



Second chair is much more than second fiddle

Never a second's hesitation – the role of the second seat in trial is to be present and anticipate



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BY MILES B. COOPER

I watched the exchange from down the hall. I wasn't quite sure what was wrong — a missing exhibit, exam outline, witness, or the lead attorney's favorite pen. Obviously the second seat had done something that the lead felt was an error. The muted acidity in his tone virtually stripped paint from the hallway wall. "That's going to improve the situation," I thought to myself. As someone who has served as a second seat, co-counsel and lead at various points, the exchange made me think about the attributes that make a successful partnership between a lead and co-counsel, second seat or supporting paralegal. A good working relationship coupled with respect and trust seemed important. Our opponents had none of these.

A good working relationship

Some leads view the second seat as a schlepper, note-taker and late night researcher. Those leads likely aren't getting full value from their second. Even the youngest lawyer, paralegal or clerk has at least two decades of experience observing human behavior. That person can draw on experience to note the individual who is shaking his head while the lead is speaking with another potential juror. The second can pass a note saying that the expert is using technical words and a couple jurors look lost — or that the lead's tone in cross may be too aggressive too early. The phrase a partner of mine uses is the "string on the balloon." Every one of us has had our moments when our emotions or our focus in the heat of battle has been slightly off. The cooler head at counsel table is an excellent grounding point to make sure the lead doesn't push too far or alienate the jury.

Clarifying roles

Clarifying roles before going in is also important. A perfect second seat mindset? "My job is to make your job easier." That can include gathering hyper-accurate courthouse details — what days that courthouse is dark, which judges allow video depositions instead of transcripts (because some do everything possible to hamper video) how that might affect presenting at trial, and how exhibits should be marked for that particular clerk. It may go

beyond that to offering to switch up on witnesses if the lead looks tired. The lead should make it clear what is expected of the second. And the second should expect that the lead, who is focused on trial and at points exhausted, might not clarify everything. This is why the second should always support the lead but not be afraid of questioning. Many good verdicts are reversed on appeal where the lead pushed too hard. A critical part of the second's job is to prevent that from happening.

Being completely present is essential. Once the excitement of jury selection and opening has passed, a second can be tempted to lapse into passive note-taking mode. Since some lengthy directs are not always riveting, this can lead to thinking about other things — whether that next witness will show or an issue in another case. The second needs to keep the focus on the case at hand. How is the jury responding? Is there an exhibit that the lead should work in to change the presentation and keep the jury's interest? Are all of the critical pieces of evidence needed from that particular witness being met? One way I was taught presence was through worry. During a trial my mentor said, at a few points, that she was not feeling well and not sure she'd be able to conduct the key exam or cross that day. Be prepared to take over. You better believe I was completely present. She told me after the trial that she did this to teach presence, not that she planned to turn over the exam.

These principles were reinforced recently when my wife and I had an opportunity to try a case together. We figured it would be an outstanding or disastrous experience. We set ground rules before we went in. She was the string on my balloon and I tried to be not too much of an ass. Fortunately the experience was rewarding. Rewarding does not mean without its moments — like any trial there was a tense second or two. While not everyone will get the chance to try a case with a significant other, I can say I strongly recommend it. In fact we did it again a few months later.

Have faith in your co-worker

Regardless of who you try a case with and what role you play, take the time to check in and have faith that your co-worker will do everything to make sure you win the case. There is no doubt that the rigors of trial serve as an ultimate crucible for lawyers working together. A little thought and effort will ensure that your



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client gets the benefit of synergy instead of schism.

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