

How ITC's Junior Atty Program Can Benefit Firms, Clients

By Victoria Reines and Philip Marsh (October 4, 2022)

It's been about four months since the U.S. International Trade Commission announced its new program, Nurturing Excellence in Trial Advocates, or NEXT Advocates, geared toward encouraging junior attorneys to take on oral advocacy opportunities during ITC investigations, and we are starting to see how the program is being implemented.[1]

Based on this, we share some thoughts on how to make the program work for firms and clients.

Program Overview

Under NEXT Advocates, administrative law judges will allow junior attorneys, i.e., those with three or fewer substantive oral arguments or witness examinations, to participate in substantive oral arguments or to examine witnesses at trial with the assistance of a more experienced attorney.

The NEXT Advocates program appears to be modeled after the U.S. Patent and Trademark Office's Legal Experience and Advancement Program, or LEAP,[2] which just celebrated two successful years, and has allowed at least **135 junior attorneys** to participate in oral arguments before the Patent Trial and Appeal Board.

Like NEXT Advocates, LEAP allows attorneys with three or fewer substantive oral arguments in any federal tribunal to request to conduct an entire oral argument or to share the time with other counsel.

The PTAB also offers training for LEAP practitioners, including a mock argument practicum where practitioners can argue before a panel of judges and receive feedback in preparation for their LEAP argument. LEAP also offers cross-training opportunities and exposure to ITC ALJs who will serve as LEAP mock judges.

Under the ITC's NEXT Advocates program, junior attorneys have now examined witnesses at trial, argued at Markman hearings, and argued key evidentiary motions, sometimes receiving additional time for arguments or witness examinations.

Based on these opportunities, we now have a better sense of how the program is being used.

Why and How ITC Practitioners Should Utilize This Program

Attorneys and Clients Benefit

NEXT Advocates offers less-experienced attorneys oral advocacy opportunities that they might not otherwise receive at this stage in their careers.

In addition, the program offers oral argument opportunities to junior attorneys in a more inviting environment than he or she might find when arguing in district court.



Victoria Reines



Philip Marsh

The administrative law judge knows that this is one of the attorney's first arguments, and a senior attorney is able to consult or to clarify, if needed.

But opportunities for junior attorneys are not all this program has to offer. In fact, NEXT Advocates can significantly benefit client and outside counsel teams as well.

Although it is not always easy to convince a client to put up a junior attorney to argue over a more seasoned oral advocate, NEXT Advocates provides some incentives for doing so.

Better Frame Your Case

Through this program, ALJs may entertain oral argument where they would not ordinarily, and give teams additional opportunities to frame their case.

For example, although an ALJ may prefer to rule on the papers for summary determination, if a less-experienced attorney wants to argue through this program, the ALJ may allow a summary determination hearing where they typically would not.

Chief Administrative Law Judge Clark S. Cheney, for example, will generally "not hear oral argument on motions for summary determination." But according to his ground rules, "a party may move for oral argument" if a junior attorney will argue under this program, according to a recent order in the Certain Movable Barrier Operator Systems and Components Thereof investigation.[3]

Similarly, Administrative Law Judges Cameron Elliot, Monica Bhattacharyya and Bryan F. Moore will also generally permit argument on motions for summary determination if a junior attorney is arguing.[4]

Opening statements present another potential opportunity for NEXT Advocates. Although many ALJs do not allow opening statements at trial, in some cases they may be willing to hear a brief, focused opening statement from a junior attorney through the NEXT Advocates program, allowing the team a unique opportunity to frame the issues for the judge as trial commences.

At the ITC Trial Lawyers Association spring meeting, which took place virtually in May, at least one ALJ who normally does not hear opening statements indicated a willingness to entertain them.

Junior attorneys could also argue discovery disputes and jurisdictional motions through this program.

The opportunity to frame the case for the ALJ in a way that would not otherwise be possible is a good selling point for clients, who otherwise may be reluctant to put up a less experienced attorney.

In fact, in a recent Markman hearing in Certain Digital Set-Top Boxes and Systems and Services Including the Same, Administrative Law Judge Elliot indicated in an Aug. 10 order that he was interested in hearing argument on three claim terms.[5]

But, at the Markman hearing on Aug 16, he allowed argument on two additional claim terms that he would not otherwise have permitted specifically because a junior attorney was arguing them under the NEXT Advocates program.[6]

Bonus Time

Some ALJs have also increased the allotted time for argument for teams using more junior attorneys under the program. Administrative Law Judge Elliot, for example, has issued orders providing teams using junior attorneys under the NEXT Advocates with an additional 15 minutes to present argument during hearings such as Markman hearings.[7]

Administrative Law Judges Elliot, Bhattacharyya and Moore each will afford a junior attorney an additional 15 minutes for a trial examination.[8]

Build Goodwill

The NEXT Advocates program also exposes and introduces the team to the ALJ early in the proceeding, e.g., at a discovery hearing, a Markman hearing or summary determination.

ALJs have also encouraged participation in the program and have amended their ground rules to provide opportunities for counsel to utilize the program, so participating may also build goodwill with the judge going into trial.

The ITC ALJs spoke in favor of the program at the May ITC Trial Lawyers Association meeting, encouraging parties to use it.

In a recent prehearing conference in *Certain Smart Thermostats, Load Control Switches, and Components Thereof*, Judge Cheney praised law firms and clients for using the program:

You can thank all of the — the judges around this country who have had this idea and have been building momentum for it. I'm really pleased to see law firms and clients investing in the next — next generation of advocates that more diversely reflects our society.[9]

How to Use NEXT Advocates

First, talk to your clients early about the program, and explain the benefits it can provide — an argument where one might not otherwise be permitted, the potential for extra argument time depending on your ALJ, exposure to and potential goodwill with the ALJ, and the ability for a more senior attorney to step in and clarify, if necessary.

Second, take advantage of this program early and at key points in your case: discovery disputes, jurisdictional motions, Markman hearings and summary determination hearings may provide opportunities for a junior attorney to argue a discrete issue, even before the evidentiary hearing.

And when it comes time for the evidentiary hearing, a junior attorney can present an opening statement — or portion thereof — conduct a witness examination, or argue evidentiary objections.

Third, seek out opportunities for cross-training. If possible, participate in a LEAP mock practicum, which will provide argument training, and may offer an opportunity to argue before administrative law judges, and might allow you to get in front of your assigned ALJ.

Over the next year, we will get an even better sense of what opportunities through the

NEXT Advocates program look like at different stages of the investigation under different ALJs.

But just a few months into the program, it is already clear that ALJs are fully supporting the NEXT Advocates program, that firms and clients have been making good use of the program, and that the program has much to offer both outside counsel — particularly junior attorneys — and client teams.

Victoria L. Reines is a senior associate and Philip W. Marsh is a partner at Arnold & Porter.

Disclosure: Marsh was part of the Arnold & Porter team that represented respondent Charter Communications in the Certain Digital Set-Top Boxes ITC investigation mentioned in this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://www.usitc.gov/next_advocates_nurturing_excellence_in_trial_advocates.html.

[2] <https://www.uspto.gov/patents/ptab/leap>.

[3] Inv. No. 337-TA-1209, Order No. 2 (Aug. 8, 2022) at 10.

[4] Inv. No. 337-TA-1323, Order No. 2 (Aug. 8, 2022) at 31; Inv. No. 337-TA-1316, Order No. 5 (June 28, 2022) at 29; Inv. No. 337-TA-1321, Order No. 2 (June 27, 2022) at 30.

[5] Inv. No. 337-TA-1315, Order No. 16 (Aug. 10, 2022).

[6] Inv. No. 337-TA-1315, Aug. 16, 2022 Tr. (EDIS Doc ID: 778265) at 74:23-75:25.

[7] See, e.g., supra n.3; Inv. No. 337-TA-1318, Order No. 16 (Aug. 29, 2022).

[8] Supra n.2.

[9] Inv. No. 337-TA-1277, June 28, 2022 Tr. (EDIS Doc ID 774792) at 27:5-10.