Junior Bar Special

Mind the gap

Alice Carse and Kannon Shanmugam consider what can be done to address the growing skills gap between junior and senior lawyers in commercial litigation, on both sides of the Atlantic

One of the most pressing issues facing the commercial Bar today is the lack of opportunities for junior practitioners to develop the skills needed to lead the types of large, complex cases that dominate modern commercial litigation. As cases increase in size and complexity, they become concentrated in the hands of a small number of senior practitioners. The inevitable result is a skills gap between those senior lawyers and junior lawyers who are not getting the opportunity to conduct advocacy. And that skills gap will only continue to grow if it is not addressed.

The annual COMBAR North American meeting gives practising lawyers from the United Kingdom, the United States, and other jurisdictions the opportunity to exchange views on subjects of mutual interest. The most lively debate at this year's meeting, held in Washington DC in April, centred on how to create more advocacy opportunities for junior practitioners in commercial litigation. It was instantly obvious that juniors on both sides of the Atlantic want to conduct more advocacy, and that senior lawyers and judges appreciate the importance of creating more opportunities for them to do so.

In our view, the profession needs to ask whether the traditional approach to training junior lawyers is working – and what can be done to train them more effectively for leading roles in modern commercial litigation. Today's senior lawyers entered a profession very different to the one entered by today's juniors. The traditional path for developing into an advocate capable of leading large commercial cases was to start with a variety of small cases, involving advocacy in both the civil and the criminal courts, and to work towards building a practice of larger and more complex cases in a particular area. Today's juniors, by contrast, have often determined on a specialised practice area even before they leave law school, and join a specialist chambers or firm.

One suggestion often made to junior lawyers is to take on smaller cases, perhaps in a different area of practice or on a pro bono basis, to gain advocacy experience. But that strikes us as an insufficient solution. For one thing, it can be difficult and time-consuming to find those cases, particularly for junior lawyers in specialist chambers or firms. But more broadly, while it is true that handling a smaller case can provide some advocacy experience – and while pro bono work is obviously worthwhile for its own sake – it does not necessarily provide experience of a lengthy trial with long document-based cross-examination.

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The way forward

There are two more promising solutions which merit closer consideration. The first is for senior lawyers and clients to provide greater opportunities to junior lawyers in large and complex cases. Senior lawyers can demonstrate trust in their junior lawyers by encouraging clients to use them to argue motions or make applications. In those circumstances, moreover, there is likely to be an obvious cost advantage for the clients in using junior lawyers.

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To be sure, as the participants at the COMBAR meeting noted, a client could object to assigning more responsibility to junior lawyers on their cases, on the grounds that the client instructed a particular leader in the expectation that he or she would conduct all of the advocacy. The general view at the COMBAR meeting, however, was that clients had been surprisingly receptive to giving junior lawyers more significant roles, especially in handling witnesses. Of course, there is some circularity involved in moving towards this approach: it needs to be considered the norm for clients to accept it, yet it will only be the norm when it is actually occurring.

When it comes to handling witnesses, there are a number of different ways in which junior lawyers can be used. The American system of taking depositions presents a particularly good opportunity for juniors to get experience in dealing with witnesses. It emerged from the discussion in Washington that junior lawyers were encouraged to take depositions from the very start of their practice. In large commercial cases with many witnesses, juniors can start by taking depositions from witnesses whose evidence is short or relates to a discrete point.

Inside the courtroom, too, junior lawyers can play important roles in examining witnesses. In England and Wales, it was for many years the convention that a junior would be given his or her own witness to cross-examine during the trial. But that practice has faded away, leaving leaders to cross-examine all witnesses and giving rise to an expectation among clients that this will happen. A number of participants at the COMBAR meeting expressed the view that it would be beneficial to return to the former convention, which not only provides good experience for juniors but can lighten the load on leaders. Others expressed support for the related practice of giving junior lawyers discrete issues on which to conduct cross-examination (see this issue, pp16-18).

Judicial intervention?

The second, and perhaps more controversial, solution to addressing the lack of advocacy experience is for the judiciary to intervene. At the COMBAR meeting, participants discussed "The Young Lawyer Rule", a rule adopted by American judge Gregg Costa when he was serving as a trial judge for the District Court for the Southern District of Texas. That rule, which was part of Judge Costa's written practices and procedures, stated as follows:

> *"The Court is aware of a trend today in which fewer cases go to trial, and in which there are generally fewer speaking or 'stand-up' opportunities in court, particularly for young lawyers (i.e., lawyers practicing for less than seven years). The Court strongly encourages litigants to be mindful of opportunities for young lawyers to conduct hearings before the Court, particularly for motions where the young lawyer drafted or contributed significantly to the underlying motion or response. In those instances where the Court is inclined to rule on the papers, a representation that the argument would be handled by a young lawyer will weigh in favor of holding a hearing. The Court understands that there may be circumstances where having a young lawyer handle a hearing might not be appropriate – such as where no young lawyers were involved in drafting the motion, or where the motion might be dispositive in a 'bet-the-company' type case. Even so, the Court believes it is crucial to provide substantive speaking opportunities to young lawyers, and that the benefits of doing so will accrue to young lawyers, to clients, and to the profession generally. Thus, the Court encourages all lawyers practicing before it to keep this goal in mind."*

If such a rule were adopted more widely by the judiciary, it would be of enormous benefit to junior lawyers. Courts on both sides of the Atlantic are obviously very busy, so the assistance of the judiciary and the court staff in trying to find time for these hearings would be essential. Junior lawyers would also need to consider how this approach can work best for their client, given the cost considerations involved.

If the adoption of a "Young Lawyer Rule" seems like a radical solution, it is far from the only way that courts can provide opportunities for younger lawyers. Another suggestion made at the COMBAR meeting was for judges to ask during case management conferences what roles junior lawyers will play as the case moves forward – for instance, whether juniors will cross-examine witnesses. In so doing, judges can play an important role in ensuring that such practices become the norm, rather than the exception.

The long-term future

In our view, the long-term future of the profession crucially depends on the profession taking steps now to address the growing experience gap between junior and senior lawyers in commercial cases. If the high quality of advocacy in commercial litigation is not maintained, it will operate to the detriment of clients, the courts, and our respective legal systems. It was gratifying to see that the leaders of the profession who participated in this year's COMBAR meeting are focused on finding solutions to this problem. ●

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Alice Carse was awarded a grant to attend the annual COMBAR North American meeting by COMBAR and the Bar Council under the International Grant Programme. Kannon Shanmugam attended as a former Temple Bar Scholar and honorary COMBAR member.