] He establishes a more lenient understanding of "young lawyer" at maximum seven years practicing.[60] He reiterates some of the same talking points of previously-discussed standing orders and directives: (1) allow young attorneys to have opportunities for oral argument as well as witness examination "especially where young lawyers drafted or significantly contributed to motions and responses"; (2) these experiences accrue to the inexperienced lawyer, clients and legal profession in general; and (3) an experienced attorney may supplement a young lawyer's arguments/questions if necessary.[61]

vi. Tennessee

Eastern District of Tennessee Judge Travis R. McDonough also utilizes many of the same buzzwords and phrases founds in other standing orders and states, "the Court believes it is crucial

to provide substantive speaking opportunities to young lawyers and that the benefits of doing so will accrue to young lawyers, to clients, and to the profession generally.[62] Accordingly, the Court will consider, among other things, whether the requested oral argument presents a speaking opportunity for a young lawyer in determining whether to schedule oral argument on a motion."[63]

vii. New York

The United States District for the Southern District of New York Judge Mary Kay Vyskocil outlines participation by a junior attorney in her Individual Rules of Practice in Civil Cases stating that she encourages less experienced attorneys to participate in "pretrial conferences, hearings on discovery disputes, oral arguments and examinations of witnesses at trial- particularly where the attorney played a substantial role in drafting the underlying filing or in preparing the relevant witness."[64] Again, we see here the similar stipulation that more than one lawyer is permitted to argue for the party so that junior attorneys might participate.[65] The attorney, of course, must have the authority to bind the party.[66] She concludes that the ultimate decision "is for the lawyer in charge of the case, not for the Court."[67] United States District Judge of the Southern District of New York, Philip M. Halpern, in his Individual Practices in Civil Cases repeats some of the same points but then goes on to also stipulate that he wants to encourage "in particular, attorneys with less than 5 years' experience… to participate in all courtroom proceedings."[68] Finally, Eastern District of New York Judge Ann Donnelly also has many of these same elements as her other New York judicial colleagues in her Individual Practices in Civil Cases, but also includes, "relatively inexperienced attorneys who seek to participate in evidentiary hearings of substantial complexity (e.g. examining witness at trial) should be accompanied and supervised by a more experienced attorney."[69]

B. Pro Bono Trial Opportunities

One answer to the often-asked question of how young lawyers can get more hands-on trial experience is resoundingly the same: "do pro bono work."[70] In addition to helping an individual or organization in need, pro bono work provides exponentially more first chair and substantive trial work opportunities for young lawyers, especially since pro bono cases typically have a greater likelihood of trial and appeal.[71] While pro bono opportunities abound, many newer attorneys hesitate to take a case on for numerous reasons, with one the most common explanations being the tendency for pro bono opportunities to fall in areas outside of a construction litigator's bailiwick such as criminal, family, probate law. First, the authors encourage young lawyers to seek any opportunity that provides meaningful courtroom experience, even if outside of the lawyer's standard practice area. Moreover, many local bar associations group or segregate pro bono cases into various legal areas and regularly provide opportunities for consumer and commercial litigation cases. In addition, pro bono assistance can also include representations of associations and non-profit agencies, many of whom encounter litigation issues more aligned with a construction litigation practice.

In fact, Building For Good, Inc. ("B4G"), which was launched by a group of attorneys from the American Bar Association Forum on Construction Law, is a national 501(c)(3) non-profit with the specific mission of providing a platform to link nonprofits and charities with skilled, volunteer construction lawyers.[72] B4G volunteer attorneys provide both transactional and dispute resolution services, and the platform provides a burgeoning construction lawyer with tremendous opportunity to not only gain substantive experience not available at that stage in private practice, but to also give back in a pro bono capacity in their area of growing expertise.[73]

Younger attorneys may also hesitate to add to their already-heavy caseloads by taking on non-billable work that may provide experience but would undercut their bottom-line in terms of

salary or bonuses associated with billable hours. Law firms can (and many do) address this hesitancy by encouraging newer attorneys to accept pro bono opportunities and establishing programs that incentivize them to do so, such as (a) providing billable hour "credit" for pro bono work; (b) encouraging a certain portion of annual billable hour requirements to be allocated to pro bono work; or (c) pairing senior attorneys with junior attorneys to provide advisory and mentorship support during the life of the pro bono litigation. In addition to standard pro bono work, some law firms also participate in "lawyer on loan" programs which allow newer attorneys to be "loaned" to a governmental entity for a period of 3-6 months to try minor criminal offenses to judges and juries.[74] These p.rograms help young lawyers gain valuable courtroom and trial experience that would be impossible to garner at that level within their own private firms.

Regardless of the pro bono opportunity at hand, there is a reason that "do pro bono work" is the standard answer to the question of how young lawyers can gain more trial experience. It is a tried-and-true resource for young litigators to gain the skills and experience needed to transform them into trial lawyers.

IV. Practical Implementation: Making the Commitment to Developing First Chairs

The path to creating lawyers who are capable of leadership is long and arduous. Anyone who has traveled this path knows that it takes far more time to mentor younger and less experienced lawyers than it does to do the work oneself. Why bother?

Building the first-chair lawyers of the future produces colleagues who can serve established customers, draw in and cultivate clients of their own, and raise even younger lawyers to do the same. Firm leadership and even succession planning becomes easier as young lawyers are taught how to push past mere task-based work and think more tactically and strategically. A series of suggested steps follows, with supporting resources and considerations fueled by the panel's experiences and results over the years.

Each lawyer's natural strengths will vary. No lawyer, however, emerges from the bar exam with a complete skill set. A planned, systematic approach to the process will offer the best prospects for success.

A. Identifying the Protégé—and Seeing It Through

Finding a suitable person for development into a first-chair lawyer involves a host of considerations, including:

- Is the young lawyer the right match for the mentor in question?
- Does the mentor have the time, energy, and willingness to commit to an investment in this person, and see the process on through to completion (or at least give the mentorship a legitimate chance to succeed)?
- Does the mentor/firm have the capacity and willingness to devote resources—both within the organization and externally—to support the future first-chair lawyer?
- Finally, does the young lawyer *understand* the goal and pathway to it, *want* the first-chair responsibility and all of the commitment that goes with it, and have the *capacity* to learn the role, acquire the skill set, and execute the position?[75]

Relative to the last point, the path to successful mentorship requires an enormous investment of time, to be sure—but also a commitment to knowing and understanding the person receiving the training. Case leadership demands a great deal of knowledge, understanding, preparation, and confidence—and an attention to detail on many levels. One aspect of this is understanding the *person* who aspires to a first-chair role. Naturally, there is no better time for this than at the outset, of course, when interviewing a prospective hire. But regular check-ins along the way are utterly crucial, as are clear communication and setting SMART expectations and goals: that is, specific, measurable, achievable, realistic, and time-related.[76]

The world is full of resources that can help people "see" one another and calibrate training and working relationships accordingly. The following is a sample of prominent tests and inventories that can illuminate aspects of personality—including strengths and weaknesses—and

facilitate the most productive approach to mentorship:

(1) The Myers-Briggs Type Indicator;[77]

(2) DiSC Assessment;[78]

(3) The SHL Occupational Personality Questionnaire;[79]

(4) The Big Five Personality Test;[80]

(5) The Integrative Enneagram Test;[81]

(6) Typefinder;[82]

(7) The Clifton StrengthsFinder;[83]

(8) The Minnesota Multiphasic Personality Inventory;[84]

(9) The Caliper Profile;[85] and

(10) Goleman's Emotional Intelligence Test.[86]

Some have argued that the most senior lawyers may be the best situated of all (through time and flexibility—not to mention their experience) to serve as mentors for attorneys just starting their careers.[87] But there is no substitute for time actually spent working on the relationship—perhaps even including the commitment and vulnerability to learn another person's "Love Language."[88]

B. Opportunities Abound: S/M/L/XL Chances for First-Chair Activity

While statistics clearly show a dramatic downturn in the number of cases brought to trial each year—and the pandemic has done the hungry litigator no favors—the landscape is packed with mentorship moments and training opportunities of all sizes. Consider the following list of activities, most of which are encountered weekly or even daily in a law practice—and each of which can be handed off and "coached up" as a discrete exercise:

- New client intake
- Pleadings
- Depositions
- Expert coordination

- Motion practice
- Status reports
- Discovery disputes
- Budget preparation
- Deal negotiation
- Mediation
- Position statements
- Liability analysis
- Papers and speeches
- Scheduling conferences

C. Ready for the World? Investing in Oneself Through Extracurriculars

First-chair lawyers should also be challenged to develop themselves through commitments outside the everyday practice of law. This can take the form of joining organizations, attending conferences, teaching, service to the profession, service to the community, direct engagement with industry members, and scholarly research and writing. For construction lawyers in particular, vast opportunities await, including professional organizations of architects and engineers, the Urban Land Institute, specialty practice groups of lawyers, local Rotary chapters, and local, state, and national construction law organizations. Lawyers who may not crave extensive social networking nevertheless can benefit immensely from seminars and other continuing education programs, and have plenty of areas where they can direct their intellectual and business development energy.[89]

D. Trust the Process—and the People

Struggle, and even failure, are inevitable. The process of learning the law and developing new and/or stronger skills means reaching beyond prior work, and leaving the safe space of tasks already performed and areas previously conquered. If managed and embraced, failure can be a powerful teacher and a transformative experience.[90] Every reader of this paper has failed in the course of a lifetime, and a career. The mentor's responsibility—internally to the trainee, laterally to one's colleagues, and outward to the client—is to find opportunities for learning and growth while serving the client well.

One author's longtime mentor described his process as "Watch one, do one, teach one." Anyone who has seen an accomplished lawyer "go" knows that seeing and hearing that lawyer perform often lights a candle of understanding that might not be available without seeing it happen. This is particularly the case when the mentor in question is utilizing a key strength—such as wooing a client, cross-examining a technical expert, managing a crisis moment in a case, or conducting a liability analysis in a high-stakes dispute. For his or her part, the trainee must deliver the effort of preparation. This means arriving with the most knowledge about the task at issue, and a willingness to take the risk and accept both instruction and criticism.

Trusting the process means establishing a process in the first place, and doggedly complying with it. Consider the following format, which applies to one author's mentoring relationship with a lead associate:

- Mandatory ***weekly*** check-in to review docket, identify essential and/or time-critical tasks, and discuss allocation of tasks and resources, emergent issues, and delegation/training opportunities;
- Travel to and attendance at industry events (including ABA Forum meetings, AIA local chapter and statewide conferences, and construction-law-specific programming)—at the firm's expense;
- Maintenance of a "trust zone" in which the mentor assumes nothing and is allowed to teach/pontificate, while the mentee is encouraged and unafraid to ask for help on how to perform a task or solve a problem;
- Periodic discussion of lead associate's own mentorship of 1- to 3-year junior associate—including mandatory weekly check-ins;
- ***Monthly*** (preferably ***bi-weekly***) lunch outing to forge better rapport, and featuring *zero discussion of work*; and
- ***End-of-year*** review, including an assessment of the protegee's progress, goals for the year ahead (focusing on refinement of professional skills, as well as business development opportunities), and compliance with firm's Core Values.[91]

The direct mentor should never be the young lawyer's only resource, nor even her only *mentor*. Beyond the value of learning through doing—including the daily practice and the

extracurricular activities mentioned herein—aspiring first-chair lawyers should actively seek out the wide array of resources available outside their own workplace. The entirety of the Colorado Bar Association placed such a premium on mentoring that it established a statewide program called the Colorado Attorney Mentoring Program (CAMP).[92] The State Bar of Texas maintains an online bank of willing mentors available to serve, and a variety of resources aimed at filling needs for lawyers who otherwise have no access to this support.[93] The ABA Forum itself has aggregated a list of the various states' lawyer mentorship programs across the country.[94] If the primary mentor is also an employer within the young lawyer's own firm, skills can be honed through firm-supported attendance at an array of workshops, seminars, and other learn-by-doing activities such as "trial boot camps."[95] For those firms without the resources to provide for "boot camps", the ABA Construction Forum hosts an excellent bi-annual trial advocacy program for young attorneys.[96]

V. The Importance of Mentorship to Maintaining and Developing Talent

There has been a recognized need, as well as an increasing demand, for mentoring or sponsoring within law firms since the mid-2000's, spurred in part by a significant increase in associate attrition. In 2005, the National Association for Law Placement reported that attrition rates for fifth year lawyers was 78%, *i.e.* that after five years of practice, 78% of lawyers were no longer practicing at their first law firm.[97] In 2022, NALP reported significant increases in both the levels of associate hiring and attrition, presumably as part of the "great resignation," with associate attrition reaching a historic average rate of 26%, up 10% from 2021. Also notable was the high level of turnover among lawyers, with 10% of lateral hires and 6% of entry level associates departing within one year of joining their firms.[98]

The 2022 Law Firm Culture Survey — conducted by Major, Lindsey & Africa and

published by Law360 Pulse — asked attorneys to identify the ten traits that they most wanted to see reflected in their firm's culture. Training and mentoring were identified as the most important:

1. Emphasis on training and mentoring **(44%)**
2. Diversity in race, gender, ethnicity and religion **(38%)**
3. Has policies that support attorneys' well-being and work-life balance **(36%)**
4. Succession/transition minded (client relationships are passed to successive generations) **(36%)**
5. Women and people of color occupy significant leadership positions **(33%)**
6. Compensation and other important decisions are transparent to all partners **(29%)**
7. Firm listens to input and everyone can contribute ideas **(29%)**
8. Civic minded (encourage or award credit for pro bono work and/or public service) **(27%)**
9. Sharing of origination credit **(26%)**
10. Low turnover (partners and associates remain for 10+ years after elevation) **(25%)**

Given the high rate of turnover, it appears likely that most attorneys are not offered the training and mentoring that they seek. Law firms also struggle to provide appropriate and effective training programs. This section of the paper addresses the experience of panelists and their identification of the attributes of a successful – and some unsuccessful mentoring and training programs, specifically with regard to providing opportunities to first chair a trial or an arbitration proceeding.

A. Mentorship Success Stories: What Worked?

i. Helping Younger Lawyers Develop a Practice Niche

Construction litigation may appear to be a specialty in itself; however, it encompasses a wide variety of potential practice areas. The shortest and surest route to first chair experience is

to develop a particular niche practice within the construction industry. This might be a particular field of construction, such as the power industry or transportation projects. It may also be a particular segment of the industry, such as federal, state and local government procurement. The best way to create a niche practice and differentiate yourself is to have experience through a case or transaction, but it can also be achieved by research, study and publication. Law firms and mentors should identify opportunities for associates and give them guidance and support in developing these niche areas.

ii. Encouraging and Assisting Younger Lawyers to Seek Out Opportunities that Lend Themselves to Trial Experience

Pursue opportunities and if one presents itself, the best advice is usually to take it—unless it clearly requires a more senior level of trial experience or a different subject matter expertise. Also, express interest in matters that could provide an opportunity to get hearing or trial experience. For example, state and local procurement protest regulations often offer more "process" than those at the federal level, including evidentiary hearings. Due to their fast-paced nature and administrative proceedings, they can provide a good opportunity to present a witness.

iii. Offering as Much and as Varied Experience as Possible.

Mentors should provide their associates with appropriate opportunities and prepare them for it, by inviting them to observe depositions, oral arguments, pretrial conferences and trials/arbitrations. This is particularly easy to do in a virtual setting where the cost of attending and the time invested in attendance is minimal. Younger lawyers should also seek out information about work being performed by the firm and request opportunities to work on cases or projects that interest them or fit within their strategic plan.

iv. Volunteering to Second Chair for the Younger Lawyer

In an appropriate matter and setting, the mentor should consider acting as the "second

chair." This gives the other lawyer an opportunity to experience not only the work of the first chair, such as opening and closing statements and examining key witnesses, but also to appreciate the responsibility that comes with the first chair seat. The most important part of the first chair experience is appreciating that you have ultimate responsibility for the outcome. Having an experienced mentor can provide support for the first chair junior lawyer and the client.

v. Integrate and Introduce the Younger Lawyers from the Outset

For new clients and matters, emphasize early that the firm places an emphasis on training and ensuring that all lawyers on the team are there for a reason and have the capability to take on significant responsibility for the case and outcome of the case. Make the younger lawyers a visible part of the team. Increasingly, outside counsel are more apt to ask questions regarding the diversity of the team. View this as an invitation to address the firm's training programs and how responsibilities would be divided among the team members, including the junior team members.

vi. Highlighting Successes

Mentors should regularly consider opportunities for younger lawyers, including motions, depositions, and public speaking both for the younger lawyer to observe and to participate in themselves. Advertising successes of all kinds and giving credit to the younger lawyer is key to enhancing confidence among peers and clients.

B. Negative Mentoring Experiences Are Worse than No Mentoring

According to various research studies, a bad mentorship experience can outweigh the positive aspects of a mentorship program:

> What makes this so dangerous for companies is that there is more harm to be done by bad mentorship than there is good to be done by great mentorship. Researchers have established that negative mentoring experiences caused more intense emotional and behavioral responses among employees compared to positive incidents. More, the ramifications of failed mentoring relationships

> can lead to emotional, psychological, and even physical ailments. And feelings about poorly executed mentoring programs can translate into negative feelings about a company. When a company has a lackluster mentoring program, Labin says, "you start to erode trust in the organization."[99]

Good judgment and empathy can likely prevent the worst of a bad mentorship experience, but there are very few training opportunities for mentors. There are also certain types of mentoring programs, particularly formal and mandatory workplace programs, that are singled out as ineffective or likely to produce negative reactions:

> But it's hard to fix mentoring programs if employers don't ask for feedback and employees don't tell them what's wrong. And that may be the case in many places. When I reached out to a group of elite, professional women about their experiences with workplace-based mentoring, hardly anyone volunteered to share stories on the record, for fear of professional blowback. One woman simply wrote, "Try to avoid formal programs at all costs. Torture."

Id.

This sentiment was echoed by one of the panelists. At her firm, a partner instituted a mandatory "trial practice" seminar that was reminiscent of a law school class. The seminar was held weekly and associates were assigned to prepare for mock depositions and witness examinations, as well as written assignments. Attendance and participation was mandatory for all associates. It was universally despised and viewed as ineffective.

In the experience of the panelists, the best first-chair opportunities have come through relationships characterized by friendship, respect and trust between a mentor and junior lawyer trial team. The junior lawyer must feel supported when difficulties arise, but be given the opportunity to make the hard decisions, knowing that the mentor will provide advice and never second guess their decisions. A trial where a junior lawyer both gets the opportunity and enjoys the opportunity to first chair with a mentor's support is the ideal first chair experience.

C. Setting Your Mentorship Program Up for Success

Mentoring programs do not fail due to lack of good intentions; instead, the biggest hurdles to success are lack of commitment, poor communication, and unrealistic expectations.

Provide training. Mentors should be given more support and resources to assist them to be effective in their role. Mentoring is about teaching, which everyone can become better at with some training and support.

Identify the goal. While committing to provide a lawyer with a first-chair trial experience is a laudable goal, it is not an outcome that is within the control of the law firm. However, positioning lawyers for more client facing roles and providing varied opportunities can be achieved with planning and commitment.

Require accountability and process. While formal programs are universally panned, a mentor relationship can easily fizzle out, especially if the mentor and mentee are not working together closely. It is helpful to make a list of goals at the outset and report at regular intervals on their status.

Be prepared. As discussed in the preceding section of this paper, most judges and arbitrators are welcoming and encouraging of junior lawyers taking first chair responsibility, but do some research into what the lawyer can expect from the bench or tribunal. Also prepare for dealing with an opposing counsel who may only address the senior lawyer or be obviously dismissive of the junior lawyer. Discuss strategies for dealing with difficult opposing counsel in an effective manner so that the junior lawyer is not unprepared or flustered. Also, give clients and witnesses advance notice of the junior attorney's role in the litigation.

VI. Addressing Implicit Bias in the First-Chair Role

The authors want to conclude by addressing a final impediment that exists relative to

promoting younger lawyers to a first-chair role: implicit bias. Despite the fact that women make up 37% of the legal profession, women are less likely to occupy lead counsel roles, such as first chair trial counsel. In a 2015 study of 558 civil cases filed in the US District Court for the Northern District of Illinois, men were three times more likely to be the lead counsel in civil cases than women. Although disappointing, this statistic is unsurprising given the challenges that exist to become lead trial counsel for any litigator – challenges which are frequently compounded for women litigators and even more so for women litigators of color.

The reasons for the disproportionate representation can be traced to a number of factors, but are seemingly keyed to implicit bias in the profession. First, implicit bias in law firm management and among clients continues to pose hurdles in increasing representation in the role of first chair/lead trial counsel. On the client side, in-house legal departments may request or even require that first-chair trial counsel in their matters be experienced litigators with a proven track record, and justifiably so – and trial work is fundamentally personal work, with the client typically choosing the lead attorney. This, recursively, may impact the law firm's choice in proposed lead counsel for its pitch when new clients are approached. When the firm is pulling from a small and homogenous group of experienced first-chair trial counsel, this likely exacerbates the existing diversity problem by presenting the client few options.

Second, on the law firm side, implicit bias may play a part in the determining the types of assignments women attorneys receive compared to their male counterparts. Additionally, partners who are frequently exposed to the courtroom and try matters frequently simply and unconsciously choose assistant counsel who mirror what that they see themselves in, i.e., those with the same race, gender, and socio-economic background.

Social factors can also play a part in some attorneys' exposure to trial work, potentially

limiting their eventual chances to serve a lead trial counsel. Examples include women who take time away from their jobs to tend to familial obligations, or women who are on "non-traditional" tracks at their law firms. Additionally, biases perpetuated by stereotypes about women can also serve as barriers for increasing diversity in lead trial counsel positions. Firm management and clients may be inclined to choose the same first chair counsel because they anticipate how a judge or jury may perceive anyone "outside of the box."

Putting an emphasis on diversity and inclusion in the first chair, and trial teams generally, makes good business sense. Many clients now demand that their matters be staffed with specific considerations on diversity and inclusion, and it is likely that this trend will increase in the near and long term. Firms that cultivate and develop attorneys with the promise of becoming talented litigators, keeping an eye on diversity and inclusion, will be better prepared and ready to take on matters organically and benefit from an existing team cohesion. Perhaps more importantly, the data shows that a diverse trial team may help achieve better results. A diversity of experience and worldviews can help with a trial strategy because there are more competing ideas and avenues to be explored, vetted and included in trial. A diverse trial team may be able to reach a broader audience and/or help convey difficult concepts more clearly to a witness, jury, or judge. There is also data suggesting that jurors, across the country, find women attorneys to be more believable.

One of the best ways to combat implicit bias, and maximize your trial team's advantages, is through simple awareness of its existence. Implicit bias training has a track record of results in reducing bias that might be preventing opportunities going to women and people of color. Law firms should recognize the benefits of diverse trial teams and be incentivized to provide such teams to client. As noted above, training and mentorship is a key component of developing more diversity and inclusion in trial teams. Because mentorship of younger attorneys takes both time

and effort, firms should incentivize these relationships by establishing formal programs that can provide both structure and guidelines, while also allowing some freedom for these relationships to grow organically.

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[20] *Id.*
[21] *See* Eastern District of Texas, Standing Order Regarding Courtroom Opportunities for Newer Attorneys.
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[23] *See id.*
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[29] *See* Chief District Judge Barbara M.G. Lynn, Judge Specific Requirements, The United States District Court for the Northern District of Texas, *accessible at* https://www.txnd.uscourts.gov/judge/chief-district-judge-barbara-lynn

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[95] The American College of Trial Lawyers has published recommendations for law firm/in-house trial training programs. *See* American College of Trial Lawyers, *Mentoring The Next Generation of Trial Lawyers – Developing Excellent Trial Lawyers in an Era of Diminishing Trials* (2019), https://www.actl.com/, https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/mentoring_the_next_generation_final.pdf?sfvrsn=4 (last visited Sept. 5, 2022).
[96] Many opportunities are described elsewhere in this paper—including pro bono service opportunities—and organizations like the ABA Forum on Construction Law often present "practicum" events to help members hone their practice skills. The National Institute for Trial Advocacy (https://www.nita.org/s/) is one of the longest-standing purveyors of "Learn by doing" training events.
[97] Paula A. Patton, "*Toward Effective Management of Associate Mobility, A Status Report on Attrition: Findings From a National Study of Law Firm Retention and a Review of Best Practices"* (NALP Foundation, 2005).
[98] NALP Foundation (April 26, 2022)
[99] Mel Jones, "Why Can't Companies Get Mentorship Programs Right?" The Atlantic (June 2, 2017), https://www.theatlantic.com/, https://www.theatlantic.com/business/archive/2017/06/corporate-mentorship-programs/528927/ (last visited Sept. 5, 2022).