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How To Successfully Transition to an In-House Position
By Michele Bradley and Susan B. Cassidy – December 11, 2014

At some point in almost every lawyer’s career, she gives some thought to the idea of moving in-house from private practice. The desire to escape the billable hour, the fear of business development obligations, or simply the opportunity to have a more predictable schedule, are all very attractive reasons to go in-house. Attorneys rarely carve out time to prepare for the in-house move, however, until the moment they are ready to make the transition. The same actions that can help you succeed in private practice are equally beneficial should you decide that you are interested in pursuing an in-house position.

We have both made this transition. Before moving in-house at McDonald’s, Michele Bradley worked as an employment associate in private practice in New York City. Susan Cassidy spent almost 20 years in private practice before moving in-house, first to Motorola Inc. and then to Northrop Grumman Corporation. She is now back in private practice as a law firm partner. This article provides helpful tips for preparing to move in-house and the key factors for success once you finally take the leap of faith and land your in-house role.

Preparing to Move In-House

Feed Your Curiosity. For starters, treat your time at the law firm as an opportunity to feed your curiosity. Your appetite to learn will enable you to develop key legal skills that will be directly transferable to an in-house position. When hiring talent, companies often look for attorneys who have a specialized niche but have exposure to other areas of law as well. Your goal should be to keep your own professional development top of mind. Get as much exposure to varying legal issues and areas of law as possible. Try to work with partners and senior associates outside of your specific practice area. Obtaining a well-rounded experience can take many different forms. For example, if you are a transactional attorney, consider a pro bono opportunity that would allow for courtroom or mediation exposure. Look for skills-training opportunities in your local legal community such as clinical programs, CLEs, or seminars.

Research Opportunities. It is never too early to begin researching potential in-house opportunities. Even if you know your transition is a ways off, skim job listings on a regular basis to determine what skill sets companies desire in their attorneys.

Once you have a better understanding of what companies look for in a candidate, develop a game plan to obtain those skills. For instance, if you are a junior associate, ask to be staffed on leaner cases where you can have heightened responsibility. Ask to participate in meetings and calls with clients. When working with a nearby client, ask to physically visit the client site and meet the in-house staff. Take the opportunity to establish professional relationships with clients. You will also learn about the company’s particular industry, as well as the legal and non-legal challenges the company faces.
Secondments, where attorneys are placed “on loan” to a client, are also a wonderful stepping stone to moving in-house. They allow you to evaluate whether an in-house position makes sense for you. You have the opportunity to learn the inner workings of a client and to understand the tactical considerations and strong business judgment that go into making legal decisions in-house.

**Network.** The reality is that in today’s legal market, a great résumé and a prestigious professional and academic lineage alone may not be enough to land your dream in-house position. A large part of your success will depend on getting out of your office and networking. Join and become active in local or national legal organizations like the American Bar Association, Association of Corporate Counsel, and other specialized groups. Participate in their events. If your schedule permits, take a leadership role in order to become visible and establish your brand. Your active participation can be a springboard to meet in-house attorneys who can provide invaluable advice.

Understand that an official mentor title is not necessary in order to learn from someone. You can use these interactions to learn more about what in-house counsel do on a day-to-day basis, what types of legal issues their companies face, and how legal departments are structured, to get a better sense whether the transition makes sense for you, and what type of company may be the best fit. Do keep in mind that networking transcends the traditional methods—use online resources like LinkedIn, Twitter, and other platforms to meet attorneys as well.

**Salary and Other Factors.** Learning, researching, and networking are all fairly obvious for anyone who is looking to make a job transition. But there are other factors that may not be top of mind when you are comfortable in your law firm job. One major consideration is a shift in salary. Oftentimes moving in-house will require you to take a reduced salary. Save early and often, so that financial considerations do not ultimately become a deterrent to making the transition.

While you are still at the firm, begin to compile a transactional deal sheet or representative matters list that you can provide to prospective employers, if requested. This sheet will help you keep track of your assignments and projects and also will come in handy as you brainstorm topics for your cover letter or interview responses. If you are still a junior attorney and have not yet decided on a practice area, consider thinking outside of the box. Choose a niche practice area, keeping in mind that labor and employment, mergers and acquisitions, securities, and real estate are often areas of need for corporations.

Last and most important, recognize that a key component to success in-house is effective communication, both oral and written. Use your time at the law firm to learn how to deliver clear, concise, and business-minded advice in a way that is not full of fluff or legalese.
Key Factors for Success after Your Move

When you finally make the move in-house, you enter a different type of law practice. As outside counsel, companies turn to you when they already suspect or know that they have a legal issue. In-house, you play a greater role in preventing problems by working in concert with your business team. The most effective in-house counsel are those who gain the trust of their business teams because they can offer advice that reflects both legal and business considerations. To gain that trust, there are a few basic points that new in-house counsel should keep in mind.

**Learn the business.** You are now a business partner on a leadership team; act like one. You will be a more effective advocate for your client if you understand what the company sells, the rhythm of sales (busy versus slow seasons), the competition, and the customer base. This type of knowledge helps to integrate you with the decision makers and also allows you to provide more targeted and useful advice.

**Be a problem solver.** Your job is not to opine on legal issues; you are there to provide solutions. And a “solution” that simply prohibits a proposal, without a viable alternative, will not be greeted warmly.

**Learn the language.** Every company has its own acronyms and terminology; become fluent. Do not hesitate to ask a colleague what a particular acronym or term means. If you do not learn the company’s language, you will miss key parts of the conversation.

**Know when to pick up the phone.** Because your job often involves a mix of legal and business advice, in-house counsel need to recognize that their internal communications may be subject to greater scrutiny from a privilege standpoint than previous communications as outside counsel. If there is truly a sensitive matter, pick up the phone or have the discussion in person. Do not create a potentially bad document that could be misconstrued later on.

**Know who your client is.** Often in-house counsel support a particular division or group within a corporation. Although one of your goals is for that business team to succeed, remember that the larger corporation is your ultimate client when providing advice and counsel. At times, this may put you at odds with the business team you support on a daily basis.

**Learn to read the financial reports.** The bottom line is important and it is equally important that you understand the financial metrics that are imposed on your business team. This understanding will allow you to offer legal advice that is consistent with your team’s overall financial goals if at all possible.

**Train non-legal professionals.** You will have limited resources compared to your outside counsel days. You will, however, work with adjacent capabilities in the corporation such as Human Resources, Procurement, and Tax, among others. Determine
who within these organizations has good common sense and invest time getting to know them. Good communication across functional areas benefits you and the corporation.

**Target concise communications.** Your audience has changed. Rather than advising other lawyers, you will be advising the business directly. Do not provide a long and convoluted legal opinion. Give clear and concise guidance up front. Bullet points often are received more readily than a typical legal memorandum. But be prepared to support your advice with the legal underpinnings if challenged.

**Be clear with outside counsel.** You are now on the other side. Managing outside counsel can be a full-time job itself if both sides are not on the same page. Time spent up front discussing what you expect from your outside counsel will benefit you greatly in the long term. Similarly, helping your outside counsel to understand your business issues and concerns will help make her a better advocate for your company.

**Keywords:** woman advocate, litigation, young lawyers, in-house counsel, corporate counsel, professional development, career transition, secondment, networking, mentors

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Depositions for Young Lawyers: Question Form and Technique Are Key
By Susan M. Halpern – December 11, 2014

The prospect of taking a first deposition can be daunting for inexperienced lawyers. If it is a difficult or unguided experience, it may not make things easier for the depositions that follow. But there is hope: “Knowledge is power!” While there is no question that experience hones skills and makes lawyers more proficient at taking depositions, inexperienced practitioners can nonetheless bridge the experience gap with careful study and independent observation and practice of basic questioning techniques. This article aims to inform, but also to provide a framework that lends itself to further study and practice.

Where Do I Start?
Before we get to the how, we must deal with the what. Understanding of question form and technique is useless without the backing of substantive knowledge. You must know what you’re going to ask before you can consider how you ask it. You also need to know procedure and evidence to be successful at taking depositions. A deficiency in any one of these areas will create obstacles for a successful resolution of any case.

So study, study, study. Read the rules of evidence and procedure from start to finish. They contain important information about how depositions work and how evidence is presented at trial. The procedural rules define how depositions are conducted, and how participants are expected to act. They are user-friendly, and they provide an outline of important concepts. Read, read, read.

You must also study your case, ensuring that you understand all claims and defenses. Prepare a proof chart at the beginning of every case, defining the elements of claims and defenses and identifying available proof sources. Your chart will be a work in progress throughout the case, as you learn more about the facts. Consider where you will find facts—and ultimately evidence—to prove or disprove elements of claims and defenses. Your proof chart will almost always suggest a need for depositions as well as the topics you will need to cover with various witnesses.

As you work on your proof chart, consider how you will explain to a trier of fact what your case is about (your factual theory), what claims and defenses you will present (your legal theory), and why the trier of fact should rule for you and feel good about it (your persuasive theory). Your theories will ebb and flow as you learn more about the case and you determine whether the facts support your hypotheses. But you have to start somewhere.

Depositions are not exercises in aimless wandering; their purpose is to question witnesses for reasons that are ultimately defined in some way by a claim or defense. Now, it is true that the scope of a deposition is limited by the concept of discoverability, not relevance. Discoverability is typically defined as relevance plus information reasonably calculated to lead to the discovery of admissible evidence. So, you can ask broader questions at depositions than you can at trial,
and you can elicit hearsay. It may not be admissible, but it may lead to other evidence that is admissible. But don’t be lulled to sleep by breadth. Depositions should always have a purpose.

**Be Ever Curious**
Depositions help you confirm information you think you know and learn information you don’t know. The key is not to let what you think you know overwhelm your fact-finding. Here’s what happens: the witness answers as you thought he might. You feel great because the witness has proved you correct. Here’s the problem: there may be more information that you didn’t anticipate. You leave it behind because you allow your expectations to define the scope of the witness’s answer.

So here is your rule of thumb: **Be ever curious.** Do not stop seeking information until there is no more information to seek. How do you know when that is? When the witness confirms it. You must keep asking for more information until the witness confirms that there is nothing more to tell you in response to your question. Let your working theories assist your questioning, not limit it.

**Question Form and Technique**
So how do you ensure that you get all the information there is to get? You ask good questions and you keep asking good questions until you are done. To do so, you must understand and be able to identify the various types of questions that exist. When you think about it, so many of our conversations as lawyers involve asking questions, including when we learn about facts from our own clients. But in the deposition setting, it is critical that we consider question form and technique. Questions are the building blocks on which we construct our cases. Study this subject, learn about it and embrace it, and you’ll be miles ahead in your quest to take good depositions. There are three types of questions.

**Open-Ended Questions**
Open-ended questions are the classic “reporter” questions: who, what, when, where, why, describe, tell us, explain, and how, to name a few. Open-ended questions seek a narrative from the witness and have the advantage of making the witness do the work for us. They are short and to the point: “What happened at the meeting?” We ask, but don’t tell the witnesses. They tell us.

A good open-ended question is short and to the point. But, sure enough, inexperienced questioners are uncomfortable with the brevity of open-ended questions. Fight this discomfort. It is somewhat counterintuitive, but the shorter the question, the more powerful it tends to be. Let’s briefly explore the ways in which open-ended questions are diluted.

First, we have “front-loading” a question. The front-load has its origins in the societal tendency to qualify demands for information. We don’t walk up to a stranger and demand: “Where is Main Street?” Instead, we qualify our demand for information with words that are generally understood to make it more courteous: “Can you tell me where Main Street is?” “Could you tell me where Main Street is?” “Would you tell me where Main Street is?” “Would you tell me where Main Street is?” We know that these
qualifiers are unnecessary, because if the listener can’t or won’t tell you where Main Street is, they would so answer in response to your question, “Where is Main Street?” Nonetheless, there is a clear societal standard that we couch our requests with these qualifiers.

Our language as lawyers must be more precise. Consider that our question and answer format conversation is ultimately going to be heard by a trier of fact who knows little or nothing about the case. The more we front-load our questions, the harder the listener must work to determine the substantive purpose of the question. And the harder we make the jury work to understand, the less likely we are to persuade them.

So here’s the thing: the witness can, could, and would answer your questions. That’s why she’s in the witness chair. No need to keep asking her! If she doesn’t know the answer or can’t answer the question, she’ll tell you. So leave your layperson language at the door and lose the front-loading. It is unnecessary and unhelpful. Here’s a rule of thumb: ask yourself what you want to know. You will seldom front-load the answer that forms in your head. Rather, that answer will almost always suggest a strong open-ended question. Pause, give it some thought, and then ask what you want to know.

The second problem with open-ended questions is the back-load. This arises from our discomfort with silence and our tendency to believe that we know the answer. Here, we direct or suggest answers: “Why did you do that, did someone tell you or did you read about it?” We have to learn to leave the root question alone. Directing the witness with a back-load may limit the information we receive, so just ask the simple question: “Why did you do that?” and let it be. Let the answer go where it goes. You may learn something you never expected to learn.

Setting up and using open-ended questions. Now that you know what a good open-ended question sounds like, consider that it often requires some set up. For this, I return to that basic maxim from trial advocacy: set the scene, roll the action. In a deposition, setting the scene before rolling the action has the added benefit of taking the witness back to the time and place of important events. Scene-setting questions cause witnesses to form mental pictures of events, which in turn may prompt a more complete description of what occurred. From our standpoint, setting the scene allows us to use simple, open-ended questions to obtain a wealth of information.

Here’s what you do. When you ask about meetings, phone calls, conversations, communications and events, to name a few, find out first where it occurred, how long it lasted, who was there, who listened in, when it happened, etc. Once you set the scene, roll the action with a solid open-ended question such as: “What happened at the meeting?” You can then continue to explore what happened by asking for more and more information: “What else happened at the meeting?” or “What happened next at the meeting?” Stay on task. You may hear about things you want to ask more about. Write them down and keep asking about your root question. When you think the witness is done, you can ask, “Did anything else happen at the meeting?” Then consider asking about things you thought he might tell you, but didn’t, probing and testing to determine whether
there is additional information. You should always confirm that the witness is done: “Have you now told me everything that happened at the meeting?” This technique is one that has been advanced for many years by the National Institute of Trial Advocacy (NITA). NITA calls this “funnelling,” and it is very effective in helping you develop a list of information. When you exhaust your root question, you can go back and ask about specifics. For example: “You said you discussed X at the meeting; please describe everything that was said about X,” followed with, “what else was said about X?” etc.

**Leading Questions**

Leading questions are short, declarative statements of fact. Leading questions contain no modifiers, conclusions, or argumentative phrases. They are very short, typically asking about one fact at a time. Strung together skillfully, leading questions can be used effectively to tell a story. Leading questions are typically used for cross-examination at trial. They are at the other end of the spectrum from open-ended questions. We don’t ask. We tell. We seek the witness’s agreement to our statement. So, we do not use leading questions to obtain information, because it would be terribly inefficient. Rather, we lead deposition witnesses to confirm, shape, and summarize prior testimony or facts so that we can effectively use them in motions or to impeach the witness at trial. For example, to confirm what you learned about the meeting, you might ask a series of questions, seeking the witness’s confirmation to each one: “You went to the meeting.” “It lasted four hours.” “There were 10 people there.” “You discussed the contract.” You get the idea. Tell, don’t ask. Build your sound bites for later use in motions or at trial.

**Closed Questions**

A closed, or “one-fact,” question genuinely seeks information about a particular fact. “Did you go to the meeting?” “Were you in the crosswalk?” These questions generally limit the witness to a yes or no answer and thus are not open-ended. But neither are they leading, because they ask and don’t tell. Nonetheless, like leading questions, they seek small bits of information and thus are not nearly as effective or efficient as open-ended questions. But closed questions can be used effectively to confirm a particular fact, or as headnotes to lead you into a scene-setting series of questions. Rather than saying, “Let’s talk about the meeting,” ask the witness, “Did you go to the meeting?” Everyone’s attention is thus directed to the meeting. You can then set the scene as suggested above, concluding the sequence by rolling the action with a good open-ended question and some disciplined follow through.

Because they genuinely seek information, closed questions are not considered to be leading. However, closed questions can be substantively leading if they are misused to suggest answers to a friendly witness who is floundering. Judges are not at all appreciative of such tactics, so don’t misuse closed questions.

**Closing Thoughts**

Good depositions start with careful study, solid legal research and analysis of claims and defenses, and diligence in formulating theories of the case. The first step in preparing for any deposition is deciding what to ask. The second step is deciding how to ask for the information.
To succeed at depositions, you must have command of question form. You don’t ask leading questions if you are fact-finding, and you don’t ask open-ended questions if you are seeking admissions. Become a good questioner by practicing asking questions out loud. Literally. Shut your office door and practice by examining things in your office. “What are you?” “I’m a chair.” Then, “You are a chair.” “Yes.” Build auditory muscle memory so that you can quickly recognize and form questions that are appropriate for the task at hand. As they say in ice hockey, it’s all about reps, and so it is with asking good questions at depositions.

**Keywords:** woman advocate, litigation, young lawyers, new associates, depositions, litigation skills, witness examination

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Mind Over Matter: 10 Tips for Surviving Your First Month of Practice
By Jessica F. Nwokocha – December 11, 2014

Most lawyers will always remember the day they began their professional career, and the looming feeling of, “Oh my gosh, I just graduated from law school and have no clue how to practice law.” You may feel overwhelmed. You may even question your decision to become a lawyer in the first place. Don’t panic. These feelings are a natural part of embarking on any new journey. The key to survival is simply to keep everything in perspective, and remember these 10 tips.

You may not start off perfect, but practice will eventually get you there. Be patient with yourself and embrace the learning and humbling experiences of your journey. Perfectionists are attracted to the practice of law. Quite naturally, you will set the bar extremely high for your work product. However, if you recently graduated from law school, there is a great deal that you have yet to learn. You are going to make mistakes. Own them, learn from them, and move on. Do not dwell on mistakes that you cannot take back. The beauty of failure is in the lesson learned and the ounce of prevention gained.

Remain calm. Many have traveled this road before you and many will travel it after you. You have to start somewhere. You have to crawl before you can walk. The benefit of starting off at ground zero, however, is knowing that you can only go up from there. You will feel as if everyone has this “practice thing” all figured out except for you. They don’t. No matter how seasoned the attorney, there is still more to learn. It’s not the end of the world if it takes you a little longer to figure out how to do even the simplest of tasks, like using the phone or copier. You’re brand spanking new at this. Take advantage of the substantial room you have to grow.

Dismiss all thoughts of inadequacy or doubt. They will do nothing but weigh you down. I would equate the first year of practice with the first year of law school. How long did it take you to brief a case or draft a legal writing assignment as a 1L? But by 3L you were much more efficient and knowledgeable, correct? This trend will also be reflected in your career as an attorney. Remember, you are where you are for a reason, and where you start does not define where you will end up. Someone saw some glimmer of untapped potential in you. You have some skill set or personality trait that distinguishes you from others. You may have thoughts of inadequacy. You will feel like a failure most days. But I promise, by day 30, you will know much more than you did on day one.

Protect your reputation. Determine how you want your name to be perceived when others speak or hear it. You are never too young to nurture your reputation because it will indeed precede you. Legal circles are small and people talk. It is important that others only speak highly of you in your absence. Be honest, thoughtful, and kind to everyone you encounter. Be a good person.
Discover what your goals are. Take charge of your future.
Few people will be as invested in your future as you are. However you picture your legal career years from now, develop a plan to help you reach those goals. Think of creative ways to gain the experiences you desire. You must be deliberate in each step you take and make each one count.

Your fellow associates will be a necessary resource. Learn from them.
Find other associate attorneys who have a few years of practice under their belts, yet who can vividly remember being in your shoes. Ask them all the questions you can. Their answers will most likely save you from wasting countless hours trying to figure the answer out on your own. The wheel does not need to be reinvented. It has been my experience that most people want to help you learn the ropes and prevent you from making the same mistakes they did.

Get involved and deeply rooted in your community. Join organizations that interest and inspire you.
Not only will you gain a deeper sense of community involvement, but you will meet new people and expand your network. Finding a cause that you are passionate about and serving the community in some way will give you an outlet, which will allow you to periodically shift your focus from work to improving the world around you.

Make time for friends and family. They will keep you grounded. Call your mom back, answer your dad’s text messages, and video chat with your sister.
There will never be enough hours in the day. You will never get everything accomplished that you need to. Your time to engage with others will seem extremely limited, but make time for your loved ones. Your parents worry about you. Don’t get so caught up in your newfound adulthood and work responsibilities that you fail to stay connected to those who truly care about you.

Strive each day to be better than you were the day before. The rest will fall into place.
You did not endure three years of law school just to let the challenges of being a new lawyer get the best of you. Instead, welcome those challenges with open arms. You are much stronger than you give yourself credit for. That strength will keep you motivated and will carry you through the many obstacles that you will face along the way. Even more importantly, you must not lose sight of why you decided to become a lawyer in the first place.

Find an attorney whom you respect and admire and form a mentoring relationship.
As much as you think you have things under control, you do not. Having a mentor to help you through this process is crucial. You need someone in your corner whom you can trust and who will be brutally honest with you about everything. You should desire a mentor who will be there to both teach you the hard lessons and to share in your successes along the way. As my mentor would say, you need to have your “safe space.”

Keywords: woman advocate, litigation, young lawyers, professional development, new associate
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Successfully Arbitrating Your First (or Almost First) Case
By Gilda R. Turitz – December 11, 2014

An attorney new to arbitrating cases for clients needs to be attuned to the issues, challenges, and opportunities presented by the differences between traditional court litigation and arbitration, even if she has had trial experience. Being well-schooled in those differences is key to winning in arbitration.

Arbitration is intended to be a more efficient, streamlined, and final process of dispute resolution, with no appeals and limited bases to vacate an award. Generally, less prehearing discovery is permitted in order to keep the notoriously high pretrial discovery litigation costs down and get to hearing more quickly.

Attorneys venturing into their first arbitration need to adjust expectations about how much discovery and motion practice they will do. Recently, in response to criticism that arbitration has become far too much like court litigation, the major arbitration service providers and professional groups have promulgated new protocols and best practices to address the perceived problems. Counsel should expect arbitrators to be more managerial than laissez-faire, with flexibility but enforcement of the relevant rules to efficiently get to hearing. To prepare to win in her first arbitration, an attorney must fully understand how to best prepare for and position her client in the fluid environment of arbitration to have a successful outcome.

The Arbitration Clause and Governing Rules
The first step is understanding that the parties’ contractual arbitration clause is the “constitution” that defines the scope and limitations of what will be arbitrated. Because arbitrators may not exceed their jurisdiction, it is critical to analyze the clause that may empower, limit, or even prohibit the arbitrator with respect to awarding certain categories of damages or other relief. The clause typically will dictate whether one or three arbitrators will decide the matter, with or without specified qualifications. It also typically will refer to an arbitration service provider or tribunal whose procedural rules will govern. The clause may also specify time periods by which the hearing must be held and discovery limitations or allowances, including whether any depositions will be permitted. The well-prepared attorney will have a thorough command of the governing rules and any statutes that may be referenced in the arbitration clause, and how they will affect the case strategy.

Arbitrator Selection
Selection of the arbitrators is possibly the most important decision counsel participates in, just as trial lawyers often say the case is won or lost with jury selection. Arbitrators typically are selected through either a party appointment system or a “strike and rank” method with respect to proposed arbitrators on a list provided by the tribunal administrator. Counsel also may ask the administrator for additional names or to list arbitrators with certain expertise, even if the clause does not require such qualifications. Stipulation with opposing counsel to one or more arbitrators should be considered if circumstances allow.
Due diligence on proposed arbitrators should be conducted as thoroughly as possible. Such efforts should go well beyond reviewing their résumés by consulting other attorneys, doing Internet and social media searches, and reviewing any published opinions or articles by the arbitrator if applicable. Arrangements to interview potential arbitrators with opposing counsel may be made through the case administrator. An interview is particularly important to learn about an arbitrator’s style and views on procedural matters such as discovery and motions in arbitration. The object of this intelligence gathering is to ascertain, to the extent possible, whether the proposed arbitrators are likely to be neutral, fair, professional, and even-tempered in their handling of a case, and to assess whether they are likely amenable to being persuaded to the client’s position.

Tell the Client’s Story
It is not necessary in arbitration to write a complaint or an answer in the same manner as required in court. A narrative explanation of the facts and claims may suffice. Although a respondent need not file anything in response to an arbitration demand, the best practice is to take the opportunity to respond by telling the defense’s side of the story rather than simply making a general denial of the claims and listing affirmative defenses. This approach gives the arbitrators a better sense of what the case is about and helps inform the upcoming proceedings.

Start with the Award in Mind
Be clear about what relief to ask the arbitrator to order. At the outset, a valuable exercise is to draft a proposed final award that sets forth the remedies the client will seek, being mindful of any enforceable contractual restrictions (for example, no lost profits or punitive damages). Drafting the desired award helps clarify what evidence is needed to prove the claims and defenses, and will assist in planning discovery.

Discovery in Arbitration
In addition to any restrictions or allowances in the parties’ clause, applicable tribunal rules will determine what discovery may be allowed. Such rules are generally less specific than those in federal and state court. In most cases, arbitrators have wide discretion on discovery. Arbitrators appreciate and will generally accede to the parties’ stipulations concerning discovery, so negotiating a mutually agreeable discovery plan, if possible, is beneficial. In any event, it is critical to determine what discovery is necessary rather than desirable, the practicalities of getting information from third parties voluntarily or by subpoena, and whether the case warrants depositions and experts. Depositions may be allowed in limited number under some rules, or by stipulation. If they are strictly discretionary with the arbitrator, a good faith showing will be required as to their necessity, relevance, and how they will advance the case rather than just drive up costs.

In contrast to contemporary court rules and case law, e-discovery rules in arbitration are limited or nonexistent. Counsel should be prepared to negotiate reasonable e-discovery protocols and agreements with opposing counsel or to propose a well-reasoned scope of e-discovery to the arbitrators, to avoid entering burdensome and costly e-discovery orders.
The Prehearing Conference
The prehearing conference is often the single opportunity before the evidentiary hearing to educate the arbitrators about the case and help shape how it will be conducted. Counsel should be prepared to discuss all relevant procedural matters, including the length and time of the hearing, any motions that will expedite issues or deal with interim relief, and a discovery plan and e-discovery protocols. Counsel may consider proposing that the arbitration be conducted in phases to promote efficiency by early determination of potentially dispositive issues or of those issues that may limit further hearing (for example, statutes of limitation or existence of third-party beneficiary rights). Counsel should be sure to seek clarification on any ambiguities in the resulting scheduling order and ask for the arbitrators’ guidance on matters not addressed. Counsel should also ensure that witness hearing protocols, including advance notice about when witnesses will be called, are included in the order to eliminate surprises at the hearing.

Presenting Evidence Effectively at Hearing
The scheduling order generally will set the arbitration hearing for a certain number of days based on discussion at the prehearing conference. A failure to complete the hearing within the designated timeframe may cause weeks or months of delay before the arbitration can be reconvened. Time at the hearing will therefore be at a premium. Counsel should obtain clarification about any time allocations between parties and how they will be monitored or enforced, and should not hesitate to ask the arbitrators about their practices and preferences at the hearing and to plan accordingly. Consider stipulations to certain facts, or limiting or waiving an opening statement if a detailed arbitration brief has been submitted, to save hearing time.

Most arbitrators will request, if not insist, on joint exhibits to the extent possible. Cooperation with opposing counsel to eliminate routine foundational testimony and admissibility issues on documents by stipulation is time well-spent. It will avoid using valuable hearing time on routine matters. Reduce duplication of exhibits by using only the fully executed copy of a document or the entire email string of a multi-email exchange, unless there is a compelling point to be made otherwise.

The attorney new to arbitration should tailor her evidentiary presentation with the understanding that the rules of evidence do not strictly apply, that objections are disfavored, and that arbitrators are generally sophisticated and experienced. Be prepared to have arbitrators allow some witnesses’ direct testimony to be presented by affidavit, or to allow witnesses to appear by telephone or video services. Counsel should be flexible and accommodating about taking third-party witnesses and experts out of order, and they should expect arbitrators to allow cross-examination beyond the scope of the direct so such witnesses do not need to return. Counsel also should be prepared to have their client and allied witnesses called adversely by the other side. Arbitrators may cut off cumulative testimony, so counsel should be prepared to make offers of proof if the witness is needed for another point. Some arbitrators actively question and even take over examinations of some witnesses, which may reveal what issues the arbitrators are particularly focused on or troubled by. Further evidentiary presentation should be adjusted accordingly.
As in a jury or bench trial, an arbitration will have its share of surprises and exhilarating and aggravating moments. But the chances for success are enhanced through careful preparation and understanding of both the arbitration rules and the arbitrators’ preferences for conducting the hearing.

**Keywords:** woman advocate, litigation, arbitration, young lawyers, dispute resolution, arbitration clause, arbitrator selection

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Risk Management for New Associates: Tips to Avoid Legal Malpractice Pitfalls
By Shari L. Kleven, Alanna G. Clair, and Michaela C. Kendall – December 11, 2014

The first few years of practicing law can be intimidating. New associates may be tossed into the pool before they can swim. Moreover, the focus for most new associates, and the partners who manage them, is on developing and improving new associates’ basic legal skills such as research, writing, and civil procedure. While these skills are critical aspects of becoming competent in the field of law, there is another critical skill set that should be part of new associates’ early training: risk management and claim avoidance.

Many new associates think that risk management and claim avoidance are issues reserved for partners and senior attorneys. This misconception can put the new associate, the firm, and the client at risk. Instead, new associates should be aware of how they can prevent malpractice claims, and how they can spot potential problems and risks. This article provides several tips for associates that apply when an attorney first joins a law practice, as well as after the attorney has worked for a few years, to help the attorney learn how to identify, prevent, and mitigate professional risk.

Getting Started
After law school, many graduates begin practicing law at a law firm. The first couple of years are spent learning a specific field or fields of practice, the expectations of the firm, and the legal system. It is a busy time, often accompanied by long hours. However, it is critical that during the first few years all new associates integrate these simple habits into their daily routines to help recognize and minimize potential professionalism risks.

Become Familiar with the Ethical Rules
New associates are aware of the rules of professionalism from law school and the professionalism exam. However, few of them reference or use those rules in their daily practice. This often is because they believe that the partners for whom they work are the ones tasked with that responsibility or that the rules are merely something to reference when a problem arises.

However, the best way to prevent a professionalism problem is to be familiar with the applicable ethical rules and consult them regularly. Thus, it is important for junior associates to stay abreast of developments in ethics and professional responsibility. It also is important that they recognize when a professionalism issue is before them, such that they should research the applicable rules and controlling law.

For example, in a matter involving an ethical screen, the partner or senior attorney on the matter may presume that the new associate knows how and is effectuating the screen properly. A new associate who is unfamiliar with the applicable restrictions and requirements will not be able to do so, exposing the firm to risk. But a new associate who is current on the issue, or at least
knows that she should look into it, can help the partner make sure best practices are being employed.

Be Wary of Social Media
Most attorneys have both a personal and a professional social media presence. New associates are no exception. However, those associates may not be aware of the risks that come with this presence.

There are three major risks for attorneys who post too much about their cases or about pressing legal matters on social media. The first is confidentiality. Attorneys are bound to protect the confidentiality of information relating to their clients and representations. This is a duty that survives the term of the representation and the attorney-client relationship. Thus, new associates should be wary about posting anything that could inadvertently reveal confidential information. This includes mentioning a client’s name, geo-tagging the location of a client, and generally commenting on a representation.

A second risk is inadvertently creating an attorney-client relationship. If a friend complains on Facebook about his landlord, and an attorney responds with advice, an attorney-client relationship could be formed. If the friend follows the advice and is disadvantaged, there is a risk that a grievance or a complaint against the attorney could result. Also, other third parties could read that same advice—not intended for their use—and rely on it to their detriment. The issue is not always whether the attorney has committed malpractice, but whether the attorney will be forced to engage in defending a bar complaint or other action.

Third, social media poses a risk to new associates’ reputations and other professional obligations. A junior attorney posting about his dislike of doctors could be a vulnerability to his client in a medical malpractice defense. Or a junior attorney may find his team is not hired for a pitch to a car manufacturer after the potential client discovers that the junior attorney has posted critically about auto industry bailouts. In addition, an attorney could harm his own reputation through purely social posts that present an unprofessional image or convey questionable judgment.

Further, all of these actions may violate the associate’s employer’s social media policy.

For these reasons, it is important that new associates recognize that what they post on social media, even when “off the clock,” can have serious repercussions. However, these repercussions are preventable. Accordingly, all new associates should take a close look at their social media presence and their employer’s social media policy, making changes to their social media behavior as warranted, and continuing to monitor what others post about them.

Actively Maintain the Matter File
New associates often are given the administrative task of “maintaining the file.” However, they rarely are given thorough instructions on the best way to do so. Typically, the pleadings and correspondence files are self-explanatory. But what else should new associates make sure is filed away during a representation?
The answer comes by imagining an unpleasant scenario: an unhappy client. If a client comes back with questions, or worse yet a claim, regarding how and why certain things happened in the representation, the file is the attorney’s best tool. It should contain information regarding how certain decisions were made and how they were explained to the client. This includes research, memos, and attorney notes. It also should include any issues that the firm consulted the client about and any topic on which the client expressed a preference or directed a specific action. At the same time, if the client raises questions about the attorney’s or the firm’s work, internal firm correspondence regarding those issues should not be included in the client file, but rather in a separately maintained law firm file, to preserve the firm’s attorney-client privilege in the information.

A properly maintained file will serve to refresh an attorney’s recollection about what happened during the representation and to document and support the details of the representation. It also will allow the team to quickly find information during a representation without having to recreate the wheel or spend hours tracking down a document. This is true for both paper and electronic files. Getting on top of file management from the start of a representation will save new associates time and stress, and it will enable them to better focus on the tasks at hand.

Keep the Team Organized
Many law firms staff a matter with attorneys of various levels of seniority. This inevitably means that the more administrative tasks often fall to the newest associate. While less glamorous than attending a big client meeting or arguing a motion, these tasks often are the most critical, and if overlooked, can lead to serious consequences.

New associates should take the lead in ensuring that their matters do not go into default. This means identifying and calendaring all deadlines and important events for the entire team. It also means reviewing the applicable rules and making sure the entire team knows how they affect the representation. In addition, it means staying on top of outstanding tasks—making sure a letter or pleading is being reviewed on time by the partner, ensuring that client follow-up is performed, and checking in on dormant cases to make sure there are no new developments.

Doing these things can greatly reduce the risk of a missed deadline or an unhappy client. And they show that the new associate is taking an interest in, and is capable of handling, basic case management.

Building Your Skills
As associates become more experienced, more is expected of them. Partners no longer simply expect the associates to perform discrete research tasks. Instead they may expect them to become fully engaged in the matter. This includes taking a bigger role in managing a case and guiding it to completion. This is true regardless of the practice area.

With this increased role comes increased responsibility for any risks and mistakes associated with that case. These risks can take several forms—overlooking a key legal issue, running afoul
of professionalism issues, managing ever-changing deadlines, and dealing with difficult opposing counsel are just a few. Below are several key steps advancing associates can take to prepare themselves for new responsibilities and to help ensure the matters to which they are assigned move forward smoothly.

**Draft and Manage a Matter Strategy Plan**

When an associate is assigned to a new matter, the associate has two immediate tasks. First, the associate must get up to speed on the matter. This involves learning the facts, finding out what the client expects during the representation, and identifying the key issues. Ideally, the associate would be present at the initial client meeting. Practically, this often is not the case, and it is not until after this initial meeting that the partner can determine the matter’s staffing needs.

Second, once the associate has a grasp on the known facts and issues associated with the representation, the associate should draft a matter strategy plan. The plan should lay out several key areas of information: a factual overview, the legal issues, the goals of the representation, strategy for achieving those goals, and a timeline of pending deadlines and events. In addition, it should set forth a draft budget that includes the amount of time each category of work is expected to take.

This matter strategy plan serves multiple purposes. It helps the associate get organized and figure out what additional information is needed, the scope of the matter, initial deadlines, and the amount of time the matter likely will require. In addition, it opens up the lines of communication between the managing partner and the associate regarding the direction of the case and what is expected of the associate. Drafting and reviewing the plan also helps train the associate for managing cases as she advances in her career. Perhaps most importantly, from a risk management perspective, once the plan is approved, the associate can use the plan to ensure that all important dates and deadlines are on the calendars of those assigned to the matter, including the partners, associates, paralegals, and support staff.

This matter strategy plan should be a living document that is revised as the representation moves forward. How often the plan is revised depends on the type and scope of representation. At a minimum, it should be reviewed every quarter. Even if there are no changes, it is a good exercise to make sure the associate is aware of pending work and deadlines and to make sure the matter remains on course. In addition, it serves as a reminder for the associate to touch base with the lead partner to let her know the case is either on track or needs attention and to ask whether there are any recent developments that need to be addressed.

**Know What to Do If a Mistake Is Discovered**

Because newer associates spend the most “hands on” time with a case, they may be the ones in the best position to discover a mistake. That mistake can range from a missed deadline to an overlooked legal issue. While every effort should be made to ensure that such mistakes are avoided, the reality is that they do happen. How they are handled once discovered is critical and often starts with the associate.
If the problem is discovered during a conversation with the client, provide the client with the basic facts, but do not make excuses, assign blame to others, admit wrongdoing, or take responsibility for the mistake or error. Doing so may void coverage under the applicable professional liability insurance because most policies include what is known as a “no admissions clause.”

Immediately upon identifying the mistake or error, inform the lead partner. If that partner is not available and will not be available within the next 24 hours, the associate should seek out the person the firm or practice has designated as either full or part-time in-house counsel. While this designation may not be as well-known, it can be easily determined by asking the office manager or another partner.

It is important that the associate not divulge key facts about the issue while determining who serves as firm counsel, because doing so may waive important privileges in future litigation regarding the mistake. By reserving the discussion regarding the mistake to in-house counsel, attorney-client privilege remains intact and will protect the firm should litigation arise between the firm and the client.

**Seek Out Opportunities to Learn**

Newer associates are busy and have little control over their schedules. The good news is that even a couple of years into practicing law, associates often gain more control over their schedules. It is critical to take advantage of this change and use the increased flexibility to seek out opportunities to learn how to manage a case.

One key area to seek out this training is preparing and addressing witnesses and discovery disputes. There are two ways to build up knowledge and experience before being asked to manage these kinds of issues alone: attend seminars on these topics and shadow senior associates or partners.

Doing so will prepare associates for the myriad of challenges that can arise during a matter: discovery disputes, objections to questions during depositions, preparing witnesses for questioning, and protecting communications with witnesses, especially experts and consultants, are just a few. Often when these types of issues arise, there is little time to react. Being prepared is the best way to avoid a mistake that may negatively impact the representation.

**Conclusion**

Following these fundamental tips will help prepare a new associate to make the transition to more senior associate status, while helping the associate identify and avoid professional risks on a day-to-day basis. These tips also will help prepare newer associates for challenges they will face as they take on more responsibilities, and will help keep the lines of communication open with the partners for whom they work. As a result, both the associates and the firms for which they work will face lower risks of ethical violations and legal malpractice claims.
Keywords: woman advocate, litigation, risk management, legal malpractice, young lawyers, new associates, ethics, professional responsibility, social media, case management, case plans

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The Young Litigator's Approach to Legal Writing
By Courtney E. Walter – December 11, 2014

All lawyers have been there—the first “official” day as a lawyer at a brand new job. While undeniably exciting, it may also be overwhelming. For some, your new law firm will host an orientation and provide you with a structured training program. You will be given all the details on your role, your responsibilities, and the resources you may use. For others, you are thrown into the mix: no training program, no orientation, and no idea where to start. As an attorney, no two days are the same. One day, you may be answering phones and responding to e-mails, while the next day, you may be sitting alongside a partner during jury selection. Each day offers another opportunity to learn something new in a training program that continues throughout your career.

As a young litigator, however, there is one responsibility that is inevitable: you will write, and you will write a lot. The partners for whom you work will depend on your ability to convey ideas clearly and concisely on paper, whether in legal memoranda, correspondence, motions, appellate briefs, or even e-mails. When more senior associates or partners handle oral arguments, newer associates are often tasked with the responsibility of building the underlying legal framework and creating the written argument. Good legal writing is even more important in federal courts, which often do not schedule oral arguments at all. Your approach will differ for each assignment, attorney, and law firm. But your writing must always be persuasive, powerful, and supported by relevant and credible legal authority.

In the legal community, where reputation is everything, judges often remark that credibility and reputation may be built on (or destroyed by) filings with the court. As the Supreme Court of Minnesota cautioned in *In re Disciplinary Action Against Hawkins*, “[p]ublic confidence in the legal system is shaken when lawyers disregard the rules of court and when a lawyer’s correspondence and legal documents are so filled with spelling, grammatical, and typographical errors that they are virtually incomprehensible.”

Understanding the importance of developing your writing skills is the first step. Using the legal memorandum from your second-year legal writing and research class as a guideline to organize your pleading may not be the right answer. It will take time to identify what works for you, your boss, the judge, and your client. Take a deep breath, know that you are capable of doing this, and begin to develop a personalized approach that works.

In your first few years, there are key points that every young litigator should know.

**Know Your Boss**

When you start a new job, make a conscientious effort to learn your boss’s approach to legal research and writing. Learn what makes her tick. New associates often complain about the lack of communication between partners and associates when it comes to assignments. But it is only natural that the partner will not have unlimited time to explain an issue. Some of the burden is on
you. Analyze the previous pleadings and see how your boss writes. While some lawyers are verbose, others are short and to the point. On paper, you and the partner share one voice. So learn to adapt to her style when you draft a pleading. Do not be afraid of constructive criticism, and ask your boss for feedback on your drafts. She will not be happy if the same mistakes need to be corrected every time.

**Know Yourself**
After three years of law school, many of us know our strengths and weaknesses when it comes to writing. Some of us have already thrown up our hands in despair when we received less than satisfactory grades in legal writing class. Fortunately, as lawyers, we are no longer graded on our writing. But the quality of our writing now affects the lives of the clients we represent. To improve your writing, focus on the weaknesses you have identified, as well as those a boss or colleague points out to you. As a new attorney, I kept a running list of the issues that I needed to work on. Before I handed in each draft, I made an effort not to repeat my previous errors. Have pride in your work, and it will show in your writing.

**Know the Issue**
Before you sit down to begin writing, make sure that you understand the assignment. Do not leave the partner’s office without knowing what he wants, and do not be afraid to ask questions. You may be concerned that a partner will get mad and assume you are “dumb” if you ask too many questions, but senior attorneys agree that the more questions you ask, the better. No one wants to waste time redoing an assignment from the bottom up. If you are asked to draft only the memorandum of law, do not draft the entire motion. If you are asked to research one issue, do not provide background on other, peripheral issues. In a law firm, time is money, and money is time. If you think the law says something different from what the partner expected, let her know that as soon as possible.

**Know Your Audience**
Your audience will dictate your approach to an assignment. It will determine whether you should be argumentative, persuasive, or neutral. It will determine whether you should be formal or informal. It will determine whether you should be reverent, or whether you have a little more room for wiggle.

**Know Your Deadline**
Remember to ask for a deadline! The most important commandment for new attorneys is to know the deadline, and also to know what might affect the deadline. Know your local rules. Know how a particular form of service may alter a deadline. Know whether extensions are given, and know when you need to swallow your pride and ask for one. Factor in whether your boss requires a number of drafts prior to the final submission. Know whether the client needs time to review your drafts. And always give yourself more time than you think you need.

**Know Your Priorities**
Your biggest mistake in setting priorities may be expending time and energy on an assignment
that piques your interest but is not actually due for weeks, at the expense of an assignment that needs to be done quickly but is a bit on the dull side. Be sure that you have a handle on your calendar and your boss’s calendar, and that you have factored in time for emergencies. Inevitably, two drafts will be due at the same time on the same day. Contrary to popular thinking, however, you are only one person, and you can do only one thing at a time. When a judge pushed up a motion hearing by two weeks in one of my cases, and I had not yet drafted a response, I had to reprioritize. I looked at my to-do list and identified the other tasks that could wait. I e-mailed the partners who had assigned those pleadings, explained the situation, and asked whether their deadlines could wait. In another case, I asked opposing counsel to agree to an extension of time to file a response.

Know the Law
Before you sit down to write an argument, make sure you understand the law. Do the causes of action arise under statutes or under common law? What are your remedies? Understand the procedure. Often lawyers want to argue the facts. Sometimes, this is appropriate, but in other circumstances, the facts may not be relevant. Drafting a motion to compel will be different from a motion to suppress or a motion for summary judgment. When a judge recognizes that you are not operating within the proper legal framework, your writing will lose credibility. And judges appreciate it when a lawyer can concede points for the sake of efficiency that do not adversely affect her client’s position.

Know Your Argument
Be sure to outline your argument. This step is crucial to your success. Know where your argument is going, and decide how much space should be allocated to each issue. Identify which issues are—and are not—important. If you are passionate about your client’s position, you may become too focused on issues that are less important to the court. Do not become sidetracked by these irrelevant issues. Sometimes, a good night’s sleep will refresh your mind and help you prioritize, or even identify issues that you had not previously considered. Be sure to double-check citations and proofread your assignment. Proofread once, twice, even three times.

Know Where to Look
Some young attorneys are inundated with resources, especially at larger firms. At other firms, you will be forced to “figure it out.” Naturally, you’ll use your legal research database to determine what the law is. But people at your law firm may be your greatest resource. Do not be afraid to ask other associates for assistance. You can also ask the paralegals and legal assistants for help. Know where to find them. They can save you time and energy in the long-term. When you do ask a partner or another associate for guidance, be sure to convey that you have tried to find the answer for yourself. There is nothing worse than a new attorney walking into a partner’s office saying, “I can’t find what you were looking for,” simply because she did not make the effort. You want to make a good impression.

Know That This Is No Longer Law School
Your legal research and writing professors will not give you daily guidance, and there are no
office hours. Deadlines are not neatly identified in a syllabus; they may change. No one will force you to learn to improve your writing. The ball is in your court. It takes patience and perseverance to identify your best approach to legal writing, but the long-term rewards will make it all worthwhile.

**Keywords:** woman advocate, litigation, young lawyers, legal writing, briefs, motions

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How to Become the MVP on a Professional Team
By Joy Isaacs – December 11, 2014

Whether you landed in a firm, an agency or government organization, or a business setting, successfully navigating through the early stages of your career will undoubtedly require you to become a member of a professional team. And if you are like most recent graduates (myself included), you likely do not have extensive experience in this arena. However, mastering this skill early on is critical, as effective collaboration can have a direct impact on the services you provide to a client.

First things first—what do I mean when I say “professional team?” A professional team can come in almost any form and have a variety of purposes. It might be a group of attorneys and staff assigned to a particular case. Or it might be a group of associates assigned to organize the office holiday party. Regardless of the team’s purpose, the common denominator in almost every professional setting is that developing successful teamwork skills is a necessity.

After interviewing a number of “seasoned” professionals from all cross-sections of the legal field, I’ve compiled a set of best practices for learning how to become the MVP on a professional team.

Understand Your Position
Being a member of a team requires coordinated and concerted efforts, so you must immediately figure out what your position is and how it fits into the overall game plan. Although it is easy to get distracted by conflicting demands, do not lose sight of your role in the team. A catcher’s job in baseball is to catch every pitch the pitcher sends his way. Similarly, if the single task you have been given is to figure out how to video conference in the expert witness for a client meeting, make it happen.

Over-Communicate
In our chosen profession, there is no such thing as over-communicating. The rest of the team needs to know exactly what tasks you have already taken care of and what is still left to do. Conversely, if you are unable to complete a task, communicate this right away so that it can be delegated to another team member. If you feel as if you are over-communicating, you are probably hitting the nail on the head. I cannot emphasize this enough. Communicate. Communicate. Communicate.

Don’t Be Afraid to Ask for Help
You are a young attorney and feel the need to prove yourself. I get it. We have all been there. But asking for help is not a sign of weakness or that you have fallen short of a required standard. Rather, as my mentor often reminds me, a truly great attorney is cognizant of her own limitations.
Follow Through
Doesn’t it drive you crazy when someone says he’ll handle something, and he doesn’t? Every single “seasoned” professional I interviewed commented that she wished “millennials” had better follow-through. This one seems obvious—just do what you say you are going to do. If you have inadvertently bitten off more than you can chew, don’t just ignore a task and hope that it goes away. See my previous points on communication and asking for help.

Show Everyone the Respect You Expect
Members of a professional team will bring different job titles, experiences, and educational backgrounds to the table, and each is invaluable. Learn to respect and embrace these differences as each individual has something of value to contribute. This is especially key early in your career. If you treat people with respect, they are much more apt to go out of their way to help you when given the opportunity. For example, the legal assistant I was assigned to at the firm had over 30 years of experience and a better understanding of the inner workings of the legal system than I did as a freshly-minted law school graduate. On more than one occasion, she has saved me from embarrassing myself by making an amateur mistake in front of a partner. Treat everyone, from the file clerk to the chair of your firm, from the receptionist to the head of your organization, with the same respect with which you would want to be treated.

Have a Sense of Humor
Even though you are undoubtedly working hard to establish a solid reputation as a professional, you can and should keep your sense of humor intact. A well-timed celebrity jab or self-deprecating remark can lighten up even the most stressful situations.

Be Enthusiastic
You just got assigned to a document review that will last four weeks—oh, and did I mention it is in Montana? Get excited! The appropriate response is: “Awesome! I’ve never been to Montana before—this will be a great experience!” All right, you don’t really have to be excited, but at least act like it. Your positivity will not only inspire others, but also will be noticed by those further up the food chain. In a professional environment, you don’t want to be labeled the Negative Nancy. You want others to want you on their teams.

Establish Your Presence
Whether a team has already been put together or it’s only in its formative stages, don’t be shy in letting others know that you are willing and able to contribute to a team. If you are not happy that the only task you were given is to set up a video conference or to do a document review in Montana, do not whine about it. Perform the task given, and perform it well. It won’t be forgotten. Then, next time tasks are being delegated, speak up and let those in charge know that you are ready to take on more responsibilities. As Sheryl Sandberg would say, don’t hesitate to “lean in.”

Keywords: woman advocate, litigation, young lawyers, new associates, teamwork, communication, respect, professionalism
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Ten Things You Need to Know about eDiscovery
By Melody B. Lynch – December 11, 2014

Electronic discovery can be daunting for attorneys of all ages and stages, but certainly for older lawyers who did not grow up with technology at their fingertips. As a young lawyer, you are well equipped to grasp the eDiscovery process and to make significant contributions to your law firm through this expertise. In my first seven years of practicing law, I have leveraged my understanding of technology and my knowledge of eDiscovery to work on some of the largest and most complex cases handled by our firm, covering millions of records and terabytes of data.

I have compiled a list of the 10 things that every lawyer, but especially young lawyers, should know about eDiscovery.

All litigation, even the smallest of cases, involves eDiscovery.
The vast majority of relevant data for litigation is now stored electronically, whether that means Microsoft Word documents, emails stored in Microsoft Outlook, Facebook messages, or text messages. Over 100 billion emails are sent and received each day. Therefore, whether you are handling a complex commercial dispute or a smaller landlord-tenant case, every lawsuit involves eDiscovery at some level.

The Federal Rules of Civil Procedure (and many state court rules) cover eDiscovery and require litigators and litigants to deal with it as a regular part of litigation.
The Federal Rules of Civil Procedure were amended in 2006 to include eDiscovery and the requirement that the parties have a case management conference to discuss electronically stored information (ESI). Many states have implemented procedural rules similarly requiring parties to discuss eDiscovery. For example, the Florida Rules of Civil Procedure were amended as of September 1, 2012, to address ESI. Moreover, while the Federal Rules do not expressly provide for cost-shifting, some federal courts have placed discovery costs for ESI on the requesting party, when the producing party has demonstrated that the information is not reasonably accessible because of undue burden or cost. Keep this in mind if eDiscovery requests become unwieldy.

Know the basic terminology of eDiscovery.
Part of demystifying eDiscovery is understanding the terminology associated with it. There are a few key terms that you need to know to converse about eDiscovery comfortably. The first term that you need to know is ESI. Electronically stored information includes email, web pages, word processing files, audio and video files, computer databases, and the like. Another term that you should know is metadata. Metadata refers to data that describes other data. For example, if I look at a document’s metadata, I can determine things like who created the document, when the document was created, and when the document was altered or deleted. The next term you should know when you get ready to produce ESI is “load file.” A load file is a computer file that instructs a review software package how to import data into a database. You will also want to know whether the files you are receiving have undergone the OCR process. OCR means optical character recognition and is the method of converting images so that they are text searchable.
This can be critical when you are trying to find that “hot document,” or needle in the proverbial haystack.

**Determine the relevant universe of your client’s ESI before the first request for production hits your desk.**

One common mistake is waiting for a request for production before speaking to your client about the relevant universe of data. Data may be stored locally on servers, in the cloud, or on employees’ personal tablets or computers, among other possibilities. Hardcopy documents also must be considered. They may be stored at a business, home, warehouse, or offsite storage facility. If you can identify the universe of potentially relevant documents, you can design an organized approach to secure those records and allow ample time to collect, review, and produce relevant documents when that request for production arrives.

**Issue litigation-hold letters to custodians.**

At the onset of litigation, you and your client should identify all relevant custodians who may possess or maintain relevant ESI. All of these individuals should receive a litigation-hold letter that alerts them to immediately cease any routine document destruction until further notice. This instruction should come in writing, from you. I like to include an acknowledgement section, which provides further proof that you have identified the relevant individuals and they have taken measures to maintain all potentially relevant documents during the pendency of the litigation (and any appeals). Do not wait to issue a litigation-hold letter until you receive a discovery request. Litigation-hold letters should be promptly issued once litigation is reasonably foreseeable, but certainly no later than when a demand letter is served.

**Send litigation-hold warmer letters at frequent but reasonable intervals.**

So you have sent a litigation-hold letter—task complete, right? Not so fast! Depending on the type of case that you are handling, including the complexity of the case, how long the case has been pending, the number of custodians, and other factors, you should issue litigation-hold warmer letters. A litigation-hold warmer letter is essentially a reminder to the custodians that the litigation remains pending and that their obligation to maintain all potentially relevant documents is ongoing. Sometimes custodians think that if they haven’t heard from the lawyers in a while that it is probably permissible to clean out their inbox or delete those old files, or they simply forget. This is a sure-fire way to end up with a spoliation claim. It is easily avoidable if you establish a timeline to issue warmer reminder letters at frequent but reasonable intervals.

**Enter into a production agreement at the onset of litigation.**

Waiting to determine production specifics until the time of production will cause your client additional legal fees and will give you headaches! I recommend reaching a production agreement between all parties at the outset of litigation. This agreement should cover things like confidentiality markings on documents, the format of electronic production, clawback procedures, and the treatment of privileged materials. For a large case with a lot of ESI, I also like to include the fields and metadata to be produced in the format of a production section so that you will receive information such as the custodian of the record; the family relationship
between the documents (i.e., emails and attachments); the sender and recipient information; the file name; the file extension; the date created; the date modified; and the file path. You also can include information about the use, protection, and destruction of documents produced. For example, at the conclusion of the litigation, do you want the other side to return the documents produced or can they be kept? Confidentiality or trade secret issues may guide you in this decision.

**Update your definitions in your discovery requests.**
Be proactive about the discovery requests you propound to the opposing party. Make sure to update your definitions to include all forms of ESI such as email, text messages, and social media posts. Cases are won and lost on gaining this valuable information, but you will never get this information if you don’t ask for it or if your definitions are so narrow that they exclude relevant ESI!

**What is proportionality and how does it apply to my case?**
Proportionality is the process whereby you right-size your eDiscovery process to fit smaller cases. You should adjust your strategy by narrowing the types of ESI that you must preserve, collect, and produce during the litigation. You also can conduct abbreviated discovery on key issues or from key custodians, and then have a settlement conference, before you commence a full-blown discovery battle. Proposed amendments to the Federal Rules of Civil Procedure will provide more guidance on proportionality.

**What review tool should I use, if any?**
Once you collect the potentially relevant documents or receive production from the other side, you should determine which review tool to use for your particular case. There are two major types of document review. The first type is linear, or document-by-document review, which includes keywords and sampling. The second type is TAR, or technology-assisted-review, sometimes referred to as predictive coding or artificial intelligence.

Once you understand these 10 concepts, you are ready to tackle eDiscovery head on. Mastery of the eDiscovery workflows and processes can make an associate an invaluable part of the litigation team. The senior partners at your firm will thank you.

**Keywords:** woman advocate, litigation, eDiscovery, electronic discovery, young lawyers, litigation-hold letters, ESI, metadata, electronically stored information, production agreements

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Jury Instructions, Verdict Forms, and the Young Lawyer  
By Cristina Alonso – December 11, 2014  

You have been asked to prepare a set of jury instructions and a verdict form for trial . . . for the first time. What do you do? Where do you start? We offer some basic guidelines for drafting jury instructions or a verdict form, preparing for the charge conference, and preserving any error that may occur during or after the charge conference. The importance of having clear jury instructions, objections, and rulings on objections cannot be underestimated. Jury instructions are usually a fertile ground for appeal. Because they involve questions of law, jury instructions are often reviewed de novo, so it is imperative that you preserve all potential issues.

Drafting Instructions
When you begin to draft jury instructions, consult a number of sources. Start with your jurisdiction’s standard or pattern instructions. Many jurisdictions provide model instructions and verdict forms for particular claims or defenses. Trial courts will usually use these instructions, unless you can show that they do not accurately describe the current state of the law or are otherwise insufficient. If you determine that additional instructions are necessary, these instructions are referred to as “special instructions.”

If you think the standard instructions do not adequately state the law, or if you would like to argue that a change in the law is appropriate based on some authority, you should submit special instructions. Special instructions should be drafted after you have reviewed the statutes and case law that apply to your claims or defenses. Keep special instructions as short and simple as possible. Additionally, ask your colleagues for special instructions they may have used in similar cases, or before the same judge. They may provide insight not only with respect to appropriate special instructions, but also as to the court’s charge conference procedures.

Be organized. Make sure that the instructions are numbered or otherwise identified so that they are easy to refer to when discussing them with opposing counsel, or on the record during the charge conference. Indicate what authority supports each instruction. It is helpful to have each instruction on a separate page. Consider referring to the parties by their names (or a shortened version of their names) rather than as plaintiff or defendant. Parties are seldom referred to as plaintiff or defendant during trial—their names are used instead. Instructions that refer to the parties only as plaintiff and defendant, as many pattern instructions do, can be confusing to jurors, especially when there is a counterclaim or cross-claim in the case.

Once you have a first draft of your instructions, read them as a whole to ensure that all issues are addressed and that there are no internal inconsistencies or conflicts. Next, compare them to the verdict form to ensure that they complement each other. Then ask someone who knows nothing about the case (preferably a non-lawyer) to read them or, better yet, to listen to you read them.

Preparing for the Charge Conference
Bring to the charge conference copies of all pertinent authority for instructions or verdict forms.
Consider providing the court with a binder that includes the instructions, verdict form, and authority you will rely on. But it is not enough to simply hand this to the judge. You must file the instructions and verdict form with the clerk’s office, so that you have a proper record for appeal. Likewise, make sure all other parties’ requested instructions are filed with the court. Be sure to compare your instructions to the opposing party’s, so that you can bring any differences to the trial court’s attention during the charge conference. It is helpful to cross reference the instructions on your copy, or to create a chart that reflects your numbered instructions and how they correspond to the other side’s instructions. Also, have written notes of your objections to the opposing party’s instructions at the charge conference. Every appellate lawyer who has ever reviewed the cold record of a charge conference will tell you that the record is almost always confusing, with people interrupting each other, talking in shorthand, and referring to things that are never identified on the record. To avoid such confusion, follow these simple steps:

Create a chart that reflects your numbered instructions in one column and the other side’s corresponding instruction in the next column.

Cross-reference your instruction to opposing counsel’s instruction (i.e., note on your #3 instruction for legal cause that it is similar to opposing counsel’s #7 instruction). That way it is easier to go back and forth between different sets of instructions.

Make notes of every objection right on the instruction. That way you will always have your objection handy, even if the judge is jumping around between instructions. Cross-reference on opposing counsel’s instructions why your instruction is different or better.

Make sure you have extra clean sets of unstapled instructions, so that you can merge your instructions with those of opposing counsel according to the court’s rulings. File your written objections and the final version of the instructions.

Do the same with the verdict forms.


**During the Charge Conference**

You have your instruction and arguments ready, but what should you expect at a charge conference? Some judges may not schedule charge conferences, and you may have to specifically ask for such a conference. If the judge refuses to hold a charge conference, object on the record. Also, always ensure that a court reporter is present whenever the instructions or verdict form are discussed. If discussions occur outside the court reporter’s presence, be sure to state for the record what was argued and ruled on when the court reporter is present.

At the charge conference, do not be afraid to object and, where appropriate, to reject suggestions...
from the court that instructions have been agreed upon. A specific objection to the failure to give
your requested instruction may be required to preserve an issue for appellate review. Likewise,
an objection to the other party’s requested instruction may not suffice—you may be required to
request a correct instruction. Make sure you know the requirements for preserving these issues in
your jurisdiction before you go to the charge conference. At a minimum, the objections must be
specific enough to raise the points you would want to assert on appeal. See Voohries-Larson v.
Cessna Aircraft Co., 241 F.3d 707, 713 (9th Cir. 2001) (“Objections to a charge must be
sufficiently specific to bring into focus the precise nature of the alleged error.”). For example, if
you believe a requested instruction does not correctly state the law, you need to explain why.
Also, be sure that you explain to the court on the record how the language of the other side’s
requested instruction is either legally inaccurate or not supported by the evidence.

Object to instructions that are confusing or misleading when considered in light of other
instructions, the facts of the case, or the verdict form. Also, object to instructions that use words
that are too legalistic for a lay person to understand.

What do you do when the court has overruled your objection and you now want to modify the
instruction? First, you must be clear that you are only suggesting such “alternative” instructions
or modifications in light of the trial court’s rulings, which you object to, and that even the giving
of this modified or alternate instruction will not cure the prejudicial harm from that ruling.
Sometimes proposing a new instruction or the modification of an instruction reads on the
transcript like you are agreeing that this resolves the objection you originally raised. This is
because the trial court is trying to get agreement on the instructions. Do not hesitate to advocate
for your requested instructions, without compromise. Making it clear that an alternate or
modified instruction is not enough to correctly charge the jury on the point should allow you to
balance your desire to get the best instruction against your desire to preserve the record for
appeal.

Be sure the record reflects that the trial court ruled on all of your instructions, what all the rulings
are, and any reasons given for granting or denying a requested instruction. You must be sure that
the instruction is identified on the record, by page or by number. Sometimes instructions may not
be considered in the order they are requested. Do not forget to return to instructions that were left
for later consideration. It helps to place a check at the top corner of each instruction when it is
ruled upon and to tab with a sticky flag those that have not been ruled upon. This allows you to
flip through each page quickly to ensure you have a ruling on each instruction. It is also helpful
to bring a laptop to court so that you can modify instructions in court and provide a copy to the
court and parties immediately.

The Verdict Form
The verdict form should go hand-in-hand with your instructions. There are important strategic
and legal issues you must consider when drafting the verdict form. First, consider whether the
“two-issue rule” applies to your claims or defenses in your jurisdiction, so that questions are
requested that will preserve your points for appeal. Under the two-issue rule, an appellant cannot
show reversible error when an error relates to one claim or defense, but the verdict does not reveal whether the appellee prevailed on that basis or on another not affected by the error. See, e.g., Colonial Stores, Inc. v. Scarbrough, 355 So. 2d 1181 (Fla. 1977) (appellate court will not grant a new trial where the jury has rendered a general verdict and the appellate court finds no error as to one of the theories on which the jury is instructed and could have based its verdict).

Next, consider the number of questions you want to ask on the verdict form. The more questions the jury is asked, the more opportunities it has to deny liability. (Frequently, answering “no” to any question on liability will result in a defense verdict.) On the other hand, the more questions the jury is asked, the more opportunities it has to make mistakes and reach an inconsistent verdict. Just as you did with the jury instructions, file with the court a copy of your requested verdict form and that of other parties.

Lastly, at the conclusion of the charge conference and again before the jury deliberates, be sure to renew your objections to the instructions and verdict form as given to the extent they deviate from what you requested. *Never preface your objection by saying it is merely “for the record.”* It is not. It is an effort to provide the jury with correct instructions and a proper verdict form. Ask the court to confirm that your objections are preserved through the end of trial, and need not be repeated after the charges are given to the jury, if that is sufficient in your jurisdiction. Absent such a ruling, ask for a side bar either immediately before or after the charges are given and before the jury deliberates and again state your objections on the record.

**The Court’s Reading of the Instructions to the Jury**

Once the instructions and verdict form are finalized, try, if at all possible, to read them in their entirety before they are read to the jury. When the court reads the instructions to the jury, listen and compare them to the instructions the court agreed to give. Make sure they are the same as any written instructions that will be submitted to the jury. If there is any difference between the two, the oral instructions will likely control on appeal.

If there is an error, ask the judge to correct the oral instruction and specifically advise the jury that its initial instruction was given in error. Consider whether a motion for a mistrial is warranted. If you do not move for a mistrial, and the jury is told the instruction was incorrectly given and should be disregarded, the issue may be waived.

Drafting jury instructions and a verdict form can be challenging, but preparing ahead of time and staying organized will make the process smoother. Start thinking about the jury instructions and verdict form early on and well before the trial starts. Continue thinking about them and modifying them in light of the court’s rulings and evidence adduced at trial. And do not forget to ensure that all instructions are filed and the record is complete.

**Keywords:** woman advocate, litigation, young lawyers, jury instructions, verdict forms, charge conference, jury charge
Cristina Alonso is a shareholder at Carlton Fields Jorden Burt, P.A. in Miami, Florida. Portions of this article were drawn from the author’s article, “Young Lawyer’s Corner: Advice on Jury Instructions and Verdict Forms,” published in *Appellate Practice* by the American Bar Association in 2012. This article also relies on an ABA article co-authored with Sylvia Walbolt, a shareholder at Carlton Fields, P.A., whom the author thanks for her guidance and insights.
NEWS & DEVELOPMENTS

December 3, 2014

Shrinking the Gender Wage Gap Will Take More Than Just Good Karm

Newly-appointed Microsoft CEO Satya Nadella made waves across the nation when he stated that women should not ask for pay raises. Instead of asking for pay raises, Nadella encouraged the women attendees at a technical conference he spoke at on October 9, 2014, to believe that “the system will give the right raises as someone goes along in their career.” Although Nadella later apologized, his remarks met substantial backlash.

In a recent article published in Fortune, Lauren Stiller Rikleen, president of the Rikleen Institute for Strategic Leadership and Executive-in-Residence at the Boston College Center for Work & Family, critiqued Nadella, noting the deep-rooted nature of the gender wage gap. For example, Rikleen informed readers that research continues to evidence a bias in the workplace against mothers. Rikleen stated that statistical data establishes that “when women marry and have children, their average incomes drop; married men with children experience an increase in salary compared to their childless male counterparts.”

Rikleen proposes the following strategies, as a “starting point” for companies seeking to close the gender wage gap in their workplace:

- Monitor assignments to “ensure that women have equal access to the internal informal networks.”
- Analyze compensation data because “you cannot change what you do not measure.”
- Hold managers accountable to established standards for salary increases.
- “Train the workplace in unconscious bias” and “implement structural mechanisms to minimize its impacts.”

Keywords: woman advocate, litigation, women lawyers, glass ceiling, gender gap, working mother

—Hannah E. Bellanger, Meagher & Geer, P.L.L.P., Minneapolis, MN
November 21, 2014

Overcome Your Fear of Networking!

In a recent article on Levo.com, Personal Branding Blog’s Heather Huhman discusses six ways to overcome your fear of networking. Acknowledging that networking “can be a scary thing to do” and “is a fear many people share,” this article provides six insightful tips for becoming a fearless networker.

Topics explored include using the magic of Twitter, attending fun networking events (WAC events for example!), hosting your own networking events, or even avoiding networking events altogether and attending workshops or speaker events to meet professionals in your industry. Another topic includes getting away from small talk and instead shifting “your focus to learning about the people you meet” and sparking “conversations with people by asking about their jobs, what they enjoy doing for fun, or why they like their jobs.”

Finally, Ms. Huhman explores the concept of “less is more” by encouraging forming one or two strong bonds with new people rather than collecting 20 business cards. By focusing on these steps, you can learn to overcome your fear of networking and learn to build “valuable relationships with people who can become friends and mentors.”

Keywords: woman advocate, litigation, networking, networking tips, conquering fears

—Tiffany J. deGruy, Bradley Arant Boult Cummings LLP, Birmingham, AL
WORDS OF WISDOM

December 11, 2014

What challenges should new lawyers be prepared for, and how can they best prepare for them?

One of the most challenging aspects of becoming a new lawyer is often overlooked. Whether you are going to work at a firm, a legal organization, in government, or in any professional capacity, new attorneys must be ready for a variety of interactions with co-workers or clients around the office, and with other professionals and community leaders at social gatherings and marketing events. These interactions call for personable, knowledgeable, and quick-thinking dialogue, and they are an important part of being a new lawyer. They also can be challenging, especially for those who have not had a full-time job before law school and have never experienced office culture and interactions in professional settings.

To prepare for this challenge, don’t focus only on the academic classes offered in law school. Pursue opportunities to become well-rounded. Study abroad, positions on journals, and clinical programs all allow students to step out of the classroom and interact with others in the community. Since so much of law school is focused on the individual student, learning how to communicate effectively with others and work as part of a team is integral to making the most of your career. To be comfortable in positions of leadership and in the role of advocate before you graduate gives you real-world skills.

As an extra plus, these positions are also great for building a résumé and for talking points in job interviews. Because these unique opportunities come around only after your first year of law school, I disagree with the call to cut law school education back to two years. Three years allow students time to take the classes they need and want, while also gaining real-world experience that will help them as they step from the role of student to that of professional.

—Heather K. Murphy, associate (pending admission) at Bressler, Amery & Ross P.C. in New York, New York.

Conflict is at the heart of being an attorney. A lawsuit of any kind epitomizes conflict, of course, but in litigation, there is also conflict between associates, between partners and associates, with opposing parties, with judges, with witnesses, and often even with our own clients. As lawyers, we must handle conflict in just about every aspect of our jobs.

Learning to manage conflict with empathy helps keep you focused on the litigation task at hand. Try to understand the other person’s role, position, and feelings of power or powerlessness. Stepping outside of your own perspective helps you think about how to resolve interpersonal conflict productively and keep your own frustrating emotions at bay.
To manage conflict, I rely on a mix of skills from dispute resolution, improvisational theater, and parenting. Vocalize to yourself why the other person might be acting the way he is. Voice modulation also can go a long way in quieting a situation down. Mirroring emotion is another effective tool to calm situations, because tempers run high when one person feels she is not being heard. Tell-tale signs of someone “not being heard” are when a person repeats herself over and over again, or when she is very quick to jump to hot emotional descriptions of events. I also gauge how the power balance between myself and the other party might be affecting our dynamic.

The key to using these techniques—along with just stepping away for a while and taking a deep breath—is to be aware of the conflict, rather than reacting quickly and maybe regrettably to it. If we can find it in us to empathize with the other person, we can take better control over the situation and be proud of how we handled ourselves as lawyers.

—Sejal H. Patel, former federal prosecutor, recent graduate of Harvard Divinity School, and a solo practitioner and writer in San Francisco, California.
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