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Surviving (and Thriving) in the First Year of Trial Practice

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Surviving (and Thriving) in the First Year of Trial Practice

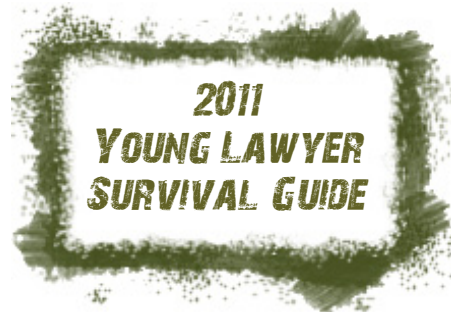
by Maureen A. Howard



The substance and procedure of trial practice may vary across different law firms and agencies, but there are certain challenges that all first-year trial lawyers face when starting out. No matter how brilliant and capable a newly minted attorney may be, there are some lessons more indelibly learned on the job than in law school; while these lessons are undoubtedly valuable, they can be painful and embarrassing. Although reading about the possible pitfalls of the first year of trial practice is not as educational as walking through the fire oneself, I have collected over the years a few tips and strategies for successfully navigating the waters of the first year of trial practice. Experience is, after all, the name we give to our mistakes. In this article, I have drawn on some of those first-year lessons learned by my friends and me that added to our collective experience. My hope is that sharing our mistakes will spare you some of your own.

Do not leave a supervising attorney's office when given an assignment without being crystal clear about what is expected of you. Too often, junior attorneys are fearful of asking questions because they do not want to appear as if they don't know what they're doing. They mistakenly believe that silence will convey understanding and competence. While perhaps initially true, this strategy can backfire if you are unable to confirm through other channels what it is you are supposed to do. Ultimately, your competence will be judged by the quality and timeliness of your work product. Don't shoot yourself in the foot by shortchanging yourself on critical information needed to succeed. Ask up front.

Do not be afraid to ask for help. If you don't know something, it is not because you are unintelligent, unprepared, or incompetent: it is because you haven't done it before. Failing to ask for help early and often can only make you appear unintelligent, unprepared, and incompetent. If a supervising attorney tells you to draft a motion



for attorney's fees, requests for admission, or letters rogatory and you haven't done it before, ask if there are samples in the firm or agency's brief bank, if she has a sample motion you could review, or if there are other resources you should look at for drafting guidance. Do not just smile, nod, and walk away, thinking you will later figure it out on your own. You will likely regret it.

Embrace your role as the client's attorney. No matter how many other attorneys are assigned to a case, and no matter how junior you are on the team, you are still an attorney for the client. No longer are you merely completing a law school assignment. If the supervising attorney asks you to draft a first set of interrogatories, think about what other steps the litigation team should be thinking of implementing in the near future. When you submit the draft interrogatories, suggest next steps that you think prudent, such as additional interrogatories, informal interviews, or requests for admissions. While the chances are that you will miss the mark, your supervisor will be impressed that you are thinking ahead to protect and promote the client's interests. Acting like a mature, proactive professional will promote that image of you in your colleagues' minds.

Do not hide from an assigning attorney or the prospect of more work. A corollary to the above tip is that you owe it to the client to follow up on work completed. This is not a game of "hot potato" where you try to get rid of the assignment as quickly as possible to insulate yourself from more work. A friend of mine once stayed late to slip a draft of an appellate brief into the supervising attorney's

in-box after hours so he wouldn't have to interface with the supervisor. A few weeks later, I asked him how his work had been received. He didn't know. He reasoned that he had completed the assigned project and passed it back: if the partner didn't seek him out with questions or an additional assignment, he had no ongoing responsibility for the appeal. As it turned out, the partner did not see the brief until the day it was to be filed — and demanded substantial revisions. Other attorneys had to be called in at the eleventh hour to pitch in to meet the deadline. Although the client wasn't ultimately injured, it was stressful and embarrassing for the associate and disruptive to the entire department.

Do not leave the courtroom after a judge has ruled on a motion without being clear about the written order. The judge may want the parties to fill out a blank form order by hand and submit it for signature right then, or she may want one of the parties (usually the prevailing party) to prepare a typed order back at the office, present it to the opposing party for approval, and note it for presentation to the court if the parties cannot agree on the language. Ask the judge at the conclusion of a motion hearing, or check with the lower bench before leaving the courtroom. I once sent a junior associate to court to argue a simple motion. A week later, when I couldn't find the order, I called her in to ask about it. She had never thought about documenting the court's ruling, or even asking me about it, which reflected poorly on her.

Read the rules of court every time. Do not rely on your memory of the rules and regulations governing practice in the courts. Make sure to double-check the current rules of civil or criminal procedure and the local rules in state and federal courts every time. The rules change, and failure to comply with the current rules can be fatal to your client's case.

Be exceedingly gracious to and appreciative of your support staff. Paralegals, secretaries, investigators, and project staff members likely know far

more than a first-year attorney about office procedures and the practical aspects of practice. They can give you a huge assist if you respect them and consider their advice. As a first-year attorney, I was told to effect service by publication. I quickly arranged for the pleadings to be published for three consecutive weeks in the *Seattle Times*, to the tune of a couple of thousand dollars. I learned later, much to my chagrin, that I could have satisfied the statutory requirements by publishing in the *Puget Sound Business Journal* for a fraction of the cost. Had I checked with either my secretary or paralegal, I would have saved the firm money and myself humiliation.

If you make a mistake, tell someone. The bigger the mistake, the more important it is to seek advice. Do not ignore it, hoping it will go unnoticed. A friend who is a supervisor in a public defender's office told me of a junior attorney who came and offhandedly reported that there was some "misunderstanding" on the language of a defense psychological expert's report during trial, but that she had smoothed it over with the jury during closing argument. Months later, my friend discovered that the "misunderstanding" was an actual modification of the expert's report by the junior lawyer and/or her intern. The judge questioned the modification and held independent hearings on the issue after the trial, all without the lawyer telling the supervisor the extent of the problem. Hiding the problem left the agency with little choice of action once the problem became known. Early advice and corrective action could have prevented the derailment of the young attorney's career.

Remember that you have an independent duty to the client under the RPCs. Know your ethical obligations! It is no defense to an ethical violation of the Rules of Professional Conduct that you were "following orders" of a senior attorney. If you think something is amiss, talk to the supervising attorney about your concerns. If you still question the conduct, consult your office's ethics guru if you have one, or call the WSBA's ethics line at 206-727-8284 or 800-945-9722, ex. 8284. ◊

"Off the Record" is a regular column on various aspects of trial practice by Professor Maureen Howard, director of trial advocacy at the University of Washington School of Law. She can be reached at mahoward@u.washington.edu. Visit her webpage at www.law.washington.edu/Directories/Profile.aspx?ID=110.

Keeping It Fresh: A Primer on Meeting MCLE Requirements (Yes, you can get creative!)

by Mark H. Bardwell

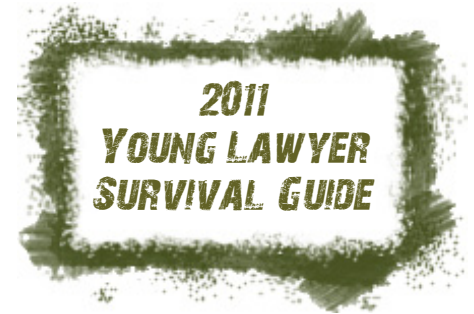
Congratulations! You graduated top of your class and passed the bar. You're on top of the world and on top of your game: after all those late nights on law review, nobody knows all the newest cases as well as you do.

For now.

But did your constitutional law professor invoke *Snyder v. Phelps*? Was *Costco v. Omega* on your e-commerce exam? Did your class on statutory interpretation mention *FCC v. AT&T*? These are just three of the recent U.S. Supreme Court cases that could make your hard-earned legal skills obsolete with the stroke of a justice's pen — if it weren't for continuing legal education.

Mandatory continuing legal education, commonly referred to as MCLE, is a required part of being an active Washington lawyer. Court rule (APR 11) mandates that all attorneys complete 45 credits of MCLE every three years. The clock starts ticking for newly admitted attorneys the first full year after admission. That means the attorneys being sworn in today after passing the bar exam in February 2011 have until December 31, 2015, to finish their 45 MCLE credits. After December 31 of the reporting year, attorneys have until February 1 of the following year to certify their credits. All recordkeeping and certification takes place online at www.mywsba.org. It's a process that WSBA MCLE Executive Secretary Kathleen Todd and MCLE Analyst Susan Strachan call "user-friendly, as easy as paying your license fees." (Todd and Strachan can be reached at 800-945-9722, if you have trouble reporting.)

I asked Strachan how a young attorney can meet her MCLE requirements, especially when CLEs can cost hundreds of dollars and young attorneys can be on tight budgets. Strachan listed a wealth of options. "For young attorneys on a budget, local bar associations are a great source of CLEs," she says. "One of the best benefits of membership in a practice section can be the CLEs they offer. For \$25, you might be able to join a section in your local bar association and attend a meeting each month where you can learn about your area of



practice, network, and earn MCLE credit." Some local bar associations do live online broadcasts of their section CLEs, so that you can participate — and get live credit — even if you have to stay at the office.

"Live" credit is one of a few MCLE compliance requirements of APR 11 that attorneys must meet. "Half of the 45 credits must be in a live forum, which encourages participation," Strachan explains. "The rest can be A/V (audio-visual) programs, which you can purchase from the WSBA CLE website or from other providers." Offerings of this type include the Law Office Management Assistance Program (LOMAP) CLEs, popular among solo attorneys, which teach solos how to handle the business aspects of a legal practice. "Be careful to pace yourself with A/V CLEs," Strachan cautions. "You're not allowed to take more than eight credits in a 24-hour period. We want to make sure you can digest the material." So, procrastinators, be warned: no cramming allowed.

Another requirement is that your 45 hours must include at least six credit hours of ethics. Strachan says that the definition of ethics in the MCLE Regulations is narrower than the common definition. "Ethics pertains to creditable activities focused on individual lawyer's conduct in the practice of law. It is a course or session of a course exclusively devoted to the discussion of the Rules of Professional Conduct or other professional conduct rules specifically related to legal practice."

What if you want to get creative? Are there any unconventional CLEs? "Moot courts and mock trials are opportunities to get CLEs," says Strachan. "You can earn up to six credits per reporting period for time spent judging, provided that you receive ac-