

Mentoring—An Unmet Challenge

by A. Bruce Campbell

In 2002, under the leadership of the Faculty of Federal Advocates (FFA), members of the Colorado bankruptcy bar and the five bankruptcy judges for the District of Colorado took part in Colorado's first Bankruptcy Bench/Bar Roundtable (Roundtable).¹ The purpose of this half-day, Saturday morning Roundtable was to foster communication between the bar and bench, with an ultimate goal of improving the quality of Colorado's bankruptcy practice for the bar, the bench, and the public (debtors and creditors) whom they serve.

The Roundtable format comprised five rotating forty-five-minute, ten- to twelve-person discussions of topics of interest, each led by an experienced practitioner and a sitting bankruptcy judge, with another lawyer acting as reporter. It concluded with ten-minute summaries by each reporter of highlights of the morning's discussions. These summaries were turned into a brief written report that was circulated to Roundtable participants. This forum, in essentially the same format, has become an annual affair, with each Roundtable addressing topics of current interest to the bankruptcy bar and bench.

Professionalism and Mentoring

One topic at the Roundtable held in December 2010 focused on professionalism and mentoring. Specifically, participants exchanged ideas about core principles of professionalism within bankruptcy practice and the status of efforts to foster mentoring of lesser experienced practitioners. To appreciate the significance of these topics to the bar, to the bench, and to the public, one need only ask:

How is it that our noble profession—one that plays such a critical role in a democracy governed first and foremost by the rule of law—is possibly the only profession that turns loose on the public licensed neophytes without first requiring some sort of formal apprenticeship, supervised by experienced practitioners? No doctor is licensed to practice in this or any other state without first completing years of internship or residency. Accountants must practice under the supervision of experienced accountants before sitting for a Certified Public Accountant exam. Before being licensed, teachers must student-teach under the tutelage of a licensed teacher. Architects, plumbers, and electricians are required to undergo similar oversight before becoming licensed to practice their professions and trades.

Participants in the 2010 Roundtable considered five questions related to professionalism and mentoring. The questions were:

1. What is the state of mentoring of young lawyers who practice in Colorado Bankruptcy Court?
2. To the extent lack of mentoring is a professional problem, what is the source of that problem?
3. How does lack of appropriate mentoring present itself in the bankruptcy courtroom?
4. What can young attorneys do to avoid pitfalls where there is no mentor to turn to?
5. What more might the profession do to support the less experienced among us, given the current state of mentoring in the profession?

As might be expected, five structured discussions among sixty lawyers and judges did not achieve much closure or many definitive answers to these questions. That was far beyond the objectives of the FFA's efforts in choosing topics for its Roundtable. It is fair to say, though, that the Faculty's objectives were met insofar as a number of participants left the discussion with a heightened awareness and concern about an important challenge we as a profession are facing. This article presents reflections on some of the issues raised during the FFA's 2010 Roundtable.

Mentoring New Lawyers Today

Without the support of empirical research on the increase or decline of mentoring of new lawyers, the following comments are based on limited anecdotal evidence and observations in a single courtroom. Good mentoring is not a thing of the past. In larger commercial cases, lead counsel frequently is accompanied in court by "juniors" who serve as second, third, or even fourth chair. Sometimes, an inexperienced lawyer first-chairs a trial with an experienced colleague at counsel table, who is available throughout the trial for consultation.

One young lawyer at the 2010 Roundtable reported that she recently had taken a position with a lawyer five years her senior. She was enthused about his insistence that she "shadow" him during every aspect of the practice, before taking on lawyering tasks on her own. She reported having changed jobs from a larger firm where everybody was on his or her own, and nobody had time to mentor anybody.

About the Author

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There is little doubt that high-quality mentoring occurs in firms of all sizes, as well as in the offices of corporate counsel, attorneys general, and prosecutors and defenders. Still, there is reason for concern. Sometimes, new lawyers appear in bankruptcy court with little or no idea of how to represent their clients effectively. Frequently, newly minted lawyers who cannot find jobs working with other lawyers undertake representing clients on their own. One Roundtable participant reported that he learned how to practice law by going to court, from judges and opposing counsel, and by making, and learning from, his own mistakes. Without a doubt, this entails a steep learning curve—but at whose expense?

Our profession may be gravitating toward less mentoring of new lawyers as the norm. If this is in fact the case, such a trend could conceivably jeopardize the discharge of the bar's professional responsibility both to the public and to the judicial process.

What Unmentored Neophyte Barristers Look Like

Less experienced attorneys who appear on their own in Bankruptcy Court generally do not display bad attitudes or unprofessional behavior. This may be due to a native propensity to hold the judicial process in high regard, effective law school training, abject fear, or some combination of all of these factors. Whatever the reason, in my experience, unprofessional conduct by inexperienced counsel—unrelated to competent presentation of one's case—is extremely rare in the courtroom. Unfortunately, exemplary demeanor sometimes does not translate to being able to perform at a competent level in court. Lack of mentoring frequently becomes apparent in the form of insufficient know-how of the mechanics in presenting a client's case in matters as basic as the following:

- knowing the expected order of presentation of the steps in trial of a lawsuit
- understanding the function, purpose, and appropriate content of an opening statement and how it differs from closing argument
- appreciating that a case has strengths and weaknesses and not losing sight of such focus as a case is presented

- using notes and outlines in presenting a case without becoming handicapped by these tools
- having a good working knowledge of particular rules of procedure, rules of evidence, and courtroom procedures prescribed by local rules or guidelines for practice in a particular courtroom
- handling exhibits, summaries, and demonstrative materials in ways that facilitate—rather than complicate—the grasp of a client's case (matters as rudimentary as numbering pages of all exhibits and avoiding materials that are illegible or so complex as to be comprehensible only to the author)
- grasping that although sometimes a meritorious evidentiary objection is critical to one's case, often an evidentiary objection may add little to or detract from one's case
- avoiding hazards of being argumentative with opposing counsel, witnesses, or the court.

Knowing how to handle such matters appropriately is not a matter of high-powered strategy or analysis. Nevertheless, it asks much of the untutored neophyte to pull together all these and other pieces for an effectively presented trial without first having been in the courtroom as a second chair or otherwise having worked under the supervision of experienced trial counsel.

Dynamics of a Decline in Mentoring

If being well mentored is a less common occurrence for today's novice lawyers, the cause may lie in simple numbers—more law grads and fewer jobs—and therefore fewer opportunities for mentoring of inexperienced attorneys. Colorado's recent history may be illustrative. Between 2006 and 2010, more than 6,400 new law grads sat for the Colorado bar exam.² During this same time period, new law graduates around the country increasingly reported being unable to find work as attorneys.³

There are few signs the situation will change anytime soon. An economic downturn more severe than any suffered in more than two generations undoubtedly has depressed the market for various kinds of commercial legal work. Technical efficiencies and competition from nonlawyer professionals and paraprofessionals may continue to decrease the demand for lawyers. Title insurance companies and real estate agents with computer access to recording "warehouses" and "approved" Real Estate Commission forms have long since supplanted most of the lawyer's traditional roles of documentation and closing of residential real estate transactions. In today's world of consumer bankruptcy, debtor's counsel compete in the market with distributors of Internet forms and legislatively sanctioned petition preparers.

Other factors in addition to the raw numbers, such as more lawyers looking for employment and fewer lawyers, law firms, and companies looking to employ them, may influence the decline of mentoring of novice attorneys. For example, the legal profession has undergone something of a cultural shift toward a greater business orientation.⁴ How often do we hear some iteration of, "If you don't treat the practice of law as a business, you will soon be out of business"? This reality is only a short step from the notion that "profitability is job one." In many quarters, per partner net income has become the accepted first measure of a law firm's success, trumping more traditional measures of superior service to clients or perpetuation of institutional professional excellence. In the view of many, the notion that separated professions from businesses—scrupulously serving the client's best interests above all else, while

letting the economic aspect of one's vocation take care of itself—has only a quaint ring, at best. Many might say that any such notion is downright naive in today's highly competitive legal marketplace. Expending resources on mentoring may be a questionable strategy for a legal practice whose primary goal is to make money or one where established lawyers find themselves competing for business with new law graduates.

In different sectors of the legal profession, other changes also may have an adverse impact on opportunities for young lawyers to be well mentored. There was a time when the hiring objective of many law firms was to employ lawyers for the duration of their careers. Business law firms added law grads with the hope that they would be partners in four to eight years. Small law offices often added a young lawyer with a view toward training that person over the course of many years to take over the practice. Today, the "big eight" accounting firm or Wall Street model of "up-and-out" has become more prevalent among law firms of all sizes. One highly regarded Los Angeles firm advises new hires out of law school not to expect to be considered for partnership. Equity positions in the firm are reserved for lateral hires who bring with them a book of business.

Increased mobility of partners and associates alike may erode institutional loyalties, as well as the extent to which mentoring is considered a valued aspect of the law firm culture. In the calculus of partner-sharing in firm earnings, rewarding mentoring skills has, in some firms, declined or been eliminated altogether in deference to rewarding business origination and billable hours. In some competitive legal markets, a legitimate concern is that skilled mentoring simply will not pay next month's rent. A general decline in institutional firm/client loyalty associated with mobility of business managers and lawyers may devalue professional relationships of all kinds, including those of mentor and protégée within law offices.

Today's government legal offices and offices of corporate counsel also may be less disposed to mentoring young attorneys. Reduced appropriations and budget pressures result in smaller legal staffs and larger caseloads, which may afford less time for the luxury of closely supervising the less experienced, junior lawyer.

Mentoring by judges of new law grads who land competitive judicial clerkships also is on the decline. As caseloads increase at rates that far exceed new judgeships or funding of additional staff, the "career" law clerk is increasingly replacing "term" law clerks. Career clerks for many judges have become an essential efficiency in managing growing dockets without growing judicial resources. As a result, fewer new lawyers are exposed to the intense mentoring experience of the venerable institution of the traditional judicial clerkship.

One cannot address a decline in mentoring in the legal profession without considering the role of law schools. Some would project that, with a growing emphasis on the clinical curriculum, law schools are the brightest hope for a profession in need of protecting the public from its uninitiated. The counter-argument suggests that our law schools are a significant source of the problem. Some have maintained that, as profit centers in many financially stressed institutions of higher learning, law schools have simply focused on turning into law grads large numbers of students who were willing to pay exorbitant amounts of tuition along the way.⁵ There is little evidence of concern by many law schools about the impact on legal professionalism that may result from flooding a market with new law graduates where the supply of lawyers already outstrips the de-

mand. This is to say nothing of the lack of concern for the new lawyers who complete their educations with large debts and small job prospects.

What the New Lawyer Can Do

Newly armed with a law license and a client, but without a mentor readily available to supervise or respond to questions, how can an inexperienced attorney maximize the chances of effectively representing his or her client? Answers to that question fill volumes and provide law schools with syllabuses for innumerable practice training courses. It may be presumptuous to offer even overarching observations and suggestions in this vein. There are, however, some common sense suggestions new lawyers may find helpful, including hard work, good client communications, cooperation, observation, inquiry, and focus.

Practicing law is not different from most other professional endeavors. With rare exception, those who perform well work hard to be well prepared. To be effective, the novice lawyer should expect to work extraordinarily hard, whether in investigating facts, researching law, learning the protocol and procedural nuances of a particular forum, or preparing to present one's case. Only with experience comes efficiency in each of these facets of the practice.

Effective lawyering requires effective communication. A lawyer needs to learn from any client what are the real needs and interests that are involved in the engagement. In almost all circumstances, the client needs to know from the lawyer what will be done to serve his or her interests and why, as well as what the alternatives

are. Good communication with one's client is usually essential to effective representation. Furthermore, it often contributes to the client's satisfaction with the lawyer's efforts, whatever the result.

Effective lawyering frequently involves cooperation with adverse parties and opposing counsel. Representing a client against an adverse party can get ugly, but rarely does it need to. Good lawyers pick their battles very carefully, realizing that battling is seldom the best way to advance a client's goals. Courtesy and acrimony are, more often than not, returned in kind. Unnecessary unpleasantness and lack of cooperation usually result in inordinate financial and emotional cost to the client.

When faced with the unknown—such as “How do I use a deposition to impeach?” or “Will Judge Smith be strict on hearsay exceptions?”—do not blindly plunge ahead. Ask. Observe. Every inexperienced lawyer is acquainted with experienced lawyers. Take one to coffee or for a drink. Experienced lawyers like to give advice, and they like to be listened to. It makes them feel smart. The best way to learn how Judge Smith handles hearsay objections and otherwise conducts a trial is to go see for yourself. Sit in on a Judge Smith trial. Judge Smith's courtroom is open to the public and, like every other courtroom, is a “classroom” for inexperienced lawyers.

Perhaps the most important bromide for young attorneys is this: never lose focus of the zealous pursuit of your client's best interests. There is a time to fight scrupulously to the end. There is a time to settle and move on. There is a time to step back and propose a creative alternative that has not been considered. The effective lawyer, together with the client, regularly weighs these and other options. In the end, true north on the compass is always the same—the client's best interests.

Striving to Improve the Profession

Two important questions the bar and bench need to consider regarding the novice lawyer are these:

1. Should the legal profession be concerned with a decline in supervision of novice lawyers?
 2. If so, what can be done constructively to address the matter?⁶
- One plausible response is simply, “get over it.” Less mentoring is part of the new landscape of a changing profession. Perhaps the best interests of clients are best nurtured by harvesting new technologies, not by lamenting what has changed from the good old days and is unlikely to change back.

There is, however, considerable anecdotal evidence that the legal profession has a problem concerning its responsibility to the public—a responsibility that is, with time, being less well discharged, opportunities presented by new technologies notwithstanding. Numerous unsupervised neophyte consumer lawyers learn from

their own mistakes at the expense of clients who often lack sophistication to know when they have been victimized. Juniors in business firms who have not been mentored are part of a generation of lawyers who, in the words of the late Bankruptcy Judge Charles E. Matheson, victimize business clients because they have never been taught the difference between billing for service and billing for time. The threatened potential result is the same with the untutored consumer or commercial attorney—a decline in the quality of service to clients.

At least some observers suspect that a decline in supervising and mentoring novice lawyers is connected directly to a decline in the quality of service to clients. If this is so, it is time for our leadership in Colorado—veteran practitioners, bar officers, licensing authorities, judges, and legal educators—to address two questions:

- Does our profession owe the public in Colorado more than we are delivering in preparing young lawyers for client responsibility?
- How can the profession in Colorado systemically improve the preparation of young lawyers to discharge their professional responsibility to the public we serve?

Notes

1. The idea for this annual dialogue was borrowed from the Portland, Oregon bankruptcy bar and bench.

2. National Conference of Bar Examiners, Bar Admission Statistics, available at www.ncbx.org.

3. See, e.g., Segal, “Is Law School a Losing Game?” *The New York Times* (Jan. 8, 2011), available at www.nytimes.com/2011/01/09/business.

4. For an in-depth critical analysis of this transformation, see Linowitz (with Mayer), *The Betrayed Profession—Lawyering at the End of the Twentieth Century* (Chas. Scribner's Sons, 1994). Linowitz quotes David Link, former Dean of Notre Dame Law School, noting: “[T]he mentoring system broke down. [N]o one was teaching practice, or, incidentally, professionalism.” *Id.* at 128-29.

5. See, e.g., Persky, “Law School? Bag It, Bloggers Say,” *ABA Journal* 16 (Feb. 2011). This article alludes to law school as “little more than a scam to get money from students,” and notes that the number of law schools has increased 9% in the past decade, awarding 43,000 law degrees in 2010—an 11% increase in ten years. *Id.*

6. There already exist in Colorado a number of programs and organizations where participants and members play an active role in coaching young lawyers. For years, members of the Inns of Court have counseled budding state and federal court litigators. The Faculty of Federal Advocates' *pro bono* program matches inexperienced aspiring litigators with seasoned trial lawyers, primarily in handling otherwise *pro se* debtors in bankruptcy discharge litigation. Several local bar associations link new and senior attorneys. Programs like these undoubtedly assist with mentoring needs of participating new lawyers, but they do not purport to address on any systematic basis the growing number of unsupervised, inexperienced lawyers that the profession is unleashing on the Colorado public. ■