

TORT TRIAL AND INSURANCE PRACTICE

AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION



Committee Newsletter | Summer 2018

TABLE OF CONTENTS

ARTICLES >>

Tips for Effective Oral Advocacy	2
By Aaron R. Klein Oral advocacy tips for young attorneys.	
An Overview of the Right to Independent Counsel	3
By Dominic Spinelli An overview of the approaches adopted by courts in determining when an insured is entitled to independent counsel.	
Tips for Acquiring Courtroom Experience in an Age of Few Trials	5
By Mirais M. Holden Tips for young attorneys wishing to acquire courtroom experience in today's climate.	

NEWS AND ANNOUNCEMENTS >>

YLD TIPS Teleconference - #BYOA: Be Your Own Advocate	6
August 9, 2018 at 12:00 EST	
Annual Meeting	6
August 2–5, 2018	
Publish Your Article with YLD TIPS	6
If you an idea for an Article or 101 Practice Series Article, contact Dominic Spinelli at dspinelli@peabodyarnold.com .	

ARTICLES

Tips for Effective Oral Advocacy

By Aaron R. Klein

Oral Advocacy is arguably the most glorified skill of a litigator. Television and literature have created a gladiator like heir around the American trial lawyer. For better or worse, today's litigator spends little time orating in front of a jury box. Instead, modern litigators exercise their oral advocacy muscles in pre-trial hearings, depositions, mediations, etc. Today's young lawyers must adjust accordingly.

Pre-litigation oral advocacy takes many forms. For the limited purposes of this post, we will focus on two forms of civil pretrial hearings: (1) general appearance hearings and (2) oral argument hearings.

1. General Appearance Hearings

For our purposes, general appearance hearings are hearings that occur at the trial court level by party motion or judicial order. This type of hearing often takes place during civil trial court motion hour and ordinarily deals with minor discovery, scheduling, or procedural issues. Often times young lawyers are tasked with attending these hearings on behalf of more seasoned attorneys as a training tool. The following tips will provide you with added confidence at your next hearing:

- A. Develop a base knowledge of the facts, procedural posture, and legal issues. You never know when a judge will ask a substantive question or opposing counsel will try to pull a fast one.
- B. Practice mindfulness techniques prior to the hearing to slow your heart rate and increase focus. Performance anxiety is not a problem unique to young lawyers. Standing before a judge 2.5 times your age and next to an attorney 2 times your age is intimidating. Mindfulness techniques are a quick and easy tool to help relax your mind and body before stepping up to the plate.
- C. Prepare a short outline of your key objectives. Often times a judge or opposing attorney will steer the conversation so far off track you can lose track of why you were there in the first place. To prevent this, take down a few bullet points on a note pad to make sure you convey your client's position to the court.

2. Oral Argument Hearings

At the trial court level, oral argument hearings can occur spontaneously but traditionally occur in conjunction with a written motion at a set time and date. Often times, these hearings are on key motions that substantially impact the litigation. As a young lawyer, preparation is paramount when faced with a designated oral argument hearing. To be better prepared at your next hearing, remember the following tips:

- A. Create an Outline.** No, the judge will not likely allow you to read through your entire script uninterrupted but an outline will help bring you back to your key points when you get sidetracked.
- B. Be Patient.** Often times attorneys attempt to take over a hearing by talking over their opponent and/or the judge. This is rarely (never say never) a good strategy and most judge's will make you pay for it. The judge will give both sides an equal opportunity to present their client's position. If the judge does not, that is the time to interrupt.
- C. Clarify.** As a young lawyer, it is often intimidating to correct a judge or an opposing litigator. However, often times it is crucial to interject in the proceeding and clearly restate your client's position. If a judge or opposing counsel misstates or confuses your client's position, cleaning up the record is key. A phrase I have seen used effectively is "respectfully your honor, I would like to clarify....."

Oral advocacy can be an element of a young litigator's skill set that sets him or her apart. It can also be an achilles heel and a source of excruciating anxiety. A little preparation goes a long way toward boosting confidence and producing results. And remember, oral advocacy is an art not a science. So be yourself, it is most often your best tool.

**Aaron R. Klein is an attorney with Stites & Harbison PLLC and part of the Construction Services Group. Aaron is based out of the firm's Louisville, Kentucky office and is licensed to practice law in Kentucky and Tennessee. Aaron's practice is focused on representation of clients throughout the building process, with a particular focus on construction litigation. Aaron can be reached at aklein@stites.com.*

An Overview of the Right to Independent Counsel

By Dominic Spinelli

Cumis and Peppers may sound like a recipe for your favorite summer salad or a new trendy restaurant. For those in the insurance world, however, Cumis and Peppers are two of the seminal cases on when an insurer is required to provide its insured with independent counsel. A recurring issue in insurance law is the right to independent counsel - - i.e., whether the insurer or the insured gets to select defense counsel. This article provides an overview of the three major approaches taken by states in determining when independent counsel is required.

1. Per Se Conflict

The first rule is that a reservation of rights by the insurer automatically entitles the insured to independent counsel. Under this approach, courts have determined that a reservation of rights letter creates a per se conflict of interest. See, e.g., *OneBeacon Am. Ins. Co. v. Celanese Corp.*, 92 Mass. App. Ct. 382, 389, 84 N.E.3d 867, 873 (2017), *review denied*, 479 Mass. 1107 (2018) (noting that "Massachusetts has adopted a per se rule that where an insurance company reserves the right to deny coverage for a particular claim, then a conflict of interest between the insurance company and insured exists.")

2. Potential Conflict

The second rule is that an insured is entitled to independent counsel where a potential conflict of interest exists. See, e.g., *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993). Under this approach, courts have concluded that a potential conflict of interest exists where an insurer reserves its rights based upon a coverage defense (the underlying claim does not come under coverage of the policy) or a policy defense (insured's breach of the policy, such as lack of notice or non-cooperation, which involves facts generally irrelevant to the litigation between the plaintiff and the insured), the insurer must provide independent counsel. The court reasoned the possibility of a conflict might be avoided in such cases if the insurance company were to offer its insured the right to retain independent counsel to conduct its defense, and agree to pay all the necessary costs of that defense and the company should be entitled to reserve the right to later litigate an alleged policy defense.

3. Actual Conflict

The third rule is that an insured is entitled to independent counsel where an actual and significant conflict of interest, is established rather than an appearance or potential conflict of interest. See, e.g., *Diego Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App. 3d 358 (1984); Cal. Civil Code §2860. For example, an actual conflict exists where the reservation of rights letter asserts factual or legal theories which undermine or are contrary to the positions to be asserted by the insured in the liability case. On the other hand, there is no entitlement to independent counsel where the coverage issue is independent of, or extrinsic to, the issues in the underlying action. Courts have found actual conflicts entitling an insured to independent counsel where: (1) the insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by the insurer's retained counsel; (2) the insurer insures both the plaintiff and the defendant; (3) the insurer has filed suit against the insured, whether or not the suit is related to the lawsuit the insurer is obligated to defend; (4) the insurer pursues settlement in excess of policy limits without the insured's consent and leaving the insured exposed to claims by third parties; and (5) an attorney who represents the interests of both the insurer and the insured finds that his or her representation of the one is rendered less effective by reason of his or her representation of the other. See *James 3 Corporation v. Truck Ins. Exch.* (2001) 91 Cal. App.4th 1093, 1101.

* * *

Understanding the right to independent counsel is important for all players. The insurer needs to consider whether it has an obligation to notify its insured of the right to independent counsel and/or whether to seek a waiver of that right. The insured needs to consider whether the applicable state law entitles it to hire the lawyer of its choosing. The independent counsel needs to understand applicable state law regarding ethical considerations, hourly rates, and the applicability of insurer billing and reporting guidelines.

* **Dominic Spinelli** is an attorney with Peabody & Arnold in Boston, Massachusetts. Dom represents insurers in matters involving directors and officers, employment practices, professional liability, and general liability insurance coverage.

Tips for Acquiring Courtroom Experience in an Age of Few Trials

By Mirais M. Holden

Few civil cases proceed to trial these days for a variety of reasons, including the rising expense of trials, a penchant for settlement among clients and attorneys, and the increasing use of alternative dispute resolution methods. Many young lawyers wish to gain courtroom experience, but with few opportunities to appear as trial counsel, examine witnesses, or argue motions, experience is difficult to come by. Below are a few tips for young attorneys wishing to acquire courtroom experience in today's climate.

1. Do Pro Bono Work: By taking on pro bono matters, young lawyers can see cases through from start to finish and handle all courtroom appearances. Additionally, pro bono work can be deeply meaningful and rewarding. Got a high annual billable hour requirement that makes it difficult to find extra time for pro bono work? Know that some law firms allow their associates to count a certain number of pro bono hours toward the firm's annual requirement, so ask your firm or company if it is willing to allow this in exchange for the valuable experience you will be gaining.
2. Observe Trials: Who are the top trial attorneys at your firm, in your company, and in your local bar? Those attorneys can be fantastic sources of learning for young lawyers. Check out the dockets of the courts in your area and attend motion days and trials at which experienced attorneys will appear. Many motion days and trials are open to the public, meaning that if you are willing to volunteer your time, you can watch and learn.
3. Receive Mentoring Through Your Local Inn of Court: The American Inns of Court is an association of attorneys and judges who seek to promote excellence and mentorship in the profession. You can find your local Inn chapter by searching the American Inns of Court website. By joining your local Inn and attending its meetings, you will meet highly qualified attorneys who are passionate about mentoring young lawyers. Your Inn may have a formal mentorship program. If not, you can ask experienced attorneys in your Inn to provide you with courtroom practice tips, or even to allow you to tag along when they make courtroom appearances.
4. Attend a Trial Training: Organizations such as the American Inns of Court and the National Institute for Trial Advocacy provide trial training seminars where young lawyers can learn from experienced trial attorneys. These seminars adopt a method of learning by doing, which allows young lawyers to practice their courtroom skills and receive feedback and training. These seminars can be quite costly, so ask your firm, company, or local Inn of Court for sponsorship to attend such a trial training. Because costly trainings are not an option for many young lawyers, some local bar associations put on trial trainings for free. In fact, the ABA YLD has recently passed a resolution encouraging all local bar associations to hold free trial trainings for attorneys in their first five years of practice.

**Mirais M. Holden is an attorney in New Orleans, Louisiana. She serves as the Program Chair on the Executive Committee of the St. Thomas More Loyola Law School Inn of Court, which is a member of the American Inns of Court. Mirais has gained trial experience through representing clients in multiple pro bono matters while working at a large New Orleans law firm.*

NEWS AND ANNOUNCEMENTS

YLD TIPS Teleconference - #BYOA: Be Your Own Advocate

TIPS will host a teleconference, #BYOA: Be Your Own Advocate, at noon on August 9, 2018. Four panelists from different generations and at different stages of their career/personal life will discuss how to advocate for yourself in the workplace to maximize your career potential. Discussion will include interviewing, salary negotiations, career advancement and work-life balance.

Annual Meeting

YLD Assembly and Events at the 2018 AVA Annual Meeting will take place from August 2 – 5, 2018 in Chicago, IL. You can register at: https://www.americanbar.org/groups/young_lawyers/events_cle/2018-annual-meeting.html Be sure to follow the ABA YLD on Facebook and Twitter to stay up to date on all of the latest YLD news and all updates for the Annual Meeting in Chicago. We hope to see you there!

Publish Your Article With YLD TIPS!

YLD TIPS is a great opportunity to be published. If you have an idea for an article and are interested in authoring an article for future newsletters, please contact Dominic Spinelli at dspinelli@peabodyarnold.com.

If not a newsletter article, consider publishing a 101 Practice Series Article with the YLD TIPS Committee. The 101 Practice Series Articles are specifically geared toward the young lawyer. These articles provide other young attorneys practical information and training in both substantive and practical aspects of law practice. 101 Practice Series Articles can include tips, lists, bullet points, examples, good quotes, lively writing, and other techniques to facilitate the readers' grasp of information. Do not underestimate how your experience can help other young lawyers.

If interested, please contact Dominic Spinelli at dspinelli@peabodyarnold.com.