

Of Counsel Interview...

Skills Converged Years Ago for this Seasoned, Top-Tier L&E Lawyer

Most lawyers bring skills and deep knowledge outside of the legal arena to enhance their client service. But not many can offer what Scott Young does. To help his many clients, Young, a partner and labor and employment attorney at Cleveland-based Thompson Hine, draws on his scientific background and current interest in and understanding of artificial intelligence as well as his communication skills and legal process.

Over a long and successful career, Young has earned a highly regarded reputation, with recognition from a host of prominent organizations, including *The Best Lawyers in America*, Litigation Counsel of America, and *Benchmark Litigation*, among others. Recently *Of Counsel* talked with him about his career, the ever-changing L&E practice area, AI, and other topics. Here is the edited transcript of that interview.

Of Counsel: Scott, why did you become a lawyer?

Scott Young: I knew growing up that I would pursue a field in science, because throughout high school and college math and sciences were definitely my strong suits. In fact, I taught calculus and physics at a boarding school right after graduating from college. But I also enjoyed standing on my feet and advocating positions. I was very active in

debate and did well in that growing up, and I also always had a general interest in business as well.

Ultimately, I was drawn to the nature of the legal profession, how it intertwined with trying to figure things out and solve issues for whomever you're trying to assist. And, I enjoyed being able to stand on my feet and talk.

OC: It sounds like you had a confluence of skills and interests that led you to the logical conclusion that law was the way to go. What was it about labor and employment that attracted your interest and pulled you into that practice area?

SY: Some of that has to do with where you end up finding yourself upon graduating from law school—in terms of where the need is. But the other piece was certainly my desire to be a trial lawyer; trying cases was something I wanted to do, and it's certainly how I see myself and have seen myself in my career.

I also have a strong interest in business and business workplaces. I enjoy trying to make it work well for both management and non-management, because I feel that if you have collaboration among the people who work at a company, then you wind up with productive workforces and successful businesses. That's

something I really like to do and have always taken an interest in: businesses and how they work.

So, the employment side allows me to get involved and engage with employees, many of whom are trying to do the right thing by others. [This practice area] also allows me to advise management to stay on the straight and narrow while maintaining good relationships with their employees. I've found that, if there's good synergy from that standpoint, those businesses tend to be the very successful ones.

OC: Sometimes you've got to be diplomatic and even gentle in questioning employees. But at the same time, you have to advocate zealously for employers. Is it accurate to call it a balancing act that you have to perform as an L&E lawyer?

SY: You're doing that if you're being tasked with defending a position by a company after they've already made the decision [to take an action against an employee] and certainly many times that's where I might find myself on behalf of my client. But more times than not, it's consultation—we have a situation; this is what it is; and what should we do about it? And yes we might get sued if we do this, but how should we handle the situation?

So, you're basically serving as a counselor for the client at that point. And then obviously they can decide to listen to you or not listen to you in terms of your recommendations. More often than not they will listen, and that way if you make a recommendation and the client still gets sued, you certainly are in the weeds in terms of why the decision was made, and so you're able to help them out of that. But sometimes it's not just advocating; sometimes they're literally presenting you with a situation and asking you to tell them what to do and what the risks are if they take different routes.

The labor and employment practice definitely allows you to do that type of

counseling,. but then there is a big piece, litigation. Probably at any given time, I have 15 to 20 cases where I'm the lead trial lawyer in court defending a client in connection with an employment matter. Many times, it does lead to that, but then there's this other aspect where I'm trying to help them avoid that situation if at all possible or put them in the best position possible.

Firing Employee, Fending Off OSHA

OC: What's a case that really stood out to you as interesting or particularly important?

SY: I could choose any number of cases, but one that comes to mind involved a situation where there was a serious accident at a job site: Someone was electrocuted while doing work at a power plant. It was caused by an oversight by the manager on site, who was a smart individual—he was an electrical engineer by background—but he just didn't do what he was supposed to do, and someone was electrocuted as a result of it.

Helping out that large national engineering company with that situation was rewarding. The issues were complex because we had to deal with several questions, not the least of which was: What do we do about the manager who made the mistake that resulted in this? He knew what happened. Sometimes you have a situation where you know what happened. The person violated a number of legal regulations that occurred as well as some of your client's own safety protocols. Consequently, you have to make the hard decision about what to do.

In this particular case, probably a couple of months after that incident, we made the decision to fire this particular manager. He sued us for that, alleging that he was wrongfully terminated because he had participated in an OSHA investigation that had happened as a result of this incident. Therefore, he alleged he was basically in a protected class, and we

couldn't fire him for that reason. The company, my client, was issued multiple citations, which we sort of expected, meaning findings by OSHA that we had violated all sorts of regulations resulting in this electrocution and based on what this engineer had done.

As a result, we defended against the wrongful termination case, saying, "Look, we didn't fire you because you participated in an OSHA investigation. We did fire you after you participated in it, but that wasn't why we fired you. We were conducting an investigation and we ultimately concluded that, yes, in fact you ultimately didn't have an excuse for what you did and you're fired." Ultimately we prevailed on that argument and his claim was dismissed on that ground.

Then we went to OSHA and said, "Look, we understand that we violated a whole bunch of regulations in this case, but it was because an employee violated all of our work rules. We took the right action in terms of dealing with him and therefore we didn't have the requisite knowledge that would be required to violate any of these regulations because he violated our rules."

And, ultimately all of the OSHA citations were vacated. Because this case involved a confluence of facts, events, and circumstances it stands out in my mind. We had to make the hard decision about what to do regarding a very educated employee in the workforce. We didn't know that he would sue us, and then we ended up using that in order to provide an explanation for why we shouldn't have to pay any fines for what he did.

L&E Meets AI & Vice-Versa

OC: You're very interested and involved in and informed about artificial intelligence. Would you talk about that?

SY: As I mentioned, science was something that I've always had an interest in. While AI is still in its infancy stages, it's definitely

becoming much more prominent with respect not to just labor and employment but law generally and business generally.

From the standpoint of the L&E space, I am definitely finding myself advising clients on the use of AI as it relates to hiring, discipline, terminations, promotions, and other related employment practices. I'm also helping clients establish employment policies relating to employees' potential use of AI tools, because one of the issues that can arise with using AI—not just with respect to employment decisions but with using it more generally—is, if you use AI to create a product or help you with marketing or in other ways, is that still your intellectual property? There are potential questions of ownership. You definitely want to have policies governing that.

Also, I provide counseling to clients on contracts with vendors that supply AI for use in employment practices. And, it's also come up with respect to defending cases in litigation. One recent example for me from that vantage point is I'm currently defending an age discrimination case. Right now, it's in front of the Equal Employment Opportunity Commission. In this case, it's a failure-to-hire [claim] and we have articulated a rationale in which we say, "The reason we didn't hire somebody who's 40 and over"—and that's when age will kick in in terms of being a protected class—"was not because of their age, but because of other various factors."

We submitted a very detailed position paper where I thought we made our position clear. I don't think it was because they were singling me out—rather, it's their new thing that they're doing—they then send me 10 requests for information relating to whether or not my client or his company utilized AI in any of its decision-making with respect to employment. They want to know when, where, how, and whether or not it was used for the person at issue or, if it's used in other circumstances, who our vendor is, what our vendor has represented with respect to the use of AI, and a number of other

questions. So, it's definitely in the employment space right now and it's definitely a very hot issue.

OC: Is age discrimination trending now in the labor and employment area? And what's another issue keeping you busy?

SY: Probably the hottest and most common sort of discrimination claim that I see right now involves age, and part of it is because anyone who is 40 and over is going to be part of that protected class. Far more than race or gender or disability, it is probably the most common type of claim that either I see in litigation or that a client is potentially concerned about if they're making an employment decision.

I would also say that cases generally involving the Fair Labor Standards Act and classification of employees or whether or not employees are properly paid overtime are also really hot issues. And, certainly defending collective and class actions from that standpoint is another common part of my practice. Some of the challenges with respect to those types of cases can be, well, you're supposed to pay an employee overtime if he or she works in excess of 40 hours in a particular week. What about the employee that says they worked through a lunch break? The employer doesn't know that they worked through a lunch break at the time that they say they did, and these

can be very complicated cases in terms of he said/she said matters. That's a very common litigation issue that I'm seeing these days.

OC: What do you enjoy most about what you do as an attorney?

SY: For me, it's interesting because each case is a little bit different, though it also can have similarities to something that I have done before, which means: experience matters. But I like that each case is at least a little different.

I really enjoy standing up in courts, in front of judges and juries, to tell a story, if that's what I'm being tasked to do, based upon the rules of evidence. I like to tell the truth in an effort to achieve the goals of the client in the most cost-effective and successful manner. That part I really enjoy.

I certainly enjoy the counseling part as well. Of course, sometimes, if the client has bad facts, we're going to try to settle the claim and be as efficient as possible. But when we're in the right, we take a strong position, and we go gung-ho from that standpoint. I really appreciate that the legal profession allows me to do that for clients and assist them and their businesses in making things work. ■

—Steven T. Taylor

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