

University of Michigan Law School

## University of Michigan Law School Scholarship Repository

---

Articles

Faculty Scholarship

---

2014

### Training the New Litigator: Some Assembly Required

Leonard M. Niehoff

*University of Michigan Law School, lniehoff@umich.edu*

Available at: <https://repository.law.umich.edu/articles/2831>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Legal Profession Commons](#), and the [Litigation Commons](#)

---

#### Recommended Citation

Niehoff, Leonard. "Training the New Litigator: Some Assembly Required." *Litigation Journal* 40, no. 4 (2014): 49-55.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# Training the New Litigator Some Assembly Required

LEN NIEHOFF

---

The author is a professor of law at the University of Michigan Law School and of counsel to Honigman Miller Schwartz & Cohn LLP, Ann Arbor.

The financial crisis of 2008 brought the legal profession to a crossroads. Indeed, it brought the profession to so many crossroads that we awoke to find ourselves in a surreal cityscape that seemed to consist of nothing but dangerous intersections. Law firms faced tough decisions about which way to go: Should we get smaller, or stay the course, or take advantage of the buyer's market for new and lateral hires? Should we jettison struggling clients or stand beside them? Should we cut budgets for business development, or do we need them now more than ever? Should we pursue some practice areas and clients that the downturn has made more attractive, or will we regret doing so once the economy rebounds?

Of course, law firms had been thinking about these questions for many years. But the financial crisis brought us the additional focus that urgency provides. "When a man knows he is to be hanged in a fortnight," Samuel Johnson memorably observed, "it concentrates his mind wonderfully."

The financial crisis urgently and wonderfully concentrated our minds on the training of new lawyers. But getting new litigators ready for prime time poses serious challenges. One of those challenges follows from the profession's limited tolerance for error. We recognize the pedagogical value of allowing people to make mistakes and learn from them—as Rita Mae

Brown put it, "Good judgment comes from experience, and experience comes from bad judgment." But law firms cannot simply turn new trial lawyers loose to blunder their way toward wisdom. The stakes are too high, some errors are irreversible, and no sensible client would consent to such an approach in his or her own case. Indeed, this risk-averse perspective is embodied in our ethics rules, like ABA Model Rule of Professional Conduct 5.1, which requires that senior lawyers in supervisory positions make reasonable efforts to ensure that more junior lawyers comply with their obligations, including the obligation to provide competent representation. Sending an untrained litigation associate off like an unguided missile is not a template for training; it is the launch code for malpractice.

Responsible law firms therefore try to provide new litigators with appropriate oversight and monitored opportunities for hands-on learning. Even under controlled circumstances, training can be a dicey undertaking. In a transactional practice, a senior lawyer will typically have an opportunity to review the work of a new associate and to catch and correct any errors before the document leaves the office. In contrast, a senior litigator watching a new associate fumble his or her way through a motion argument, a cross-examination, or a

deposition may have little or no chance to intervene and stop or repair the damage.

Mark Bernstein pointed this out to me when I interviewed him in the course of preparing this article. I was particularly interested in Mark's perspective because so much of the recent discussion around training seems to be directed by lawyers from large defense-side firms that are encountering increased client skepticism about the value new associates add to their matters and about the necessity of having multiple lawyers present at meetings, depositions, hearings, and the like. This shift in client demands may pose challenges to large defense-side firms. But they are not new to Mark, who serves as president of the Sam Bernstein Law Firm, PLLC, in Michigan, a long-established plaintiff-side personal injury firm of about 30 attorneys.

Mark made the point in a compelling way, contrasting the opportunities for intervention in the training of litigators with those in the training of physicians. He described watching one of his children being delivered by a relatively inexperienced obstetrician, the senior and supervising doctor standing right alongside in case something went wrong. When an issue arose, the more experienced physician calmly reached over and took care of it. Mark told me that, in an ideal world, we would be able to step in and pull our aspiring trial lawyers out of any trouble. Alas, litigation does not work that way.

Given these considerations, we want our new litigators to receive the best training we can reasonably offer before sending them onto the high wire—often without a net. A few obstacles, however, stand in the way of providing that training. The good news is that there are only two major obstacles; the bad news is that they are pretty big ones: time and space.

---

## Obstacles of Time and Space

Time is an obstacle because most of a law firm's best litigators are also its busiest. Unless those lawyers set aside time to train and mentor newer lawyers, it will not happen. But, of course, any time that a lawyer reserves for these purposes cannot be devoted to other useful things, like billing hours and wooing clients. Based on anecdotes and complaints I have heard over the years, it appears that some firms address this issue by giving their training portfolio to senior lawyers who have time on their hands, ensuring that associates take their lessons from those attorneys whom management least wants them to emulate.

New lawyers may harbor their own concerns about spending time on training. They come to the practice knowing that law firms measure success by using a formula of merciless simplicity: Reward follows from revenues and results. Some of them will believe that a big billable year covers a multitude of sins—including absences from firm-sponsored educational

activities—and that training is for underachievers and suckers. Unfortunately, some firms will validate those beliefs.

Space poses some serious challenges as well. Mark Bernstein observes that the leading trial lawyers in a successful plaintiff-side litigation firm will usually be out of the office—at a deposition, a hearing, a trial, or an appellate argument. He compares his business to an airline that wants to see its planes in the air and not in the hangars. Litigators in large defense-side firms may not be in trial as often, but they, too, will frequently be away from their offices. This makes training tough. A new associate will have a hard time learning from an experienced litigator if they rarely find themselves in the same room.

---

# Sending an untrained associate off is not a template for training; it is the launch code for malpractice.

---

In my view, technology has aggravated the problem. When I entered practice in 1984, a fair amount of my training took place informally in the library. Newer lawyers who were engaged in research projects congregated there, and more senior lawyers often wandered down to assign work. This frequently led to discussions among the assembled, the library serving as a town square where issues were debated, ideas tested, strategies evaluated, and war stories told. It was interesting, exciting, and engagingly democratic: We huddled around a table and collectively tried to figure out how to win. Technology has rendered this space obsolete, so, in many firms, associates now spend their days isolated in their offices where they conduct research on their laptops and receive assignments by phone or email. We have lost something valuable in this shift away from common space, and our new litigators are the worse for it.

A straightforward solution would be to have new lawyers accompany experienced litigators as they go about their business. This puts them in the same time and space; it affords the neophyte a chance to observe and ask questions; it provides the senior lawyer with an opportunity to monitor the new lawyer's development; and it allows the experienced attorney to assign greater responsibility in a manner informed by, and tailored to, the particular individual's progress. I was the

beneficiary of such an approach, spending the early years of my career tagging along with half a dozen different partners. They were all larger-than-life characters: One had been with the Marines on Guadalcanal; one had argued a historic case before the Supreme Court; one was a world traveler; one was a natty dresser with a passion for good food and wine; one was a beefy Iowan who smoked Camels, drove a giant station wagon, and listened to tapes of John Philip Sousa marches; one was a West Point graduate who had served in Vietnam—a lawyer with whom I still practice and from whom I continue to learn. Four were members of the distinguished American College of Trial Lawyers, and the other two were fully their equal in the courtroom. It was a spectacular education.

---

## The Role of Law Schools

Educations like that have become pricier. The financial crisis raised to a fevered pitch the drumbeat of complaints that law firms were passing on the cost of training new lawyers by having them attend depositions, hearings, conferences, and trials even though they added little or no value. Many clients pushed back on billing practices. Some even drew inflexible lines regarding the experience level or number of lawyers who could attend such proceedings (or, in its most severe form, who could work on their case at all) and be paid for it. Law firms remained free to have junior lawyers labor hand-in-glove with experienced litigators, but the firm would have to underwrite the costs associated with doing so.

Of course, these challenges would be ameliorated if new lawyers entered the practice with sufficient skills for law firms to feel comfortable giving them more responsibility more quickly. For years preceding the financial crisis, the profession had been engaged in a dialogue about the disconnect between what law students are taught and what lawyers need to know. In 1992, a Task Force of the American Bar Association Section of Legal Education and Admissions to the Bar issued a report, commonly called the MacCrate Report, to address this “gap between the teaching and practice segments of the profession.” Although the MacCrate Report concluded that the gap was more a function of perception than reality, it spurred increased attention to the skills-oriented elements of the curriculum.

Ironically, this conversation escalated on the cusp of the crisis when, in 2007, the Carnegie Foundation published its influential report, *Educating Lawyers: Preparation for the Profession of Law*. Based on a study of 16 law schools during the 1999–2000 academic years, it found much to praise in these “impressive educational institutions.” It also, however, found shortcomings in their efforts to get students ready for the actual practice of law.

The Carnegie report, the financial downturn, and the increased cost of tuition prompted a perfect storm for the criticism of law schools, which were accused of saddling students with unmanageable debt, indulging the faculty penchant for arcane theory, and launching their students into the world without the skills necessary to practice (and thereby pay off their loans). A November 19, 2011, article in the *New York Times* entitled “What They Don’t Teach Law Students: Lawyering” is characteristic of the critiques. The article detailed the charges against law schools at some length, stating, for example: “Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England.” “Professors,” the article went on to claim, “are rewarded for chin-stroking scholarship, like law review articles with titles like ‘A Future Foretold: Neo-Aristotelian Praise of Postmodern Legal Theory.’” Even Chief Justice John Roberts got into the act, remarking (also in 2011): “Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.” A flurry of indignant finger-wagging by members of the profession followed: Law schools needed to solve law firms’ training problem by delivering “practice ready” lawyers to their doorsteps.

I have sympathies with both camps. I have been a practicing litigator for three decades. I understand the rewards and the frustrations of training new lawyers. The young attorneys I helped train went on to become a United States attorney, a federal judge, heads of their own firms, and outstanding trial lawyers—although I have also had my share of failed protégés. My experience working with freshly minted graduates over the years fully persuades me that law schools can, and must, do more to prepare their students for practice.

But I am also an academic. I have been teaching for almost 30 years and serving on the full-time faculty of the University of Michigan Law School since 2011. I teach foundational courses—like civil procedure, evidence, and professional responsibility—and more theoretical ones as well—like a seminar called Law and Theology. As a result of my experiences in this environment, I know that law schools have made tremendous advances in preparing their students for practice. I know that easy caricatures of legal scholarship and “chin stroking” faculty members do not give law schools sufficient credit for that progress. And I know that, although improvements can still be made, there are also real and significant limitations on the ability of law schools to train new lawyers, especially new litigators.

That law schools have made substantial progress with respect to experiential and skills-oriented education is beyond

dispute. Consider, for example, the dramatic transformation in the availability, quality, and academic standing of clinical programs. As my University of Michigan Law School colleague David Santacroce observes in a forthcoming piece, in the late 1950s only 15 American law schools offered a legal clinic for credit; by 1987, 80 percent of ABA-approved law schools were doing so; by the mid-1990s, the ABA had adopted regulations that required law schools to offer their students “substantial opportunities for . . . live-client or other real-life practice experiences” and to afford more employment security to clinical faculty; and the 2007 Carnegie report noted the growth and critical

---

“Always remember  
that this is *your* career,  
not the firm’s career,  
and no one else’s. Own  
it. Invest in it.”

---

role of clinical education in the contemporary legal academy. Recent years also have seen a dramatic increase in internships, externships, and practicum courses in discovery, trial practice, appellate advocacy, and negotiation and settlement strategy. Of course, we must vigilantly preserve our progress against budgetary and other pressures, and much work remains to be done. But anyone who claims that law schools have not been paying attention, well, has not been paying attention.

At the same time, it is important to remain realistic about what law schools can and cannot achieve. Some law schools serve student bodies with highly localized professional goals. But many teach students who may end up in Chicago, Atlanta, Miami, or Los Angeles. As a result, law school curriculums tend to focus on federal law and provide little (or no) instruction in state substantive law or procedural rules. Most state-specific education happens in the bar-review process.

Just as important, law schools cannot indoctrinate students with the norms of the legal community or the firm where they will practice. Yet, those norms shape a great deal of what lawyers actually do on a day-to-day basis and put considerable flesh on the notion of what it means to be trained. One of my earliest assignments as a new associate was to prepare a response to a motion and to ask the opposing lawyer for an extension to file it. When I phoned the other attorney, he placed some

conditions on agreeing to the extension. This exchange left me flummoxed, and I said I would have to call him back. Was my request unreasonable? Was his? Should I dig in my heels? Should I agree to some of his conditions? Should I agree to all of them? I wandered down to the assigning partner’s office and sheepishly asked what to do. He grinned, politely refrained from calling me an idiot, offered some instruction, and said “that’s how we do things around here”—“around here” in this context meaning in this city, within this practice area’s culture, in this firm, under his supervision. A few months later, when a similar situation arose in a case overseen by another partner, I learned that “around here” meant something slightly different—around there.

Stated simply, the practice of law is highly context-dependent and no law school can prepare its students for all of the context-driven practical and normative variables. Nor, I submit, should law schools try to do so. A law school that purported to deliver “practice ready” attorneys would strike me as an unspeakably arrogant, impossibly misinformed, or dangerously naïve institution. In critical respects, law schools cannot make new lawyers competent to practice; they can only make them competent to *become* competent. The rest falls to the firms for which those attorneys will go to work. This is an inconvenient truth for which no one should apologize. It inheres in our particular service profession, always has and always will.

---

### Training New Litigators

So how should those of us who worry after the training of new litigators go about it? Which way should we turn at this decisional crossroads? Well, as Yogi Berra once famously declared, “When you come to a fork in the road, take it.” Indeed, multiple answers to this question exist, and the best training draws on a battery of strategies.

A good place to start is your summer clerkship program. In better economic times, some firms—particularly, large ones—filled the calendars of well-credentialed prospects with social events and other frolics and detours designed to lure them aboard. The financial downturn rendered this approach, which now seems the stuff of fable, all but extinct. Yet, most law firms still do not take maximum advantage of the opportunities that summer clerkship programs present.

Many such programs are structured on a model in which senior lawyers provide summer associates with narrow research and writing projects on discrete issues. This enables the supervising attorney to confirm what the clerk’s law school grades may already have revealed: that the candidate can understand a legal question, look up the answer, and intelligibly convey it. This is a useful component of a clerkship program, but it makes no sense as its sole focus unless the firm intends to conscript the new lawyer into a lifetime of service staring at a computer screen.

Firms should also use their summer programs to initiate the training process and, not incidentally, to discover whether any insurmountable obstacles exist to making any of the clerks into skilled litigators. This happens. In the past 30 years, I have encountered more than a few bright, capable, hard-working young lawyers who lacked the instincts, the competitive spirit, the mental and verbal agility, and/or the intestinal fortitude that typically characterize successful trial attorneys. Not all were lost causes—attentive mentoring kept some in the fold—but most were better suited to a different place in the profession. Using appropriate training mechanisms—like deposition simulations or moot arguments of motions—to put summer associates through their paces can help identify issues that no number of research projects will ever flag. And spotting potential problems sooner, rather than later, is more cost-effective and is better for all concerned.

---

## We lost something valuable in the shift away from common space, and new litigators are the worse for it.

---

In many firms, the first few years of a new lawyer's work will similarly do little to advance the lawyer's training or to identify any possible mismatch between the novice's innate gifts and a career in litigation. The beginning lawyer may discover that he or she is living on a diet of research, memo writing, and the most tedious tasks the practice has to offer: reviewing documents, compiling privilege logs, creating factual chronologies, and so on. To some extent, this is understandable and reasonable. After all, the work needs doing. Certain things roll downhill, as the saying more or less goes. And new attorneys typically bring a distinctive value to such projects: They tend to be attuned to recent changes in the law, competent at conducting legal research and online factual investigations, and adept at learning the new technologies that now drive electronic discovery. Also, client skepticism about whether associates bring anything useful to the table has created greater pressure on supervising attorneys to assign projects where they plainly do. Alas, these forces frequently combine to produce attorneys who are no better skilled in

their third year of practice than they were in their third year of law school.

Avoiding these risks requires a thoughtful and deliberate approach to training. My search for the gold standard in preparing new trial lawyers to practice led me to Charlotte Wager of Jenner & Block, one of the nation's preeminent litigation firms. A litigator herself, Charlotte serves as the firm's chief talent officer and oversees all aspects of the firm's hiring and attorney development. As I anticipated, Jenner uses a wide variety of tools to address the challenges of training new litigators.

Charlotte says that her firm addresses the clients' concerns about value by working with the firm's new lawyers to "break through that 'no experience' barrier as quickly as possible." The firm's storied pro bono program plays an important role here. In our conversation, Charlotte highlighted the firm's participation in a variety of projects, including a municipal court initiative that seeks to identify pro se plaintiffs who have trial-worthy cases and who need a lawyer, and a domestic violence program that gives new lawyers the opportunity to go to court, examine a witness, and secure an order. All of this provides newer lawyers with excellent experience and serves the public good along the way. My own firm similarly strives to afford real experience to our new litigators as soon as possible and uses its pro bono program to achieve the same ends.

Firms also should remain mindful of training beyond their pro bono programs. The first firm with which I was affiliated had in its stable of clients a large shipping company. The firm handled its big cases, but the client also had lots of smaller matters involving damaged goods where little was at stake. The firm could have taken a pass on those lesser cases but, instead, worked out a fee arrangement attractive to the client and used them to give new litigators some experience. I still recall the luxury, and the agony, of spending an entire weekend preparing a case that involved a broken porcelain statue worth just a few hundred bucks. I learned a lot from the exercise (including that the statue's manifest ugliness did not provide a defense).

To manage the cost and choreographic complexity of trying to get a firm's new lawyers and its experienced lawyers into the same space at the same time, Charlotte emphasized Jenner's willingness to take the measures necessary to make that happen. The firm has a formal mentor program, which helps ensure that everyone receives the training they need and that no one gets lost in the crowd. In addition, Jenner partners devote considerable time to formal training exercises, like working with instructors from the National Institute of Trial Advocacy to help educate newer lawyers on the techniques of taking and defending depositions. And the firm uses a benchmarking process to measure the progress of budding litigators as they hone their skills.

Then there is the challenge of new lawyer skepticism about devoting time to training rather than billable hours. Of course, many new lawyers will come to the firm hungry for training and will happily take advantage of all opportunities offered. But cynics who view non-billable activities as pointless and pernicious will come, too. Over the years, I have seen many young litigators fall well short of their potential because they failed to take personal ownership of their careers. They viewed themselves not as lawyers, but as employees of a law firm, and they passively gave their careers over to the firm to manage. This mindset prompted some to view themselves as billing machines; it led others to do whatever the firm asked but not to take the initiative to do anything else. Both approaches proved workable in the short term. But neither approach cultivated the self-development, healthy ambition, and individual vision that characterize a truly robust and fulfilling career in the law.

When I was a new lawyer, an immensely successful senior attorney told me, "To make your mark in the legal profession, you need to be so engaged and so active that every time someone turns around they step in your name." Significantly, he did not say "the firm's name." Of course, we want our new lawyers to exhibit loyalty, work well as part of a team, and take an interest in advancing the firm's reputation and success as well. But, in my experience, the best lawyers do not abdicate to others the responsibility for building their careers.

New litigators come to firms with some assembly required. The good ones will allow the experienced attorneys to put things together for them; the better ones will show a personal investment in the craftsmanship; the best will strive to make the final product excellent and uniquely their own. Every year, I talk with our newest lawyers about making the transition from law school to the profession. I note the ways in which the formulas for success in these environments differ; I stress the importance of developing skills quickly; and I celebrate their good fortune in landing at a law firm that cares about their training. But the most important thing I say to them is this: "Always remember that this is *your* career, not the firm's career, and no one else's. Own it. Invest in it. Make it something of which you can be proud."

As Charlotte Wager described the messages that her firm sends to its new litigators, it occurred to me that some of them touch on this same theme. For example, she encourages new attorneys to take the time to learn about the firm's client base, to educate themselves about the industries they will be serving as lawyers at Jenner & Block, and to read the *Wall Street Journal* to learn more about the issues currently of interest to business. This wonderful advice helps new lawyers position themselves to do the best possible job for the client and prevent embarrassing gaffes. Nothing will reinforce a skeptical

client's concerns about an associate's value more quickly than a remark that reflects ignorance of who the client is and what the client does.

A much smaller firm like Mark Bernstein's can adopt many of these same strategies. Mark can, and does, have a mentor program; he can, and does, encourage new lawyers to take ownership of their careers. He cannot replicate every dimension of a large firm's formalized in-house academy. But, in my discussions with Mark, it became clear that his firm seeks in its own way to achieve the same goals. He sends his associates to continuing legal education seminars and conferences, and, what is more important, he is willing to absorb the cost of sending new lawyers along with his most experienced litigators as they go about their work. He knows it is the only way he has to ensure they end up in the same space at the same time. He understands that this is critical to the success of the novice and, ultimately, to the success of his firm.

We find ourselves at a decisional crossroads with respect to the training of new litigators. We can stall out, blaming our law schools, our clients, and even space and time for making it hard for us to move forward. Or we can take the forks in the road before us and pursue all those avenues that will provide meaningful training to our newest colleagues. The latter approach will require strategic thinking, teamwork, excellent communication, and the restless and relentless pursuit of a goal. But so what? That is what we do. We are litigators. ■