

Junior-Attorney Training and Use of the Judicial Power

In 2023, the American Bar Association passed a resolution urging judges to allow a second lawyer to present at oral argument if he or she has practiced for ten or fewer years.¹ Similarly, the Patent Trial and Appeal Board offers up to an additional 15 minutes of oral argument for parties who allow less-experienced attorneys to argue.² And several judges have issued standing orders granting argument preferences to junior attorneys.

But others have questioned whether even a laudatory goal, such as training junior attorneys, is properly advanced through use of the judicial power to decide cases. One federal district judge recently wrote that, while he “understands and respects” why judges might adopt such argument preferences, he “questions whether judges should be interfering with the attorney-client relationship.”³ And a recent misconduct complaint against federal judges alleged improper use of the judicial power to allot argument time based on the personal characteristics of the attorney designated to argue.⁴

Here, I offer some data on the practice, stemming from a broader study that I conducted of every active-status federal district judge’s standing orders across many topics.⁵ Of the 603 judges covered in my study, 105 of them — or 24 percent — extend some preferential treatment to a junior attorney at oral argument. In short, junior-attorney argument preferences are common but not predominant. That 24-percent figure counts only judges’ orders that give some official benefit in litigation, such as a thumb on the scale in deciding whether to grant oral argument at



all or whether to grant more argument time than would otherwise be granted. I did not count a judge’s mere encouragement of junior-attorney argument, unattached to some official action.

Can one infer anything about the views of judges who do not have such a standing order? I conclude not. For a host of reasons, even judges who believe in the importance of training junior lawyers might not issue an order that gives an argument preference on that basis:

- First, influencing how clients and firms staff cases may be viewed as an improper use of the judicial power. A client who receives a benefit by sending up a junior attorney might be perceived, even if subliminally, as receiving not only the benefit of a speaking opportunity but also some preference on the merits.
- Second, judges may perceive the problem animating these standing orders as declining trial rates generally, for all lawyers, meaning that nobody has deemphasized junior-attorney training as to war-

rant a response focused on that topic.

- Third, judges may see the number of years of bar admission as an imperfect proxy for those who deserve a greater chance at oral argument. For example, that proxy would exclude attorneys who changed practice areas to litigation after several years of bar admission or who spent time away from practice to care for family.
- Finally, judges may simply be concerned about the burden on parties of finding, staying abreast of, and complying with judge-specific standing orders in general.

When I took the bench five years ago, I found little guidance about how judges use standing orders to regulate litigation. I hope that my overall study contributes to that literature, including on this topic of recent focus.

¹ Am. Bar Ass’n Resolution 515 Report, 1–2 (Feb. 6, 2023), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2023/515-midyear-2023.pdf>.

² U.S. Pat. and Trademark Off., *Legal Experience and Advancement Program (LEAP)*, <https://www.uspto.gov/patents/ptab/leap> (last visited Aug. 23, 2024).

³ Minute Entry Before the Hon. Iain D. Johnston, *In re Deere & Co. Repair Servs. Antitrust Litig.*, ECF No. 141 (N.D. Ill. July 19, 2023).

⁴ Tiana Headley, *Ethics Complaint Spotlights Judges’ Courtroom Advocacy Policies*, BLOOMBERG LAW (Feb. 5, 2024), <https://news.bloomberglaw.com/us-law-week/ethics-complaint-spotlights-judges-courtroom-advocacy-policies> (citing ethics complaints over a policy prioritizing oral argument time for lawyers who are newer, female, or minority).

⁵ This topic was my thesis for a Judicial Studies LLM program at Duke Law School. See J. Campbell Barker, *Standing Orders: A Survey of Individual Judges’ Regulation of Practice in All Future Cases Before Them*, 102 WASH. U. L. REV. 277 (2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4418419.

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