CLIENT ALERTS & INSIGHTS

# Passing the Baton: Checklist for In-House Lawyers Retaining New Trial Counsel on the Eve of Trial

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Featured Practices: Litigation

**Key Takeaways**

- Retaining new counsel on the cusp of trial is a momentous decision for any company that requires careful planning and coordination to ensure a smooth transition while maximizing the company's chances of success in court.
- A poorly managed handoff can lead to missed deadlines, overlooked evidence and confusion over trial strategy or roles, increasing the risk of unfavorable outcomes. The stakes are high, and any misstep can jeopardize months or years of preparation.
- In-house counsel can foster a seamless transition by conscientiously addressing key considerations, including promptly sharing key background materials, exhibits and witness access; clarifying trial roles; and leveraging technology such as AI to streamline the process. Early and open communication with both outgoing and incoming counsel is essential to ensure trial readiness and a unified approach in the courtroom.

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The pleadings are closed. Mountains of documents have been produced. Depositions have been taken, hour upon hour. Summary judgment briefing has been meticulously developed, artfully drafted and submitted-but ultimately denied. Now trial approaches, with all of its foreboding risks and tantalizing rewards. As in-house counsel, you must decide: does your company need to bring in new outside lawyers to try the case? You may conclude that incumbent counsel is perfectly suited to conduct the trial. "Dance with the one who brung ya'," as the saying goes. Or you might determine that new ideas, novel approaches and a unique trial skillset give your stakeholders the greatest chance of success with the jury or judge. If you select the latter route, it is critical to place newly retained trial counsel in the best position possible by expeditiously addressing the 11 key considerations outlined below:

**1. Key Background Materials and Context**

When new counsel is retained on the eve of trial, furnish them with key background materials immediately, so that they can begin to internalize the case and formulate trial themes. At a minimum, the portfolio of indispensable background materials encompasses the following:

- operative pleadings
- deposition transcripts
- expert reports
- *Daubert* motions
- summary judgment briefing
- hearing transcripts
- vital correspondence
- court decisions
- any memoranda synopsizing overarching legal and factual strategies

Further, your frank appraisal of the case's strengths and weaknesses will prove priceless, as it enables new counsel to structure the most appropriate path forward. Be sure to apprise trial counsel of any interpersonal dynamics or past episodes (such as alleged discovery misconduct) that may color the judge's perception of the parties.

**2. Exhibits**

New trial counsel often faces imminent deadlines for identifying trial exhibits, a crucial milestone. Empirical research demonstrates that modern jurors attach more credibility and weight to contemporaneous documents than to witness testimony, which is vulnerable to fallible memories and bias (e.g. litigation incentives to dissemble). Accordingly, exhibits frequently dictate the architecture of trial narratives, along with individual direct and cross-examinations. Belatedly amending exhibit lists after the deadline is not always indulged by the presiding judge, and in any event can have significant tactical repercussions.

New trial counsel should be provided with key/hot document sets immediately upon retention. Broader access to all produced documents (typically via an electronic review platform) should be granted as soon as practicable. It is imperative not to omit potentially persuasive documents from the exhibit list.

### 3. Motions *in Limine*

In some jurisdictions, motions *in limine* must be filed well before the pre-trial conference. Submitted motions *in limine* should be forwarded to new trial counsel, so that they can prepare for oral argument, assess the likelihood that the motions will succeed and modulate trial strategy accordingly. If motions *in limine* have not yet been filed, incumbent counsel should circulate a list of proposed motions *in limine*, along with rationales for each. Review of essential background materials and hallmark exhibits (as explained above) will also aid new trial counsel in apprehending the scope of potential motions *in limine*. In jury trials, motions *in limine* can be outcome dispositive.

### 4. Jury Instruction Preparation

Too often overlooked and ignored until the frenzied threshold of trial, jury instructions and accompanying verdict forms are hugely influential in deliberations. After all, they are the only substantive law your jurors will ever lay eyes on. Research confirms that most jurors attempt to follow (the frequently convoluted) instructions to the letter. Any draft instructions should be shared with new trial counsel immediately, along with any previously gathered model instructions or exemplars from similar cases.

If no draft instructions exist, new trial counsel, incumbent counsel and local counsel (if any) should confer regarding the court's predilections for jury instructions, as well as the law governing the charge in your jurisdiction. New trial counsel should begin researching, drafting and tailoring jury instructions and verdict forms the moment they are hired

### 5. Access to Key Witnesses

Written deposition transcripts convey the substance of testimony, but not the vivid nuances and vexing quirks of personality. You should permit new trial counsel to meet with key fact and expert witnesses as quickly as feasible. In-person summits allow new trial counsel to assess the communication style, credibility and likeability of the very witnesses who will tell your story to the jury or judge.

Among other things, trial counsel's assessment of witness demeanor will impact the scope of trial testimony, the order of evidence and the methods of witness preparation. Face-to-face meetings also permit new trial counsel to ascertain which team members enjoy natural rapport with seminal witnesses, and to strengthen that baseline connection. Camaraderie between examining attorney and witness enlivens direct examination, heightens juror attention and enhances both likeability and credibility. Core witnesses should be encouraged to set aside substantial time for multiple trial preparation sessions, including mock direct and cross-examination.

### 6. Weaknesses in the Evidentiary Record

Once new trial counsel has completed their initial review of background materials, you should have a candid discussion concerning any gaps in the evidentiary record supporting your primary trial themes. Supplemental discovery may be advisable.

In instances where discovery has already closed, new trial counsel may have to resort to more exotic mechanisms for augmenting the evidence. Trial witness lists can be expanded. Additional third-party testimony and documents can be procured via trial subpoenas. Courts can take judicial notice of

materials not otherwise in the record. Demonstratives and summary exhibits can be created. Impeachment materials can be introduced. Stipulations can be sought. And so on. The sooner new trial counsel knows about deficiencies in the proof, the sooner she can cure them.

**7. Jury Testing**

The results of any historical mock jury or focus group testing should be provided to new trial counsel at the outset. If no jury testing has been conducted, you should strongly consider at least one expedited exercise prior to trial, even on a highly compressed time horizon.

Testing is invaluable and has myriad benefits: (1) identifying trial themes that resonate with your specific jury pool; (2) isolating vulnerabilities; (3) objectively gauging trial risk for your business stakeholders; (4) generating profiles for jury selection; and (5) providing new trial counsel with the opportunity to familiarize herself with the dynamics of the case (presentations and demonstratives created for mock trials can often be adapted to the real trial, yielding synergies).

Even where some testing has already been completed, there is nonetheless often value in supplemental testing featuring new trial counsel to evaluate juror receptivity to revamped themes and attitudes towards discrete issues and witnesses.

**8. *Voir Dire***

Unfortunately, many lawyers relegate *voir dire* to an afterthought, lost in the torrent of openings, closings and examinations. But in the race for the hearts and minds of jurors, no art is more decisive or formidable.

Shortly after being retained, you should invite new trial counsel to confer with incumbent and local counsel concerning both *voir dire* procedures and the law of jury selection in your jurisdiction. *Voir dire* practices can vary dramatically from courthouse to courthouse, and even from courtroom to courtroom in the same building. Similarly, legal standards for cause strikes and the permissible bounds of juror questioning fluctuate by jurisdiction. Ensure your new trial counsel is familiar with both local custom and precedent. Ask trial counsel for regular updates concerning *voir dire* strategy as trial approaches.

**9. Initial Appearance of New Trial Counsel**

The appearance of new trial counsel should be timed and choreographed to maximize credibility with the court. Presiding judges are often skeptical of new trial counsel who debuts on the eve of trial, since it typically augurs a request for a continuance and an unwelcome disruption to the court's schedule.

Postponement of a fixed trial date should be avoided wherever possible to remain in the good graces of the court. That said, there are instances where the state of the record justifies (and even demands) the credibility risk of asking for an adjournment. More generally, the credibility of new trial counsel is determined by her first few appearances before the judge. Where feasible, new trial counsel should be given the opportunity to advocate for reasonable positions at their first hearing, rather than shocking the court with radical proposals or departures from the judge's prior conception of the case. Precise tactics for introducing new counsel will depend on the unique circumstances of each case;

### 10. Clear Communication from In-House Counsel Regarding Trial Roles

Where new trial counsel and incumbent counsel will work together at trial, or where multiple law firms will represent your company at trial, you should set expectations by clearly and transparently communicating the role each counsel will play in front of the jury or judge. There should be no lingering questions as to who is responsible for final tactical decisions in the fog of courtroom combat, where good faith disagreements can arise.

Clear communication from in-house counsel about respective roles eliminates friction and ensures a unified, integrated, consistent trial presentation. It goes without saying that all outside counsel should conduct themselves collegially, work collaboratively, and subordinate their individual egos to the common objective: victory for you, your stakeholders and your company.

### 11. AI Enhancements

AI can facilitate and accelerate an efficient transition from old counsel to new, especially where there is a looming trial date. While the outputs of current models are imperfect and always require vetting by experienced attorneys, new trial counsel can use internal firm AI platforms (with appropriate confidentiality safeguards) to (a) synopsize depositions; (b) collate and organize voluminous exhibits; (c) generate chronologies; (d) compile key admission lists; (e) create examination templates; (f) populate cast lists; and (g) test the outer parameters of trial narratives, among other things.

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