We’re Not in Kansas Anymore: 
*The Challenges of Trying Cases in Unfamiliar Jurisdictions*

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I. Introduction

While many bemoan the gradual “death of the jury trial,” the exercise of Seventh Amendment in jury trials is alive and well, albeit in a diminished case count. As the number of cases actually going through to jury trial may be declining, clients on both side of the bar are more often employing the concept of “specialists” long ago adopted by the medical and other professions. Akin to surgeons, trial lawyers who have finely honed their craft now maybe called upon by clients to use their skills in a more precise fashion as members of a “trial team” comprised of different lawyers from different firms. This growing concept of a “virtual law firm” wherein clients tap different skill sets to their best advantage in presenting a meaningful case to a jury is one that is not going away. Accordingly, the astute practitioner is wise to arm herself with knowledge of how to best integrate into such a team, whether as the parachuting lead counsel or the local “ground troop” counsel.

II. The Call

We’ve all been on at least one end of this transaction. Or if you haven't, you likely will be. You’ve been practicing for a while in your city. You’ve got a nice track record, good client base. You’ve tried some cases with pretty good success. You’re established in the local legal community. You’re even a DRI member of course (because all the good lawyers are). You’ve done pretty well. Life is good.

So, then you get a new case for client X. But either at the outset of a new case (or maybe after the case has already been plugging along for a while), client X throws you a curve. “We’re going to bring Jane Smith—she’s our national counsel and will try the case. With you second chairing.”

You of course agree, because after all—it’s what the client wants. But you say to yourself, “So what am I—chopped liver? This lawyer doesn’t know my state/county/city!”

Or how about this: You’re happily litigating along in your nice office in your home town when client X calls you and says: “I want you to take over a case we have pending in Springfield. Our local lawyer there is Jane Smith – you guys will get along great.” Never mind the fact you don’t know Jane Smith, and never mind the fact you’ve never been to Springfield, much less know anything about the court system there.

It is important when contacted about the potential of getting involved in a case that you determine why the client is tapping you and what is expected. A realistic client hopefully isn’t expecting a miracle on the case, but be mindful that something prompted the call. And, the something isn’t always (or usually) complete dissatisfaction with the currently handling defense counsel, so don’t assume this. Instead, take the time to have a forthright conversation on the why and what topics. This contact is the “mission setting” one that will define the client expectations—and yours.

So…what do you do?? Many challenges await. In addition to the normal pressures involved in figuring out the case, litigating it and trying it, now you have the increased pressure of being “the chosen one” the client is counting on to save them in whatever foreign jurisdiction involved. If you’re the incoming lawyer, you’ve already got the client’s trust, which is a good thing. Now all you have to do is win the trust of your local lawyer, the judge, the judge’s staff, and a jury. All of whom will be suspicious of you from the start. No big deal.

To be sure, there will also be discussion of the “who” topic, but this shouldn’t consume the conversation. Indeed, the handling attorney is more often than not a very knowledgeable source of case and local information that you will have to integrate into your team.
III. Challenge 1: Breaking the Ice: The Call After the Call

Remember first and foremost—this is a team effort. You are there because the client trusts you and thinks you can help them. So, the thing you need to constantly remember is you have to do what is best for the client.

Once the client has made “the call,” the next call will be the initial contact between the parachuting lawyer and the lawyer in charge of the landing zone. Absent the client facilitating this contact by teleconference or meeting, the relationship is usually set on its best footing by the local counsel graciously reaching out to the parachuting lawyer to welcome her to the fight and determine the initial needs and wants of this new member to the trial team. When the initial call is one where the new member reaches out it can be awkward and stilted.

This initial call in the new “marriage” of trial team members is the one which will set the tone for the relationship. As they say, you only get one first impression—as such, make the most of it. It is not the time for war stories, but some socializing is appropriate to learn a little about each other and your practices. It is no time for ego. Selflessness is key. If you are the parachuting lawyer respect the skill and knowledge brought to the table by the currently handling lawyer. Alternatively, if the landing zone lawyer, learn the specialization of the new attorney to your team. Both individuals should welcome the help being provided them and that they work for a client willing to give the necessary resources for a successful defense.

Sure, it’s maybe a little awkward at first, because the incoming lawyer is understandably viewed with some degree of suspicion. But the local lawyer is the one who will in all honesty end up making or breaking the case, because they are the ones who know their way around (and of course to) the courthouse. The incoming lawyer is the relative outsider—nobody knows them. That lawyer doesn’t attend local bar meetings, doesn’t know the judge, doesn’t know the judge’s clerks (hopefully there is one), doesn’t know the court clerk1.

If you’re the incoming lawyer, before this call, you should also learn what you can about the case. You can’t call the local lawyer and be a total idiot about the matter2. Besides, especially if you are coming in after the case has been going on for a while, the local lawyer will have the case file you so badly need.

So, because you either have been on the receiving this kind of call (or just because you’re a decent human being), you make contact with the local lawyer. You establish a relationship with them. You get to know them, their firm, their jurisdiction. And if you’re the incoming lawyer, before you even call the local you do some research on them so you at least have some idea of who they are and what they do.

IV. Challenge 2: Getting Admitted

OK, this isn’t usually a “challenge” in the traditional sense, but it still must be done. And sometimes, it really is a challenge. Here’s a real-world challenge that happened to Jeff:

I got assigned case in Hawaii to try for a client. The local lawyer was Leighton Oshima, and he could not have been nicer or more helpful (and our good relationship (see above) was what ended up winning the case for us, I’m convinced. But there was a very serious challenge with the judge, who was seemingly dead set against me from the start. The usual almost pro-forma Admission Pro Hac was opposed by plaintiff’s counsel, and an actual hearing was held. The judge took it under advisement, then later decided I could come in but told me flat out that I was not going to be “lead counsel.” He also instructed me that I could not open and close. He was a very good judge as it turned out—his decisions were spot on (even the ones I didn’t like were well reasoned), and his trial demeanor was great. But I almost didn’t get in.
V. Challenge 3: Learning and Abiding by Local Procedural and Evidentiary Rules

This kind of goes in the same time frame as challenge number 2, because to get admitted, usually you have to swear you’re read and will abide by whatever that jurisdiction’s rules are. And you don’t want to be a liar from the start, so at last try to read the rules before you swear that you’re familiar with them. If you’re lucky, the Rules of Procedure and Evidence aren’t too different from the ones in your home jurisdiction. But there are likely going to be differences. Maybe not big ones, but still there are differences. Maybe it’s in how depositions are noticed, or the way Motions and briefs have to be formatted. Or maybe it’s the way motions are set, or it’s the style and format of copies that need to be delivered to the judge. Regardless of what they are, you have to make sure you know them. This is yet another way where your local counsel is crucial to the case and can steer you around some rocks.

VI. Challenge No. 4: Establishing and Executing the Battle Plan

Every case has its own nuances, but every case has two simple items—facts and law. Assuring all team members have full information on these fronts is essential. And, communicating it as soon as possible is the hallmark of a well-oiled trial team. The nature of where the case is in the pre-trial process will affect such information flow, but common themes predominate a successful working relationship.

A. Meet in Person at the Earliest Opportunity

No amount of teleconferences, Skype or WEBEX “meetings” or flurry of emails can replace the building of a relationship by an in person meeting. Insist that this occur as soon as possible after the client forms the team. The meeting should be a business one in the offices of the landing zone counsel with a social lunch or dinner. If possible a visit to the courthouse and, if possible, incident location, should be arranged. All other team members should be available also for this meeting.

B. File Materials Should Be Conveyed Promptly

Odds are that the case in which the trial team is formed is an extensive one on the document front. Pains should be taken by both the parachuting lawyer and the landing zone lawyer to assure the prompt conveyance of these materials. It is well understood that everything—even in our electronic transmission era—cannot be sent or digest at once. It is for this reason that the parachuting lawyer should first request that the landing zone lawyer send a meaningful “starter kit” to inform and educate the newcomer to the important portions of the record. This will afford the development of review and the questions that necessarily follow. From there, the other materials can then flow until both counsel have essentially duplicates of the same materials.

It is important to emphasis that nothing should be withheld on the sharing of information. From correspondence (even email) to formal pleadings and discovery, the client is best served by all team members having complete access to the same information. Nothing good can come from withholding materials—even if the thought is that “there is no need for this to be shared” given the respective roles of counsel. Again, information sharing is the key to serving the client’s interests.

C. Integrate the Team Members Meaningfully in Hearings and Ongoing Discovery

Not only will the parachuting lawyer be new to the landing zone lawyer, but also to the other counsel (plaintiffs’ and co-defense) in the case. These relationships, too, should be fostered as early as possible by fully
involving, to the extent possible, the parachuting lawyer into hearings and any remaining discovery matters. The introductions are the responsibility of the landing zone lawyer and, handled appropriately, send the message of cooperation and not dissention on the defense trial team. If the opposition senses all is not right on the client derived “marriage,” you best believe that the perceptive opponent will sense the same and take full advantage of it for her client.

D. Establish Lines of Communication Within the Team

While it is likely that numerous calls and emails will occur between the new trial team members from the top on down, the communication channel should be formalized with weekly telecoms/meetings with all team members participating. These should be agenda driven and not left to rambling conversations. Both the lead and local should have a hand in developing the agenda which should be circulated ahead of the conference.

E. Establish Lines of Communication External to Client and Others

The team should speak with “one voice,” though it is understood that different team members will have their own communication with others. In this regard, however, the team should have clear expectations of when communications are to occur with the client, outside counsel, and any experts. Just as with the communication within the team, to the extent possible the communication should be scheduled and agenda driven—particularly with the client.

VII. Challenge No. 5: Convincing the Judge You Are Not Actually an Alien and Are Believable

At some point, you will appear in front of the local judge. That judge will start out not liking you (see real world story above). After all, you’re not from Springfield. You have to establish as much of a relationship with the judge and his staff as you can. You may have a lot of contact, and you may have barely any. But any time you appear in front of that judge, show up early and let the staff know you’re there (if allowed). And if you’re allowed to contact the judge’s office for any reason (that’s ethically allowable, of course), go out of your way to be nice to the staff (and of course the judge). You’re already behind the 8-ball, so make sure you do not alienate the judge and his/her staff.

VIII. Challenge No. 6: Convincing the Jury You Are Not a Bad Person/ Hired Gun

The other side will likely pound the fact that you’re from out of town, because they want to make the jury suspicious of you and your client. Depending on whether you’re in state or Federal court (and the size of the county/jurisdiction), you’ll hear some variation of this: “Mr. Jones is from Metropolis. Anybody know of Mr. Jones or his firm, Mega, Rich and Smart, LLP? That’s a really big firm up there in Metropolis, so maybe you have. Now he’s here to represent Enormo Corp in this lawsuit we brought on behalf of the widow of Mr. Niceguy. But can you promise Mr. Jones you won’t hold those facts against him or Enormo Corp and can be fair? etc., etc.

Of course, there’s no way you can get around the fact that you’re not from Springfield. And the more you emphasize that fact, the more the jury will focus on it. And if you try to ingratiate yourself to them, it will likely come off as fake and they will dislike you even more. So really all you can do here is not emphasize the
‘alien’ status and just focus on the matter and establishing trust with them. Kind of like you should be doing anywhere (even back in Metropolis), but just more.

IX. Dealing with the Hiccups

Forthright communication and clearly outlined goals and expectations should aid in avoiding issues, but they are sure to arise. These need to be addressed early and within the team if at all possible. The client who had formed the team desires execution of the battle plan and doesn’t want to be employed as a “go between” on matters of bruised egos or ruffled feathers. Handled issues of personality and assignment internal to the team.

On issues involving strategy or disagreements on the same, these also should first be addressed internal to the team. However, it is appropriate to involve the client where needed to obtain buy-in or rejection of approaches to the execution of strategy affecting the trial and its outcome. Ultimately, the communication lines established should foster sharing crucial information and decision-making with the client, while keeping internal squabbles within the proverbial barrack tent of the trial team.

X. A Safe and Victorious Landing

The current day defense practitioner needs to educate herself to the adoption and spread of the virtual law firm approach in the defense of cases. It will be rarer and rarer that one firm takes a significant matter from cradle to grave without a client or principal bringing other counsel form outside to assist in the prosecution of the defense of the case. By fully considering how a client is best served in such an environment and how one can serve as an effective trial team member, regardless of role, the prepared defense lawyer will both serve the client’s need and find professional satisfaction in a case well presented. Even in Springfield.

Endnotes

1 Some of the best practical help ever received has come from being friendly to clerks—both judges’ clerk and court clerks.

2 Actually you can, and some have. Not the best way to start a relationship with the local lawyer though.