

Your First Trial: Understanding the Second-Chair Role

By Michael R. Carey

This article is for the lawyer facing his or her first jury trial. More likely than not, the bulk of your contributions will come from counsel's table rather than the podium. The following are a few lessons I learned as second chair at my first jury trial.

Keep Your Trial Team Informed

As you cart your exhibits and trial binders to the courthouse for the first day of trial, you will be eager, excited, and probably a little scared. On the first day, veteran first-chair trial attorneys feel this too. But you should also be confident knowing you have put in the long hours preparing the case for trial. Indeed, the last few weeks were consumed by motions in limine, witness preparation, trial briefs, cross-examination role-play, and rehearsal and refinement of opening and closing arguments. The reason you are second chair for this trial is because you know the facts and law as well or better than anyone on the case team. What you lack in stand-up time in front of a jury, you compensate for with case-specific expertise. First chair is counting on you to have the answers ready before you are even asked; this is your primary contribution from the second-chair position.

The biggest mistake a first-timer can make at trial is to assume that the first chair knows the facts and law of the case as well as you do. This might be true, but at trial, you cannot afford to miss introducing a key exhibit, or to sit on a critical objection for fear you will offend a senior first-chair trial counsel. Moreover, even if first chair was in full command of the facts and law on the first day of trial, he or she may be so focused on nailing the other side's expert that an important detail slips past. You are responsible for these details because, while your first chair crosses that expert, you get to listen and take notes. But second chair is not a casual observer role—you are actively listening and evaluating the evidence

for substance and delivery. Tell your first chair about any problems before it is too late. If you cannot successfully fulfill this role, you might as well be sitting in the gallery.

Keeping your first chair informed starts during jury selection. During voir dire, take a moment to inventory the prospective jurors. As first chair moves through the panel to elicit biases and general background information, watch the other jurors to gauge their reactions. If a juror smiles and nods amiably when your client is the topic of discussion, make sure first chair gives that juror a chance to speak. Likewise, make sure first chair hears about any jurors who

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are obvious preemptories, and watch opposing counsel to see which jurors they like and which jurors they fear. Armed with this information, a skilled first chair might be able to establish such a rapport with the troublesome juror that opposing counsel uses one of their strikes on the juror. Successful first-chair trial lawyers are sharp on their feet, but they are not omniscient. It is your job to look in the places they cannot.

The same goes for any time your first chair has a witness on cross or direct. Even a great trial lawyer cannot cross a difficult expert and evaluate the jury at the same time. Likewise, unless the first chair has eyes in the back of his or her head, he or she cannot watch opposing counsel or the judge while questioning a witness. You have the luxury of looking around the room to see who might be falling asleep, who is aghast, who is roll-

ing their eyes, or who is nodding along with your first chair's line of questioning. First chair relies on you to provide a comprehensive evaluation of how the jury and the judge are responding to the evidence. Use the reactions of others in the courtroom, especially the jurors, as your barometer.

Another key element of keeping your first chair informed is following along in your witness outlines during direct and cross-examinations. When first chair finishes a cross or direct, he or she should be able to turn around and count on you for a nod if everything needed from that witness was covered. If any information was missed, you should hand your first chair a note describing exactly what testimony is needed, or direct him or her to the page and line in the witness outline where the question was missed or an incomplete answer was given. It is easy to skip over important evidence when you are trying to keep an evasive or scattered witness on task, but second chair has the luxury of just listening, making it much easier to evaluate the testimony as it is presented to the jury.

An extra benefit of following along with witness outlines is that you will be at the ready with exhibits. If an adverse witness is not telling the truth and you have impeaching evidence in the file, nothing spoils the moment more than sifting through a binder of documents or flipping through a deposition transcript to find the right page and line. You can and should have a file for each potential witness containing copies of potential exhibits and impeaching documents highlighted where appropriate. When first chair turns to counsel's table, you should have the documents ready in hand. The jury will take note of your preparation and teamwork.

Finally, do not check your intuition at the door. You may be tempted to rely on your first chair for the entire trial strategy. This is a mistake. Jurors are not lawyers, and they know nothing about your case. In your first trial, you are more like

the juror than the veteran first-chair trial attorney. Everything is new to you, and the questions you have are likely the same questions the jury will have. Think about what they want to hear and how they want to hear it. If something does not make sense to you, the jury is probably confused too. Alerting your first chair to your question gives him or her a great opportunity to educate the jury. If the opportunity arises and it is appropriate, you can educate the jury about elements of courtroom procedure everyone else takes for granted. For example, if you publish an exhibit to the jury, you might explain that the jurors are free to touch, feel, and examine it. They will appreciate the fact that someone else in the courtroom seems to be learning about the complicated trial process along with them.

Take Advantage of Your Newbie Status

Chances are first-chair trial counsel on both sides are quite comfortable in the courtroom. If you are lucky, they might even remind you of this fact with a clever quip. My personal favorite is “This ain’t my first rodeo, kid.” Don’t be intimidated.

Judges will naturally give you more leeway in your first trial. They remember their first trial, whether it was as a practitioner or as a judge, and they generally want you to do well. They remember the nerves and unfamiliarity. You can probably expect the same from opposing counsel. A first trial is often an occasion when lawyers momentarily put aside gamesmanship to acknowledge this rite of passage in our profession.

Also, the court should recognize that you have been chosen as second chair because of your talent and skill. Use this as your chance to build credibility. As discussed above, you know the case better than anyone in the room. Demonstrate this to the court. The place to start is in arguing pretrial motions. If you have the best grasp of the facts and law involved in your particular case and you can demonstrate it with accurate citation to case law and the record, the court will look to you throughout trial when a

question arises. You may also be called upon unexpectedly by your first chair to rebut opposing counsel on an unforeseen issue. Make it your goal to be seen as the honest authority about the facts and law of the case.

Be Meticulous with Your Trial Checklists

As second chair, you may be responsible for the exhibit checklist. This is simply an inventory of all possible exhibits created before trial based on the parties’ pretrial disclosures. The checklist should have the date when the exhibit was offered and which witness it was offered through, a space to note whether it was received by the court, and another space for comments, including notes about any objections. If you can show the court you have meticulously recorded the offer and receipt of each exhibit, your checklist might become the master copy in the event of a discrepancy. Nothing builds more credibility for you and your clients than if the court can trust you with this important task. The jurors will also take note of the court’s reliance on your checklist—an advantage that in most other circumstances would give the appearance of impropriety. Do not slack on the exhibit checklist. And if opposing counsel wants to check their work against yours, offer to help them out. The jury will notice this too, and they will reward you.

On the other hand, and it goes without saying, do not share your checklists of elements and defenses with opposing counsel. The exhibit checklist is a standard tool at counsel’s table, but experienced trial attorneys also use a separate checklist that lays out each of the elements of their client’s claims and defenses. As the plaintiff, before you rest your case, you must be certain you have elicited testimony or introduced exhibits supporting each and every element of your claim(s). At times, the elements checklist may feel like a redundant and tedious exercise, but it is critical. For example, while first chair massages your star witness on the facts to support your most elusive element, he or she can very easily skip over witness out-

line questions on the most obvious elements—the elements that are virtually taken for granted by you and perhaps the jury too. When you rest and realize you forgot an essential element, you expose yourself to a directed verdict. At best, you jeopardize the exclusion of certain facts from your closing argument. Second chair’s role is to carefully adhere to the elements checklist and direct first chair back to the podium to clean up anything that was missed.

The elements checklist is equally important from the defense perspective, but the defenses checklist is longer. First, you need to audit the elements of plaintiff’s claims as they go in so you can pounce with a motion for directed verdict if warranted. In addition, you also need a checklist for the elements of your affirmative defenses. These checklists are easy to prepare, often mirroring the jury instructions and special verdict form, but they can be overlooked in trial prep or simply ignored at trial. No matter how well rehearsed your direct and cross-examinations and no matter how thorough your witness outlines, the evidence never goes in exactly as you planned. The elements and defenses checklists are your safeguard, and second chair is best situated to manage them.

Another advantage of keeping detailed checklists is that it makes your daily trial reports much easier. When you sit down at the end of the day to log the progress for your client, your checklists will give you the names of each witness called that day, including the exhibits that were introduced through them. They will also remind you of the objections to exhibits made by you or opposing counsel, the claims or defenses that were covered, and even which elements of those claims or defenses were satisfied and by whom. If you happen to discover a missing element or exhibit that was not offered, this is a perfect time to discuss with first chair what sort of cleanup is necessary.

Shepherd Your Clients and Witnesses

Every courthouse is laid out differently, but in most of them there is the potential

that you or your clients will bump into jurors during a recess. It can happen in the bathroom or outside where the smokers congregate. You may be seated in a booth for lunch and not realize four jurors are eating in the booth behind you. For these reasons, you cannot allow your clients or witnesses to discuss the case unless you are absolutely certain no jurors can see or hear you. They will carry their knowledge and judgments back to the jury box and infect the entire pool with anything they heard or saw. Nine times out of ten, their experience with your clients and witnesses outside the courtroom will not reflect as well as what you put on the stand or what they see sitting beside you at counsel's table.

The best way to shepherd your clients and witnesses is to lead by example. No matter your jubilation or frustration with the trial progress, save your outbursts for a private setting. If your clients and witnesses are unable to follow suit, do not let them show their feelings in places where jurors could observe them. Direct them to a corner of the gallery or assign them a bench on a different floor of the courthouse than your courtroom to sit at or even ask them to use the bathroom on the far side of the courthouse—anything to avoid a juror seeing or overhearing your clients and witnesses outside of the courtroom. This responsibility is yours because first chair has more important things to do during recesses.

On a related point, during recesses and between trial days, remove all sensitive materials from the courtroom to a secure place. You cannot afford to lose your witness outlines, trial checklists, and other trial strategy materials. Opposing counsel is not supposed to look through your trial materials, but everyone is better off if you do not give them the opportunity.

Act Appropriately at Counsel's Table

Although you may never speak a word to the jurors at your first trial, they are judging you just the same. What you are wearing, how you interact with your own team and opposing counsel, and even a roll of the eyes when you know a

witness is lying will be noticed. The best advice is to be likable. If someone needs to take on the bad-cop role, let it be first chair. You want the jurors to see you sitting quietly taking notes and assisting with exhibits as necessary, all the while appearing confident about your client's case. There is no need to draw attention to yourself and away from first chair. On that note, make an effort to sit still. If the jury can see your legs, keep both feet planted on the floor in front of you.

One way to appear confident is to be organized. Remove clutter from counsel's table and be ready with an exhibit or deposition transcript when first chair needs it for impeachment. Tabbed notebooks are a good way to organize your witness outlines and trial check-

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lists and reduce clutter. If you have coffee or water, throw away empty cups at recesses. Do not leave boxes of trial materials under counsel's table or haphazardly strewn about behind you. When you are organized, you look like you know what you are doing, and when you look like you know what you are doing, it builds credibility with the jurors.

Keep an eye on opposing counsel without making it too obvious. If counsel is shuffling for an exhibit to impeach your witness, make a note of the subject matter. You may be able to figure out what they plan to use and develop a strategy to address it. Do they seem agitated by your first chair's questioning on a particular topic? Maybe this is something that deserves more attention. Maybe the adverse party is seated in the gallery and is leaning over the bar to communicate with opposing counsel. Are they panicking or celebrating? First chair likely cannot see what is going

on at opposing counsel's table from the podium, so it is up to you to report anything noteworthy. From counsel's table, you can learn a lot about what opposing counsel is up to, but remember that you are being watched by the jury. If you look like you are trying to spy on opposing counsel, the jurors will lose trust in you. Whatever you do, follow the rules of professional conduct.

Enjoy Yourself and Reflect

You only get one first trial. Celebrate when it is over no matter the outcome. This is also a good time to reflect. Did you enjoy being in trial? Can you picture yourself delivering a compelling closing argument in a high-exposure case? Some people are hardwired for jury trials. Others prefer to litigate from their laptops. Your first trial may teach you which category you fall into.

Another lesson you will learn at your first trial is the importance of your case work-up. Everything you produce in litigation can potentially be turned into a blowup exhibit and presented to the jury. This means that the answer, discovery responses, and even casual letters, could become the centerpiece of opposing counsel's main argument. You do not want a sarcastic objection you made months ago to reflect on you and your client in opposing counsel's closing argument. Remember, ultimately, the jury is the final audience for every pleading and piece of correspondence during the pretrial phase.

Finally, make sure your first chair eats well, drinks plenty of water, and gets some sleep during trial. Trial is grueling and he or she needs to be sharp. If your first chair is on track, it will make your job easier and more enjoyable. ■

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