

# Second Chair Like a Champ

By Howard S. Shernoff

*Like a golfer's caddy, the assistant to lead trial counsel can help plot the course.*

I recently had the opportunity to check off one of the higher ranking items on the proverbial bucket list: sit second chair for my father at trial. The experience lived up to all expectations – and not only because my father is a legendary trial lawyer and we achieved a multi-million dollar verdict for our client on a \$31,000 insurance bad faith claim.

The experience brought fulfillment and insight on many levels. In addition to enjoying the father-son camaraderie, I learned the importance of supporting a fellow lawyer. And by supporting I don't mean sitting in the front row and pulling hopefully for the home team. I refer to the constant and fluid process of staying one step ahead of everyone else in the courtroom, including the judge, opposing counsel and the first chair himself. That is the charge of a mindful second chair.

A second chair can play multiple roles: law-and-motion specialist, jury consultant, instant legal resource, trial technician, confidant and student. I feel I did a decent job of assuming these duties and thereby helping my father and our client. Below are my reflections on what comprises these roles and makes them important.



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## Law and motion specialist

As bad faith plaintiff lawyers, we typically litigate against large corporate defendants using preeminent defense firms. So we are accustomed to fielding a lot of law and motion. But in the run-up to trial, the luxury of noticed motion briefing schedules and breezily-granted time extensions fades fast. Trial counsel are left to deflect a daily salvo of potentially dispositive motions, filed and served on the fly as if the sheer prestige of trial suspends the rules of civil procedure.

In our trial, defense counsel served me a new, so-called supplemental trial brief almost every morning. True, the judge shouldn't dignify such sandbagging, but just in case, you have to be ready. Lead counsel had enough on his mind planning for the day's witness examinations. So, as second chair, I needed to absorb and argue much of the law and motion. This often requires staying up late to write opposition briefs and getting up early to rehearse oral arguments for *ad hoc* morning hearings.

We were fortunate to have facts in our case that lent themselves to some offensive law and motion, including a viable motion for a directed verdict on the insurer's breach of contract. I spearheaded this effort and, one morning during an *ad hoc* hearing at the close of evidence, found myself arguing for and winning a directed verdict. The victory enabled my father to concentrate full bore on his specialty: proving up bad faith and setting the stage for a meaningful punitive award.

## Jury consultant

The second chair jumps into action on the very first day of trial. During jury selection, a conventional six-pack process can produce a brisk game of musical chairs. With

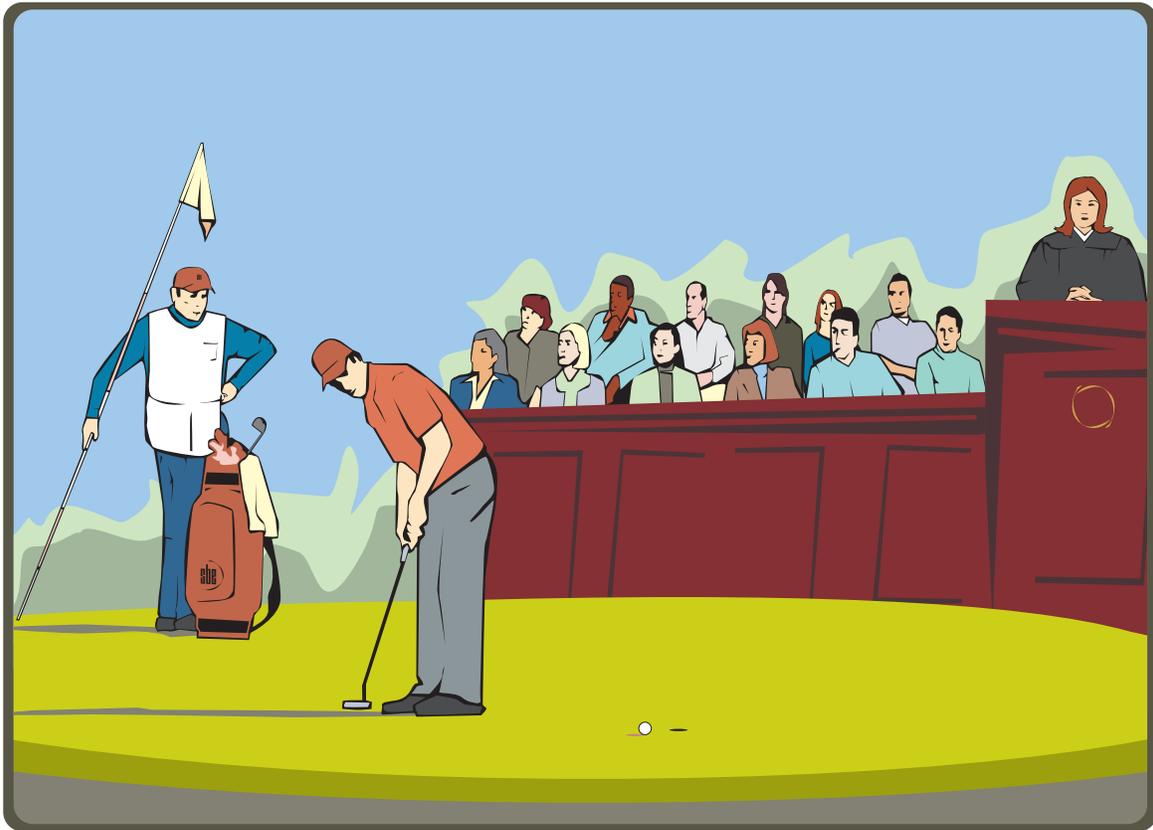
lead counsel concentrating on conducting a thoughtful *voir dire*, second chair must keep track of every movement of every juror. And simultaneously note down everything said by everyone. If the luxury of an internet connection is available, then quick online searches on potential jurors also becomes part of this duty.

Our judge was wise enough to seat four alternate jurors, all of whom ultimately ended up migrating to the jury box owing to various circumstances. That means the composition of our jury changed by a full one-third during trial. Our position on whether to support or oppose a substitution had to be asserted on the spot at impromptu sidebars. By this time, defense counsel's high-priced jury consultant was long gone. But we were armed with my written backgrounds and observations on each juror angling for dismissal and on each alternate poised to step in.

## Instant legal resource

Judges don't like to get things wrong at trial. The side that is consistently prepared with authority to reinforce its position maintains a distinct advantage. We fed our judge a steady diet of favorable authority every step of the way – in pre-trial motions, at *ad hoc* hearings and even immediately following the verdict, to steer her away from a remittitur. When necessary, we also reminded her of the court's earlier rulings and of prior witness testimony. I am not claiming that in every instance I supplied on-demand pinpoint citation to relevant authority by rote. My memory is terrible. But I am relatively deft with a laptop.

A second chair using only a pen and a legal pad is like a caddy carrying only a putter. The entire universe of your case – briefs, motions, rulings, transcripts, depositions, exhibits, statutes, cases and



anything else – must reside locally on your laptop. In addition to preserving instant access to these records, I carry a full digital complement of useful legal resources: all state and federal codes, rules of court, jury instructions, local rules and others. I am not describing online access to these materials. They all live and breathe on my laptop – as well as on a backup flashdrive. And much of it also makes itself at home on my iPhone and iPad.

Naturally, you need to know how to use your laptop. Assess your own computer skills on a beginner-to-advanced range. If you know how to open a few applications and use their basic tools, you are a beginner. You should strive for a higher level.

Test yourself by asking if you can execute the following power tasks instinctually, all of which prove useful during trial: convert document formats (e.g., from Word to PDF); Bates stamp exhibits using Acrobat; reformat all aspects of a document using Word; edit text and graphics on PowerPoint; connect remotely to your office server; set up and deploy a new network connection, including your own MiFi (a pocket-sized mobile network router, which you should own and carry); access quickly all past email from the last several years; and most important, locate

and open any desired document, anywhere, at any time, in less than 10 seconds, and search it for any term or phrase within another 10 seconds.

### **Trial technician**

Add to the foregoing required computer skills one more: fluency in trial presentation software. Usually this is Trial Director or Sanction. Whatever it is, save your client outsourcing costs by running it from your own laptop at counsel table with a direct connection to a good projector. As for the Elmo, it can serve as an emergency backup. Throughout our trial, I used it as a paperweight.

### **Most important, locate and open any desired document, anywhere, at any time, in less than 10 seconds**

Every trial exhibit – all documents, deposition transcripts, graphics, PowerPoint presentations, jury instructions, verdict forms and video testimony of unavailable witnesses – resides in your trial presentation software. Your job is to work with lead counsel to craft polished presentations

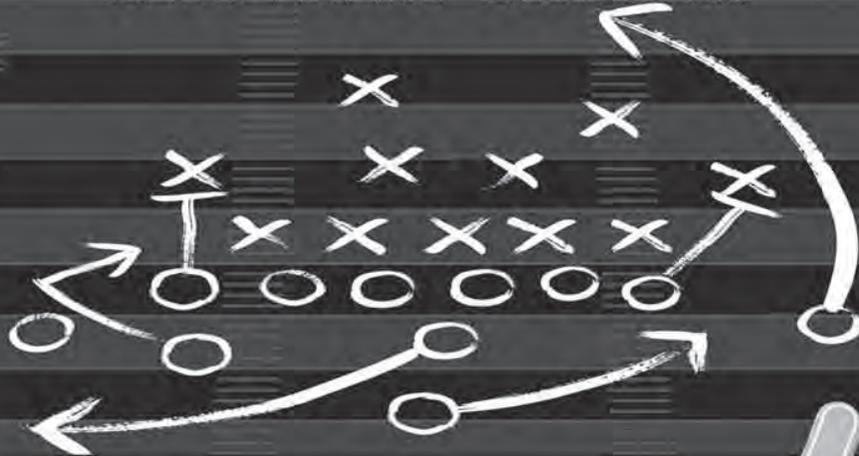
of demonstrative evidence for all arguments and witness examinations. I am not soapboxing for loads of fancy visuals with special effects. In our case, we used no PowerPoint presentations whatsoever. But we did project key documents and jury instructions as big as life at just the right moments to burn indelible impressions in the jurors' minds.

Our opposition relied on a hired-gun technician who knew his way around the presentation software but not the facts of the case. The result was a rocky stream of disjointed presentations by the defense – like watching someone speak on a TV broadcast when the sound is a few seconds off – that lacked luster and often lost the jury.

### **Confidant**

Things happen fast in a trial. Even a seasoned trial lawyer can have doubts about a decision. Or at least feel better by corroborating with another lawyer. The instances at trial when my father paused and said to the judge, “Your honor, may I have a moment to confer with my co-counsel?” allowed him to check his instincts or even occasionally to change his mind. This is not to mention the most

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basic role of a confidant, which often plays out with a glass of wine at the end of the week, when even a superlawyer will step back into his human skin and avail himself of a shoulder to lean on and an ear to bend.

Simply put, we all do better when we're showing off. A humble second chair enables the operation of this sophisticated natural law.

A confidant also is a natural co-strategist. As a second chair you likely will find yourself spending every free moment with lead counsel, listening to opening and closing arguments as they are being developed, plotting witness examinations, coordinating exhibit presentations, devising special jury instructions and partaking in the formulation of the overall battle plan.

### Student

The road to and through a trial can be solitary. Some might say inherently solitary. But when traveling it alone, a lead counsel foregoes a valuable mentoring opportunity. And mentoring does not necessarily steal focus or demand extra effort. It can occur as a byproduct of simply being at your best in the presence of a protégé. In fact, the protégé, or mentee, simultaneously drives the peak performance of the mentor and derives benefit from it. More simply put, we all do better when we're showing off. A humble second chair enables the operation of this sophisticated natural law.

The mentor need not be the elder. When that is the case, the second chair may be fairly excused from bringing to the table the technical bag of tricks described above. My father, in the twilight of an illustrious career, already is looking forward to sitting second chair on a number of my cases and on those of other associates at our firm. While I wouldn't dare to venture that any of us has anything to teach him at a trial, I do believe that his second-chair experiences will prove gratifying and enlightening in ways he probably cannot yet envisage. ■

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