

## Litigation Webinar Series

# Next Steps for Next Gen: Practical Ways to Empower Younger, More Diverse Lawyers



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# Overview

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- Introduction
- Why is the Next Gen initiative so important?
- Judicial Orders
- Success Stories
- Ways to Increase Trust and Success



# Introduction

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# Introduction

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## Next Gen Mission

NEXT GENERATION  
**LAWYERS**

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### NEXT GENERATION LAWYER

With the Goal of Empowering the Next Generation of Lawyers, the ChIPs Next Gen Lawyers Committee is working with all stakeholders, the Federal Circuit Bar Association, the FJC and the Judiciary to encourage opportunities for junior lawyers.

# Introduction

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## Next Gen Mission

- Visit <http://nextgenlawyers.com>
- Collaboration of efforts

IN COLLABORATION WITH

**FISH.**

FISH &  
RICHARDSON

  
CHIPS

**Federal Circuit Bar Association**  
**BENCH & BAR**

FCBA BENCH & BAR

# Introduction

## ChIPs Conference

- Visit <http://chipsnetwork.org/>



# Introduction

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## ChIPs Conference

- Stands for “Chiefs in Intellectual Property”
- Founded in 2005 as an informal dinner group by seven heads of IP from major technology companies in Silicon Valley:
  - **Anirma Gupta** (General Counsel at Tanium)
  - **Noreen Krall** (Vice President, Chief Litigation Counsel at Apple)
  - **Hon. Michelle K. Lee** (Under Secretary of Commerce for Intellectual Property; Director of the United States Patent & Trademark Office; former Head of Patents & Patent Strategy at Google)
  - **Julie Mar-Spinola** (Chief Intellectual Property Officer at Finjan Holdings)
  - **Mona Sabet** (Founder, VIBLIO; former GM, Grace Hopper Conference)
  - **Emily Ward** (Vice President, Chief Technology Counsel at PayPal)
  - **Mallun Yen** (Executive Vice President at RPX Corp.; former VP of Worldwide Intellectual Property, Cisco Systems, Inc.)

# Introduction

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## ChIPs Next Gen Committee

- Kathi Vidal, Fish & Richardson—*Lead Committee Member*
- Natalie A. Bennett, McDermott Will & Emery
- Judge Christopher J. Burke, District of Delaware
- Isabella Fu, Microsoft Corporation
- Judge Paul Grewal, Northern District of California
- Jessica Hannah, Apple
- Karen Keller, Shaw Keller
- Noreen Krall, Apple
- Rachel Krevans, Morrison Foerster
- Judge Barbara M.G. Lynn, Northern District of Texas
- Sonal Mehta, Durie Tangri
- Judge K. Nicole Mitchell, Eastern District of Texas
- Judge Jimmie Reyna, United States Court of Appeals for the Federal Circuit
- Julie Mar-Spinola, Finjan Holdings, Inc.
- Gabby Ziccarelli, Blank Rome LLP



# Why is the Next Gen initiative so important?

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## Next Gen Mission

- Giving junior lawyers opportunities is one way to start leveling the playing field and promoting an experienced lawyer pool that is representative of our juries.
- A trend is occurring in the practice of law where fewer cases go to trial therefore fewer opportunities exist for young lawyers to have their day in court.

# Why is the Next Gen initiative so important?

## Next Gen Mission

- Builds on the work of Judge William Alsup
  - For the last seventeen years, at least 100 junior lawyers have benefited from Judge Alsup's practice of guaranteeing oral argument, as opposed to having issues submitted on the papers, on any matter when a lawyer within her first four years of practice will argue.
- Judge Alsup:
  - "In my experience, young lawyers have performed at least satisfactorily and, more commonly, very well during oral argument because they have typically prepared the papers (and, if the truth be told, may know the record and the case law better than their seniors)."



Judge William Alsup

# Why is the Next Gen initiative so important?

## Next Gen Mission

- Judge Alsup's words ring true:
  - Earlier this year, Vidal decided to have two of her young associates, **Holly Victorson** and **Emily Petersen Garff**, argue a summary judgment motion in a housing discrimination case the firm is handling pro bono. The **team won every legal issue** in the hearing before Judge Lucy Koh of the Northern District of California, who has a standing order encouraging opportunities for young attorneys.



Holly Victorson  
Associate,  
Fish &  
Richardson



Emily Petersen  
Garff  
Associate,  
Fish &  
Richardson

# Why is the Next Gen initiative so important?

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## Next Gen Mission

- It is the statutory function and purpose of the Ninth Circuit Judicial Conference to, *inter alia*, “consider the business of the courts of the Ninth Circuit and advise means of improving the administration of justice.” (See Statement of Purpose, Policy and Guidelines For the Conduct of the Business of the Ninth Circuit Judicial Conference, Resolutions Subcommittee, Ninth Circuit Judicial Conference, (June 1990)).
- The defense of legal rights hinges on the quality of the advocates who defend those rights in court. As trial opportunities continue to dwindle, the overall quality of advocacy inevitably suffers, detrimentally affecting the ability of lawyers to try cases that involve protecting those rights. (See ABA Section of Litigation, Report of the Task Force on Training the Trial Lawyer (June 2003)).

# Why is the Next Gen initiative so important?

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## Practitioner Remarks

- “It really is helping. It’s always been challenging in this practice to get young attorneys in the courtroom.”
- “Courtroom opportunities can be close to life or death, or seem that way . . . [it] is particularly acute in patent litigation because it is typically high-stakes.”
  - Bryant Boren of Baker Botts
- “You see more and more of these orders, and that’s going to move the needle . . . [it] necessarily means that more opportunities flow to women and minorities.”
  - Kathi Vidal of Fish & Richardson



# Judicial Orders

# The Case for Judicial Orders

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- Fewer cases going to trial; fewer stand-up opportunities.
- Need to train junior lawyers to preserve our profession.
- Levels the playing field for all (gender, race, diversity).
- Creates meaningful work for the next generation (keeping them meaningfully engaged in the law).
- Promotes mentoring (as parties will work more closely with junior lawyers to ensure they are prepared).

# Judicial Orders: **Encouraging**. Incentivizing. Requiring.

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## Northern District of California

- The Court **strongly encourages lead counsel to permit young lawyers to examine witnesses** at trial and to have an important role. It is the way one generation will teach the next to try cases and to maintain our district's reputation for excellence in trial practice. – Judge Alsup.
- **Full set of Judicial Orders available at:**  
[www.NextGenLawyers.com](http://www.NextGenLawyers.com)



Judge William Alsup

# Judicial Orders: **Encouraging**. Incentivizing. Requiring.

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## District of Massachusetts

- In an effort to counter that trend, the undersigned District Judge, as a matter of policy, **strongly encourages the participation of relatively inexperienced attorneys in all court proceedings**. Such attorneys may handle not only relatively routine matters (such as scheduling conferences or discovery motions), but may also handle, where appropriate, more complex matters (such as motions for summary judgment or the examination of witnesses at trial). – Judge Saylor



# Judicial Orders: **Encouraging. Incentivizing.** Requiring.

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## Northern District of Texas

- 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.** – Judge Lynn



Judicial Orders: Encouraging. **Incentivizing.** Requiring.

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## Eastern District of Texas

- . . . the Court has currently set the *Markman* hearing in this case for the morning of January 12, 2016. To the extent that any party planned to submit any of the disputed terms on the papers alone, **the Court will grant additional time to argue** those terms, if they are argued by an attorney with seven or fewer years of experience.
  - Judge Mitchell



# Judicial Orders: Encouraging. **Incentivizing.** Requiring.

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## Eastern District of California

- The court values the importance of training young attorneys. If a written request for oral argument is filed before a hearing, **stating an attorney of four or fewer years out of law school will argue the oral argument, then the court will hold the hearing.** Otherwise, the court may find it appropriate in some actions to submit a motion without oral argument. – Judge Mueller



Judicial Orders: Encouraging. **Incentivizing.** Requiring.

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## Northern District of Georgia

- Moreover, the Court **shall grant a request for oral argument on a contested substantive motion if the request states that a lawyer of less than five years out of law school will conduct the oral argument** (or at least a large majority), it being the Court's belief that new lawyers need more opportunities for Court appearances than they usually receive. – Judge May



# Judicial Orders: Encouraging. **Incentivizing.** Requiring.

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## Northern District of California

- . . . with no fewer than six post-trial motions set for argument next week, surely an opportunity can be made to give those associates that contributed mightily to this difficult case a chance to step out of the shadows and into the light. To that end, the court **expects** that each party will allow associates to present its arguments on at least two of the six motions to be heard. **If any party elects not to do this, the court will take its positions on all six motions on the papers and without oral argument.** – Judge Grewal




# Judicial Orders: Encouraging. **Incentivizing.** Requiring.

## Sad Ending

I appreciate that my order acknowledged the possibility that the parties would decline this opportunity and simply submit their motions on the papers.<sup>4</sup> But I would be remiss if I did not observe the irony of another missed opportunity to invest in our profession's future when two of the motions originally noticed for hearing seek massive fees and costs.<sup>5</sup> To be clear, GSI asks for \$6,810,686.69 in attorney's fees, \$1,828,553.07 in non-taxable costs<sup>6</sup> and \$337,300.86 in taxable costs,<sup>7</sup> while UMI asks for \$6,694,562 in attorney's fees, \$648,166 in expenses<sup>8</sup> and \$302,579.70 in taxable costs.<sup>9</sup> That a few more dollars could not be spent is disappointing to me. My disappointment, however, is unlikely to compare to the disappointment of the associates, who were deprived yet again of an opportunity to argue in court.

**SO ORDERED.**

Dated: March 11, 2016

  
PAUL S. GREWAL  
United States Magistrate Judge



# Judicial Orders: Encouraging. **Incentivizing.** Requiring.

## Conclusion

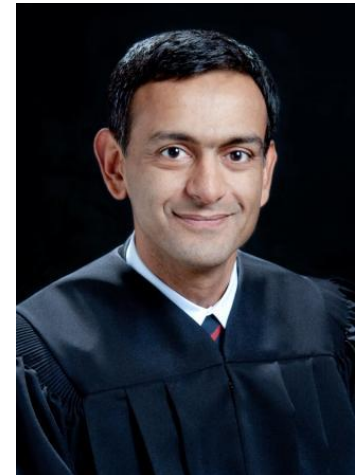
By SARA RANDAZZO

May 13, 2016 11:20 am ET

0 COMMENTS

Facebook made an interesting hire this week for its in-house legal department, turning not to a competing tech company or to a big law firm to find its recruit, but to the judiciary.

U.S. Magistrate Judge Paul S. Grewal, who has overseen a number of big intellectual property cases from his perch in San Jose, Calif., is joining Facebook next month to oversee global litigation for the social media giant.



# Judicial Orders: Encouraging. Incentivizing. **Requiring.**

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## Northern District of California

At the Pretrial Conference on March 3, 2016, the Court will hear oral argument on the following issues: . . .

- ... Samsung's Motion In Limine #2 to Exclude Evidence Of Market Share Based On Products Not At Issue In This Trial. **This issue shall be argued by an attorney 5 or fewer years out of law school.** ... — Judge Koh



# Judicial Orders: Encouraging. Incentivizing. **Requiring.**

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## 9<sup>th</sup> Circuit

- NOW, THEREFORE, BE IT RESOLVED that the Chief Judge is requested to move, at the next meeting of the United States Judicial Conference and in accordance with 28 U.S.C. § 331, to encourage judges and districts within the Ninth Circuit to adopt rules and orders which support the creation of opportunities for newer lawyers by rule and order.
  - 2016 Resolution

# Judicial Orders: Issues

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- Issues with these orders:
  - “Young” versus “Junior”
  - Concern that young connotes age versus experience.
  - Certain number of years of experience (2-7).
  - Concern that even JD year doesn’t reflect prior opportunities given to attorney. Consider “relatively inexperienced” or similar language.
  - Concern that some firms do not have junior lawyers.
- Helpful solution:
  - ***Consider language making clear that all orders are open for discussion.***

# Judicial Orders: Issues

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- ***Consider language making clear that all orders are open for discussion . . .***
  - Judge Saylor: “Counsel are encouraged to seek additional guidance from the Court in particular cases concerning the scope or application of this policy.”



# Judicial Orders: Other Considerations

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- (1) Even relatively inexperienced attorneys will be held to the highest professional standards with regard to any matter as to which experience is largely irrelevant.
- (2) All attorneys appearing in court should have a degree of authority commensurate with the proceeding that they are assigned to handle (e.g. authority to propose and agree to a discovery schedule).
- (3) Relatively inexperienced attorneys who seek to participate in evidentiary hearings of substantial complexity, such as examining a witness at trial, should be accompanied and supervised by a more experienced attorney.

– Judge Saylor

# Judges Actively Promoting Next Gen Opportunities

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## All over the country

- Judge Alsup (N.D. Cal.)
- Judge Casper (D. Mass.)
- Judge Costa (S.D. Tex.)
- Judge Davila (N.D. Cal.)
- Judge Donato (N.D. Cal.)
- Judge Hillman (D. Mass.)
- Judge Saylor (D. Mass.)
- Judge Guilford (C.D. Cal.)
- Judge Grewal (N.D. Cal.)
- Judge Koh (N.D. Cal.)
- Judge Lynn (N.D. Tex.)
- Judge May (N.D. Ga.)
- Judge Miller (S.D. Tex.)
- Judge Mitchell (E.D. Tex.)
- Judge Mueller (E.D. Cal.)
- Judge Rogers (N.D. Cal.)
- Judge Talwani (D. Mass.)
- Judge Tigar (N.D. Cal.)

# Educating Junior Lawyers

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- Delaware Federal Trial Practice seminar (every two years):
  - Designed to give younger lawyers experience standing up and making arguments before Judges in their home District before whom they will be practicing:  
<http://www.ded.uscourts.gov/sites/default/files/FBA/FBA-FedTrialPracticeSeminarMain.htm> and <http://defba.org/federal-trial-practice-seminar/>
- Hillman Advocacy (W.D. Mich.)
  - Annual three-day trial skills seminar involving the Judges of the Court : <http://hillmanadvocacy.com/>.
- ChIPs Initiatives to Train Women to Secure and Excel in Stand-Up Opportunities
  - Mocks before Judges and In-House Counsel:  
<http://chipsnetwork.org/upcoming-events/>.

# Mentoring and Education

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- N.D. Cal.: CJA senior panel attorneys paired with junior lawyers for 2-year mentoring program preceding panel membership.
- D. Del.: Federal Trial Practice Seminar graduates encouraged to take on Federal Civil Panel cases upon graduation from the program.



# Success Stories

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# Success Story: Before Judge Koh

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- Summary Judgment Hearing in the Northern District of California
  - Class action lawsuit on behalf of low-income, disabled plaintiffs.
  - Five violations federal and state claims alleged, some offering the possibility of treble damages.
  - Opposing Counsel:
    - Senior associate
    - Two partners
- Mock hearing key to success
  - Ran by Kathi Vidal and co-counsel
  - Client attendee acted as judge
- Fish swept all five legal issues

# Success Story: Before Judge Koh

- **Kathi Vidal filed a Notice of Argument by Junior Attorneys**

Plaintiffs respectfully notify the Court that they intend to have first year associate Holly K. Victorson and second year associate Emily Petersen Garff argue the upcoming summary judgment motions. Ms. Victorson and Ms. Garff were the primary drafters of Plaintiffs' briefing, and were involved in taking much of the discovery Plaintiffs relied upon in their motion. Given the gravity of the issue before this Court, Plaintiffs respectfully request that more experienced counsel be able to assist in the argument should the need arise.

Dated: April 13, 2016

FISH & RICHARDSON P.C.

By: /s/ Katherine Vidal

Katherine Vidal



# Success Story: Before Judge Koh

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- Earlier this year, Vidal decided to have two of her young associates, **Holly Victorson** and **Emily Petersen Garff**, argue a summary judgment motion in a housing discrimination case the firm is handling pro bono. The **team won every legal issue** in the hearing before Judge Lucy Koh of the Northern District of California, who has a standing order encouraging opportunities for young attorneys.



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Emily Petersen  
Garff  
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Richardson

# Success Story: Before Judge Koh

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- Holly, on having Kathi as back up if needed:
  - “That was key to me being confident going into the hearing. We didn’t end up needing it, but it was comforting to know that if something went horribly wrong, the cavalry was there just in case.”
- Holly, on her experience:
  - “It was an incredible experience. I definitely feel that having that as a base experience sets me up for the next big opportunity that comes along.”
- Emily, on her experience:
  - “I’m definitely going to feel a lot more comfortable in the courtroom next time, which is great because I can focus more on the legal arguments instead of the logistics.”

# Success Story: Before Judge Humetewa



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- *Markman* Hearing in the District of Arizona
  - Six claim terms
  - Opposing counsel:
    - Senior associate and partner
- David Barkan convinced the client to allow James to argue the *Markman*.
- Kathi Vidal helped refine the arguments and ran through the presentation many times.
- James, on his experience:
  - “It was great. I consider myself very lucky to have gotten the opportunity. These opportunities only help the legal profession, and I'm really actually humbled by the experience.”
  - “How it really benefits me is that it provided feedback early in my career, so I can see how I can improve.”

# Success Story: Before Judge Humetewa

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- For more information on these stories, visit:
  - *Helping Judges Spread the Word: Rookie Lawyers Welcome* by Scott Graham at The Recorder
    - <http://www.therecorder.com/id=1202758568348/Helping-Judges-Spread-the-Word-Rookie-Lawyers-Welcome?slreturn=20160623013833>
  - *How To Help Young IP Attys Shine In Court* by Ryan Davis at Law360
    - [http://www.law360.com/ip/articles/808298?nl\\_pk=886daeab-a452-47d1-b5cb-932dbdc90475&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=ip](http://www.law360.com/ip/articles/808298?nl_pk=886daeab-a452-47d1-b5cb-932dbdc90475&utm_source=newsletter&utm_medium=email&utm_campaign=ip)



# Ways to Increase Trust and Success

# Judicial Orders: Creating Trust with Clients

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- Supervision by an experienced attorney
  - Consider making explicit in order to give in-house counsel assurances.
  - Protects against more junior lawyer being “out lawyered.”
  - Encourage dividing up arguments as appropriate to give more opportunities.
  - Make clear that Court will not construe junior lawyer arguing as evidence that party does not care about motion/issue. Party may also share goal of the court to advance the profession.

# Judicial Orders: Creating Trust with Clients

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- Other Techniques
  - Corporate counsel could insist on meeting all the lawyers on their cases (and could directly ask them questions in pitches and meetings).
  - Corporate counsel can offer training across their firms and could ensure that junior lawyers are encouraged to participate.
  - Law firm counsel could send a notice in advance of a hearing advising the judge that a junior lawyer is prepared to argue part or all of a given motion and in that notice could request that the Judge allow more senior counsel to assist if the need arises.
  - Law firms could aggressively teach junior lawyers business development skills as there is no better way to get opportunities than having your own clients.
  - Law firms could track metrics on opportunities given to junior lawyers and corporate counsel could require the reporting of such metrics.

# Is Pro Bono Enough?

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- Stand-up opportunities.
- Are we providing oversight and mentoring?
- Great opportunities and important for society, but no replacement for stand-up work in your field before clients?
- Will clients consider that work when determining whether to allow opportunities in their cases?

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# Questions?

# Thank you!

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