Being an effective second-chair trial counsel

A look at the responsibilities both before and during trial

By Shant Karnikian

A young lawyer's first experiences in trial are often as second-chair trial counsel. The role of second chair is not just a rite of passage to becoming lead trial counsel, but crucial to success at trial. The following are ten lessons I learned as second-chair trial counsel to my mentor and managing partner, Brian Kabateck, over the course of six high-stakes jury trials, all of which resulted in substantial verdicts.

Be overprepared

Despite my best efforts to avoid clichés and cheesy quotes, a quote by Benjamin Franklin encapsulates the importance of adequate preparation: "By failing to prepare, you are preparing to fail." Preparation for trial is the starting point for ensuring success. More importantly, preparation will ensure that you and your team avoid time-consuming (and sometimes irreparable) problems down the road once trial begins.

For example, imagine finding out during trial that a defendant will not voluntarily produce a witness you planned on calling the next day and you have no mechanism to compel attendance because you did not timely serve a notice to attend. Instead of preparing for the next day of trial, you spend your evening trying to have a process server serve the witness with a trial subpoena at the last minute, with no assurance that the witness will even comply. While these mistakes may not be fatal, preparation and awareness of deadlines will help avoid scrambling to deal with unforeseen and entirely avoidable problems *during* trial.

Dealing with deadlines

The first step of trial preparation entails becoming intimately familiar with the deadlines and rules associated with

the trial. Creating a calendar of all trial-related deadlines is essential, including the briefing schedules for motions in limine, bifurcation motions, non-expert and expert discovery motions, or other dispositive motions. The pre-trial calendar should also include the deadlines for filing other critical trial-related documents such as your witness list, exhibit list, jury instructions, statement of the case to be read to jurors, verdict form(s), and trial briefs.

The rules governing most of these dates/deadlines are usually found in local rules, and sometimes in general standing orders issued by the Court. For example, in Los Angeles Superior Court, most trial-related filing deadlines are outlined in Local Rule 3.25(f). And, of course, any contested motions must comply with the notice requirements of Code of Civil Procedure ("CCP") section 1005.

Other critical trial-related dates to keep in mind include deadlines associated with giving notice to attend or serving subpoenas to attend trial, governed by CCP section 1987. This all may seem overwhelming, but tools exist to assist lawyers in coming up with comprehensive lists of deadlines. I often use SmartDockets.com, a free website which will generate a list of all deadlines (along with authoritative sources) associated with a particular date, based on the applicable rules in the jurisdiction. While these services are convenient, it is best to double-check each and every deadline.

Format and content of trial documents

Deadlines are only half the battle when it comes to complying with pre-trial requirements. Next, second-chair trial counsel must ensure that the formatting and contents of trial documents comply with the applicable rules. These rules are not typically outlined in the CCP, but often found in the local rules or in a judge's own rules. In Los Angeles, Local Rules 3.48 through 3.183 provide an overview of how trial should be conducted, the requisite filings, and the formatting of such filings. Any second-chair trial counsel with a trial in Los Angeles must be very familiar with these sections. Not only do they provide a guide for trial preparation, they will be a useful resource during trial.

If the case is within the Los Angeles Superior Court Personal Injury ("PI") hub, the "Fourth Amended General Order" provides an even more specific list of what is required and the format in which they must be presented to the Court at the Final Status Conference. If the case is not in the PI hub, inquire with the department where the trial will take place as to whether the trial judge has a particular set of instructions they want followed as it pertains to trial documents. This should be done at least three months prior to the start of trial.

Obtaining and knowing the rules and deadlines and preparing the pre-trial and trial documents yourself may sound like overkill or a task you can delegate to a paralegal, but the sooner you develop an understanding of what needs to be prepared and how it should be formatted, the sooner you can pay attention to the actual substance of what you are preparing.

Becoming Master of the Universe

The value in preparing the trial documents yourself, as opposed to delegating to a paralegal or secretary, is that you will develop a better understanding of every piece of evidence in the case and the relevant issues. Mastery of the facts, evidence, and issues will then allow you to better serve as second chair and make your job during the trial much less stressful.

You should familiarize yourself with every possible trial exhibit, all relevant (and sometimes irrelevant) facts, the testimony of every witness, and all the ultimate issues at trial. While this may sound like a herculean task, especially in voluminous cases, it is critical to success. Even though you are not the lead trial attorney, you are going to be the exclusive source of information for the lead trial attorney. In that sense, your role is even more critical than that of the lead trial attorney. For example, if you do not know of a particularly bad fact or damaging evidence, how do you expect the lead trial attorney to deal with it when it comes to their attention for the first time in the middle of trial? You must develop a comprehensive understanding of the landscape, then act as the guide for your lead trial attorney.

Have a backup plan for exhibits

In case my Benjamin Franklin quote was not enough, I must now reference another adage I strongly believe in – Murphy's Law: "Whatever can go wrong, will go wrong." No matter how much preparation goes into the trial, problems arise and things don't always go according to plan. Having redundancies and back up plans built into every aspect of your trial plan will save you time and energy down the road.

This applies first to the logistics of trial. While technology in the courtroom provides valuable tools, the reality is that laptops crash, batteries die, and networks go down. For any piece of evidence or demonstrative you plan on displaying through a computer, make sure you have multiple hard-copy backups. Moreover, make sure you have the ability to project hard-copy versions of exhibits – like an "elmo" projector. If you plan to play excerpts from a video deposition, make sure you have multiple hard copies of the transcript so you can read from the deposition if the video won't play or if the judge sustains objections to a particular portion of the video. If you plan to show a critical document or image in opening through PowerPoint, make a "blow up" of the document or image on a big poster board to show the jury in case the projector doesn't work. Everything you plan on doing should have a redundancy built in.

...And backup for witnesses

This same principle applies to your trial strategy. For example, your first chair may have planned on calling three

witnesses on a particular day, but one of them got sick and could not show up. Now your team must tell the judge that you've run out of witnesses, who must in turn tell the jury to leave early and come back the next day – something judges understandably hate doing because it unnecessarily extends the trial. However, if you scheduled one or two backup witnesses for that day, the problem could have been entirely avoided, and the judge and jury would be none the wiser. If you are tasked with making arrangements for witnesses or experts to attend trial, make sure to keep in mind that someone – or sometimes multiple people – might not show up. There is no penalty for having too many witnesses available, but there are serious consequences when you run out of witnesses.

Prepare witness folders

For every potential witness who might be called at trial (by either side), create a comprehensive but concise folder of anything that might possibly be needed during their testimony. This folder should contain: a "page-line" summary of the witness's testimony; a copy of all exhibits that could possibly be used during the witness's examination; a fact sheet with information about the witness; reports (if the witness is an expert); and any other relevant notes. The contents of this folder do not all have to be prepared at once. Start by preparing the folders themselves before trial, then fill them as you prepare for that witness.

As master of the universe for exhibits and information, the second chair is in the best position to select relevant exhibits to include. Be over-inclusive at first, then pare it down as necessary while working with your lead counsel.

These folders will serve as a repository of anything and everything that will be needed during the examination of that witness. The duplicate copies of relevant exhibits will serve as a backup if there are problems with computers or other equipment. The deposition summary will serve as a tool for cross-examining or impeaching an adverse witness.

Make your witnesses feel comfortable

Even though your first chair will be conducting the examination of most witnesses, they may not have the time to sit down and prepare every single witness they will be calling. As the second in command, you need to work with the witness and prepare them for their testimony. This is not just limited to preparing the witness for their substantive trial testimony (which is something the examining lawyer should do if possible), but also involves making the witness feel comfortable. After all, if the witness is not comfortable on the stand and as a result cannot communicate clearly, the value of their testimony may suffer.

This is particularly true for percipient witnesses who – unlike experts – have not spent much (or any) time in a courtroom. While you may have spent plenty of time hanging out in the pews of Stanley Mosk courthouse checking Instagram, waiting for the judge to get through the twelve case-management conferences before calling your case, your client and their relatives may get nervous simply by being in a courtroom. Judges often issue exclusionary orders that prevent witnesses from sitting in the courtroom until they are called as a witness. You don't want the witness's first exposure to a courtroom to be when they are on the stand answering critical questions that require them to emote and articulate important testimony about their loved one.

Take the time to talk to each and every witness a few days before their testimony, and on the day of their testimony. Describe the courtroom, describe the judge, describe the jurors (tell them some interesting things you learned during jury selection so the jurors are seen as humans and not just a crowd of people staring at the witness), and describe the process. If possible, walk them into the courtroom during a break and let them hang out so they realize it is just another room where they can be comfortable. This will give the witness a sense of familiarity with the situation when they take the stand, and allow you or your first chair to elicit their best possible testimony.

Leave the stenography to the court reporter

It is natural for a second-chair attorney to think they need to write down everything transpiring at trial. During the first day of my first trial, I attempted to type out every question and every answer during jury selection. That evening, when Brian asked me about how a particular juror answered a critical question about holding companies accountable – a theme we were trying to develop for opening – I realized why I would make a lousy court reporter. Trial lawyers are not court reporters. It is inevitable to miss key testimony while engaging in this futile endeavor.

While taking good notes is absolutely necessary, it is important to actually listen to what is happening in the courtroom. Listening is a precursor to taking good notes. I've adopted a method used by Brian. I split a yellow pad into two columns: the left column approximately one-third of the page, the right column approximately two-thirds of the page. In the right column, I write down only exchanges or answers that I believe are important or require follow-up. In the left column, adjacent to the corresponding testimony noted in the right column, I make a note about how we should follow up on a particular issue, or which exhibit number to use while following up. Not every item in the right column deserves a note in the left column, and not every potential question in the left column deserves to be asked during re-direct, cross, or re-cross.

You are better off actively listening to what is happening rather than trying to transcribe it. As a second chair, actively listening will allow you to

anticipate which exhibits may be necessary during re-direct or cross. If you are not conducting the examination, you have the bandwidth to do more efficient things rather than just write down every word being said. The lead lawyer does not have that luxury, given the demands of their role at that moment. You can monitor the bigger picture and be prepared to provide the exhibits, information, or transcript your first chair needs.

Also, keep in mind that your listening is being observed by the jury. If the lawyers aren't paying attention to the testimony, then why should the jury?

Know when to step in

During my first trial, while Brian was engaged in a heated cross-examination of a key witness, I thought of what I believed would be an excellent question to ask the witness. I scribbled some illegible words onto a tiny post-it note, turned around, handed it to Brian in a frenzy, interrupting his flow in the process. In retrospect, the question I thought of was not even relevant, and the process of interrupting Brian ruined the flow of an otherwise very powerful exchange which had captivated the jury.

Upon completing the cross-examination, Brian walked back over to counsel table, leaned over to me as he sat down while still smiling at the jury, and quietly whispered to me through the smile: "Don't ever do that again, okay? Thanks." He later explained the importance of letting the examining attorney maintain their line of questioning and waiting until the right moment to interrupt with notes. We made a pact that day to mutually abide by those principles. Now, even if he has feedback or suggestions during my examinations of witnesses, he waits until the time is right.

While sitting at counsel table and listening to an examination being conducted by your first chair, you may have the occasional "epiphany" and think of a great question to ask the witness or a relevant document to show the witness. The odds are likely, however, that the question you've just thought of is something your first chair will eventually get to, or it is not worth interrupting the flow of the questioning. If you do feel that is a critical issue, only interrupt your first chair during an appropriate moment, like a natural break in the line of questioning, as opposed to in the middle of a series of important questions.

You should also remember that your role is not just to assist, but rather to anticipate. Your lead counsel may not know as much about a particular witness as you do or may not be aware of exactly how the witnesses testified in deposition. It is your role to follow along and provide additional information for questioning or impeachment. Sitting around and waiting for your lead counsel to ask for a particular document is not enough. By actively listening, you should be able to anticipate the possibilities of what your lead counsel may need and be ready to provide it when the opportunity arises.

Anticipating your co-counsel's needs is very different than overwhelming them with information. Your role is to digest the universe of information available and act as a filter. While you are following their orders, keep in mind that you are their second-in-command and they are relying on you for input and help.

Act the part

Jurors are astute observers and want to be entertained. They will watch your every move, inside and outside the courtroom, on or off the record. Since you can never speak with jurors during the trial, your body language and your actions are the only way you will be communicating with them. It is important to keep this in mind at all points of the trial, and to conduct yourself with composure, confidence, and humility.

Maintain your composure no matter what is happening. Never celebrate, gloat, or be a "sore winner." If things are going your way, be confident and act like that was the plan all along. Similarly, never sulk, panic, or show frustration. If there is an unexpected surprise, be confident and act like that was the plan all along.

Never appear uninterested in a particular witness. Even if you are tasked with doing something that will prevent you from listening to the witness, at least pretend to be paying attention at all times. If an adverse witness is blatantly lying, don't appear outraged. This will only lend credence to their lie and legitimize their testimony.

You are asking the jurors to side with you in the battle against the other side. If you truly embrace your role as an integral member of your trial team, they will feed off the sense of comradery between you and your team and will want to join you.

Be willing to take on more challenges

Your role in trial as second chair is not limited to listening and assisting the lead lawyer; it should involve examining witnesses or otherwise actively participating. The more prepared and willing you are, the more opportunities you will be given. You would be surprised by how willing your lead trial attorney will be to allow you to examine witnesses or argue substantive motions even in your first trial. After all, given all they are tasked with, what lead trial attorney wouldn't want to have less responsibility?

Your lead trial attorney will likely help prepare you for examination of witnesses. If you prepared the briefing on important issues, you probably know the facts and law better than the lead attorney. If you've been actively listening, you're already miles ahead of other lawyers who have not yet participated in a trial. Despite all this preparation, it may never feel like you are completely ready. However, in some situations, there is value in putting action before readiness.

Take care of yourself

Trials are physically and mentally demanding. Serving as second chair is particularly grueling given all of the

various responsibilities you are handling in the background, combined with the responsibilities in the courtroom all day. As younger lawyers with less experience, second chairs often do not realize the demands of trial, and do not appropriately manage their lives during trial the way more experienced trial lawyers can. Neglecting your physical and mental health during trial will lead to a vicious cycle where your job becomes even more difficult, which in turn negatively affects your physical and mental health. Given the challenging and unpredictable nature of trial, the last thing you need is more unknown variables in your life: what to eat, where to eat, when to sleep, etc. Maintaining consistency in all aspects of your life during trial is a valuable tool not only for preserving your health and sanity, but also for optimizing your performance as a trial lawyer.

While I am normally not very health conscious, even I have come to realize just how important diet and nutrition are during trial. Given the time constraints and need to work during breaks, you need a consistent plan for how and what you will eat during breakfast, breaks, lunch, and dinner. Your plan may depend on the location and facilities of the courthouse. During the first week of an eleven-week jury trial at the Spring Street Courthouse, we quickly realized that our original plan of going to a local restaurant for lunch every day was not going to work since re-entering the courthouse through security would take 15 precious minutes after lunch. For the next ten weeks, we packed a simple (and mostly healthy) lunch every day in a cooler and ate as a group in the hallway while preparing for the afternoon.

Adequate sleep is another important component of maintaining physical and mental health during trial. While many lawyers pretend to take pride in "pulling all-nighters" and not getting enough sleep, there is no way to perform optimally during trial without getting enough rest. In a lengthy trial, just a few nights of not getting enough sleep will soon catch up with you and hinder your performance. If you manage your time correctly, there is no reason to sacrifice sleep.

This leads to the next important component: time management. Aside from efficiently managing the litany of tasks associated with the trial itself, you must make an effort to manage your schedule outside of the trial. Fortunately (or sometimes unfortunately), the world keeps turning while you are in trial. Other cases remain active, so plan in advance to ensure there are no important deadlines pending while you are in trial. I have been fortunate enough to have colleagues willing to help with assignments I cannot get to during trial, or I arrange to put those assignments off.

At home, it helps to advise friends and family of your unavailability and avoid making commitments you won't be able to keep. I am lucky to have an understanding wife who is also a lawyer, and having her support during trial is invaluable. Tapping into your network of friends, family, and colleagues for support can help ease the burden associated with trial. It is important to not become a complete recluse and occasionally take some time to maintain contact with people in your life.

In addition to staying in touch with others, stay in tune with yourself. Given the "always on" nature of trial, taking a few minutes to unplug, reflect, and mentally recharge has great benefits. I try to start each morning before trial with ten minutes of meditation, or, if possible, thirty minutes of exercise. I end each day with a few minutes of winding down and doing something mindless like watching TV – while occasionally eating some junk food (if my wife is already asleep). Whatever it is you do to stay grounded and relaxed, keep doing it, or do more of it.

Lastly, have fun. While trials are certainly the most grueling part of being a lawyer, they are also the most fun I've had as a lawyer. Enjoying your time with your trial team is what keeps trial from getting too stressful and overwhelming. The work we do is serious, our mission is serious, and the stakes at trial are serious. Having fun while we do it is the only way to ensure that we do not take ourselves too seriously.

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