

Going to Trial

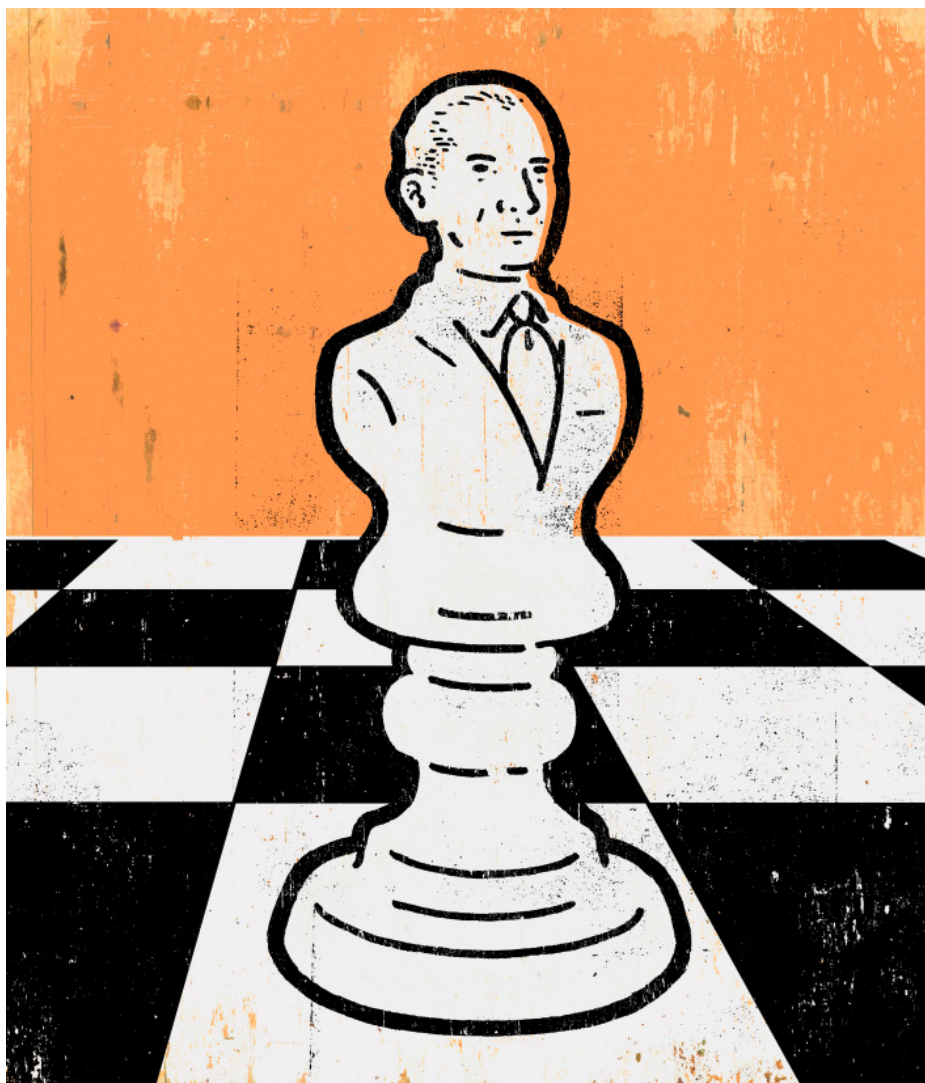
What in-house counsel can do to best prepare for success at trial

FEW THINGS CAN CAUSE IN-HOUSE COUNSEL to lose sleep more than taking a case to a jury trial. Not only are juries often unpredictable and the results uncertain, but many trial decisions must be made spontaneously by trial counsel, leaving in-house counsel feeling they have limited ability to directly impact the trial. Nevertheless, though outside counsel may be the public voice for the organization during trial, there are important steps that in-house counsel can take, both before and during trial, that will help maximize your company's chances of winning a trial.

Farella Braun + Martel

EXECUTIVE SUMMARY

Although much of the trial process is in the hands of outside counsel, there are tasks in-house counsel can perform to increase the company's likelihood of prevailing. Some of these tasks include: (1) assembling the best trial team possible, which should be composed of lawyers with substantial trial experience and deep familiarity with the case file, (2) potentially retaining appellate counsel, (3) establishing a protocol for keeping informed of the trial's key developments, (4) selecting the best company representative to be present at the trial, (5) deciding whether and when to use a jury consultant, and (6) ensuring that potential opportunities for settlement are not overlooked.



SELECTING AND MONITORING TRIAL COUNSEL

The first and perhaps most important decision you must make is whom to select for your trial team. In most cases it is wise to have the counsel who prepared the case in its earlier litigation stages take the lead in trying the case. As a general rule, bringing in a “hired gun” who is known for his or her skill at trial advocacy but is not deeply familiar with the case file is a dangerous practice. On the other hand, if the current litigation counsel does not have significant trial experience (which is increasingly the case, with fewer matters actually proceeding to trial), it may make sense to add another lawyer or firm with trial experience to play some role in the case—even if they don’t take the lead role. The most effective trial teams are often just that—teams—drawing on a variety of skill sets. You should always make clear, however, who is ultimately in charge and has the final say on strategy decisions.

Once the team is assembled, it is important to develop an effective communication strategy that gives you the information necessary both to provide input into strategy decisions and to report to your senior management. If you will be attending the trial, you should consider having a brief meeting at the close of every trial day, with everyone on the team attending, and in which the day’s developments are summarized and the team then outlines the agenda for the next day. Setting a clear agenda with a time limit can help prevent such a meeting from becoming merely a time-consuming rehash of the day’s high and low points. This team meeting should also be followed by a brief consultation between yourself and lead counsel if there are any more sensitive issues to discuss. If you do not have the time to do this, consider appointing a trusted member of the team (preferably not lead trial counsel) to draft a short email summary of the day’s events that you can then use for internal company reporting. This email should summarize the evidence presented, any significant rulings, and any strategy decisions made. It should also give you a preview of what is expected the next day.

RETAINING APPELLATE COUNSEL

If the amount of money at stake is substantial enough, consider retaining an appellate lawyer

Bringing in a “hired gun” who is not deeply familiar with the case file is a dangerous practice.

to supplement your trial team. In many cases decisions made throughout the trial will impact the appellate record. And in most cases trial counsel will be so focused on winning in the trial court that he or she may overlook the potential appellate implications. In other cases the appellate implications may be obvious only to practitioners who spend a significant portion of their time working on appeals. Having an appellate counsel attend trial daily is useful to the extent decisions need to be made immediately. However, if that is too expensive, an alternative is to simply add the appellate lawyer to the distribution list for the daily status report, and have that attorney on call for consultation regarding jury instructions, evidentiary issues, and other key strategy decisions that may affect a possible appeal.

PRESENTING YOUR COMPANY TO THE JURY

When your case comes before a jury, you will need to find a way to personalize your organization. Having a representative of the company present in the courtroom every day of trial is one way to indicate to jurors that you take the case seriously and that the company is not simply some faceless entity. Each case will be different, but in many instances the ideal company representative is someone who has some

personal involvement in the underlying dispute but is not so directly implicated that his or her credibility and motives are subject to question. On the other hand, if your company is the defendant and the individual alleged to have been the “wrongful actor” is particularly sympathetic and credible, you may consider having that person be the face of the organization. Doing this communicates to the jurors that they are passing judgment not just on some impersonal entity but on the integrity of this particular individual, with whom, ideally, they will have developed some connection. Thus it may be harder for jurors to reach a verdict motivated by a desire to give something to a sympathetic plaintiff, thinking that the organizational defendant “can afford it.”

Although it is critical to have an individual in the courtroom identified with your company, you should not appear to have a whole team of people filling up the courtroom. Particularly if your company is up against an individual or a smaller organization, you don’t want to look like you have hordes of people working on the case. A large, conspicuous team reinforces the “David versus Goliath” impression and can potentially irritate the judge (particularly if your counsel needs to ask for additional time to complete a task during trial). If you and your colleagues are present in the courtroom,

EXPERT ADVICE

TIPS FOR WORKING WITH JURY CONSULTANTS

- Select a consultant familiar with the applicable jury pool.
- Engage a consultant early in the process, before discovery is complete, to discuss trial themes.
- Keep budget constraints in mind and look for cost-effective alternatives to full mock trials.
- Ask your consultant to provide feedback on the style and impact of your key witnesses.
- Pay much more attention to the comments made by focus group members or mock jurors about the case than to any “verdict” they might reach.
- Use your consultant’s voir dire knowledge and resources to help craft the most revealing questions for prospective jurors.

COMPLEX LITIGATION

it is preferable that you not consult with trial counsel in the presence of the jury.

WORKING WITH JURY CONSULTANTS AND FOCUS GROUPS

In virtually any case involving significant potential damages, it makes sense to involve a jury consultant in some fashion. Indeed, meeting with a jury consultant, at least for a short consultation, at the outset of a case can be a wise investment. A skilled consultant can help you and outside counsel define potential winning themes and direct the case most effectively for trial. Doing this analysis before discovery is complete can be highly worthwhile—it's money well spent.

Of course, most jury work occurs as trial is approaching. Though jury consultants are invaluable in complex cases, that does not necessarily mean you need to spend hundreds of thousands of dollars on lengthy mock trials. Mock trials can be very useful—providing an opportunity to hear “jurors” deliberate on the issues involved and providing counsel with an audience for a dry run of the opening statement and the closing argument. The exercise can also help counsel anticipate and articulate an opponent's best arguments. (The actual “verdict” reached by a mock jury is far less informative than which issues are most important in the mock deliberations. So it is critical not to let a favorable verdict in a mock trial go to your head. Remember that almost invariably your counsel will not do as good a job presenting your opponent's case in a mock trial as opposing counsel will do at the real trial.) However, other less time-consuming and expensive techniques can also provide valuable input. For example, focus groups in which ordinary people discuss issues of significance to your case (e.g., impressions of a particular industry, what a “reasonable, impartial person” would be expected to do in a particular situation) can be very informative.

Jury consultants also can be helpful in evaluating and preparing potential witnesses. Studies have shown that people form a general impression of a speaker within just a few seconds. By reviewing a portion of a videotaped deposition, for example, a consultant can help

you identify witnesses that make a particularly good or poor impression, as well as giving you ideas on how poor witnesses can be made stronger. Often very minor adjustments to a witness's speaking style or body language can have a major impact on how the witness is perceived. Some consultants propose that they actually work directly with your witnesses to improve their presentation skills. But proceed cautiously with this approach, because there is some risk of such “coaching” coming out at trial, which may be very negatively perceived by jurors.

Finally, jury consultants can be quite helpful during the jury-selection process. They have witnessed hundreds of voir dire examinations and can help you design questions that expose hidden biases or, conversely, form a positive connection with the potential jurors. A wealth of research on these strategies is available, and it is wise to take advantage of this expertise. However, if the consultants will be involved in the actual process of striking jurors, you should attempt to not make this too obvious to the potential jurors. For example, if the court allows it, you can simply have the consultant sit at counsel table during the selection process.

REASSESSING SETTLEMENT POTENTIAL

It is, of course, widely known that the vast majority of complex commercial cases (roughly 97 percent by some estimates) settle before trial. In addition, of the few cases that do proceed to trial, roughly half of them settle sometime during trial. Even cases that proved impossible to resolve in pretrial mediation often become ripe for settlement when motions in limine have been decided or a jury verdict is imminent.

Though trial counsel ought to provide sound advice on the likely outcome of the trial,

your lead trial lawyer should, to the extent possible, be primarily focused on winning the case, not on reaching a settlement. As in-house counsel, you are particularly well situated to evaluate whether a settlement during trial makes sense. You should rely on the judgment of well-chosen trial counsel, but you should not assume that your attorney will be looking to settle once the trial is under way. That's not the attorney's job. Therefore, it's your responsibility to be proactive in raising the issue of settlement with trial counsel and your internal management if you deem it appropriate. ●

Personalize your organization by having a company representative present in the courtroom every day of trial.



KAREN KIMMEY is a partner at Farella Braun + Martel and a member of its Business Litigation practice as well as its Intellectual Property and Technology practice. She is a seasoned trial lawyer who has successfully handled numerous bench and jury trials. Though Ms. Kimmey is a powerful courtroom advocate, she also understands the importance of finding efficient means to achieve her clients' business objectives, and is experienced in alternative dispute resolution. She represents clients in a wide range of commercial disputes, with a particular emphasis on class actions; unfair competition claims; shareholder litigation; and copyright, trademark, and patent disputes.
kkimmey@fbm.com