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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

How Firms Are Grooming The Next Appellate Stars

By **Jimmy Hoover**

Law360, Washington (January 5, 2018, 2:45 PM EST) -- Client demands and market forces have created a shortage of oral arguments opportunities for developing new appellate lawyers. In a series of interviews with Law360, firms explain how they are dealing with the problem.

As the cost of legal representation has increased, so have the expectations of paying clients, often dousing the chances of anyone with single-digit court arguments from handling an appeal. The explosion of appellate practices at large firms and a crop of new boutiques in recent years has also created a low-supply, high-demand market for those opportunities that bodes poorly for new attorneys.

But firms have to adapt if they want staying power, said Constantine L. Trela Jr., the chair of Sidley Austin LLP's Supreme Court and appellate practice group. Trela said that after he and other higher-ups at the national firm clock out for retirement, "you don't want to have the firm left with people who basically haven't argued cases."

Getting new associates in front of the lectern can also have more immediate benefits, said Deanne Maynard, the co-chair of Morrison & Foerster LLP's Supreme Court and appellate practice. "On-the-feet experience makes better all-around advocates," Maynard said. "Once you've faced the hard questioning yourself, you approach brief-writing differently — you focus on making sure the brief anticipates and answers questions that the judges may have."

Perhaps most importantly, firms that give new attorneys to young associates can be more attractive to talented new lawyers. "Offering associates the chance to take a leading role is helpful for both recruitment and retention," said Tom Saunders, an appellate partner at WilmerHale. "Associates want to know that their relationship with a firm is a two-way street and that the firm is going to invest in their professional development."

But even if firms are starting to recognize the benefits of a battle-tested associate team, getting clients to bankroll what may seem like a professional development program is another matter. "Just like you don't want to be a heart surgeon's first surgery, clients aren't wild about having their case being somebody's first argument," Trela said.

One way to make it an easier sell is ensuring that young lawyers spend time with the client before the conversation even comes up. "The instances where we've had success have been instances where we've had the associate front-and-center throughout the case — going to the meetings and participating in

strategic discussions, not just editing the briefs," Trela said.

"Have them involved right from the beginning so the client is thinking of them as a key member of the team not just a resource that the real members of the team turn to to do the grunt work," he added.

Trela used that technique to convince Microsoft Corp. to sign off on having Sidley Austin LLP senior associate Nathaniel C. Love argue on behalf of the tech giant before the Second Circuit in a patent case involving Acacia Research Corp., a litigious patent licensing firm.

"He had done, in particular, a lot of work with Microsoft's in-house lawyer and had been in all the discussions about how the case should be briefed," Trela said. "When I picked up the phone to call the client to talk about it, it was not at all a long or difficult conversation."

After Love nabbed a "great result" for Microsoft, "proposing him to the next client is a much easier sell," Trela said.

WilmerHale's Catherine Carroll described a similar experience for her first Supreme Court oral argument as a young partner in 2013, which she recounted in an article for Law360 in October. The case involved an insurance company for whom she had worked on numerous matters over the years.

"It wasn't the sort of thing where the suggestion was being made out of the blue," Carroll said in an interview. "I had gotten to know the client well over the course of several previous matters, where the more senior lawyers I was working with always went out of their way to make sure that I received credit if credit was due."

Adjusting the bill is another way to make an otherwise reluctant client warm up to the idea of having a less experienced colleague handle the appeal. "We've done that on occasion and we've done that both right at the outset when the appeal starts and we've done that as the case progresses," Trela said of such fee incentives.

If a client is still not convinced, Trela said he has offered to have the young lawyer in question participate in moot court practice for the argument, free of charge. "You don't have to pay for it, you'll see this lawyer arguing on his or her feet and see what you think," he said he tells clients. "It’s a benefit to you since all of us have spent time preparing for it."

Indeed, allowing greener attorneys to handle an oral argument doesn't have to be a dice roll, or charitable act on the part of an institutional client. Sometimes, it's just good case strategy.

WilmerHale's Saunders said having associates argue an appeal can be be good legal strategy. He often recommends it when the client is an appellee defending the judgment of a lower court, rather than relying on a widely recognized appellate lawyer. "If the theme of your brief is [that your opponent is] just disputing the facts and the court below is entirely correct, sometimes you can be stepping on your message if you have brought in your most senior superstar to deliver that message," Saunders said.

At Orrick Herrington & Sutcliffe LLP, Supreme Court practice chair Josh Rosenkranz has a more straightforward way of spreading opportunities to his colleagues: telling the client "no."

"If a client comes to me and says, 'We have this case we'd like you to take the lead on,' I would say, 'I would love to help you. This is really important, but I'm oversubscribed,'" Rosenkranz said.

After delivering that message, Rosenkranz proceeds to "actively credentialize" a colleague, and assure the client that despite not taking on the argument, he will "be there every step of the way," he said.

Rosenkranz admits that the strategy comes "at the risk of losing an opportunity," but he has a rule of not arguing more than 10 appeals, or more than two Supreme Court cases, each year.

"There's a certain vanity in taking every argument opportunity that's available to you and I think it does a disservice to your colleagues," he said. "It's also an acknowledgement of my own limitations. I'm just not as good when I argue two dozen cases as I am when I argue one dozen cases a year."

--Editing by Katherine Rautenberg.