How to Speak Loudly Without Saying a Word

Effective Appellate Advocacy from the "Second Chair"

By Nicholas A. Danella

The "second chair" is more than an extra seat at counsel's table, and the person sitting in it has a unique role and particular responsibilities.

Much has been written, including in the pages of this magazine, about effective appellate advocacy. Seemingly all of that literature has focused on the role of the "lead attorney" on appeal—that is, the "first chair," the counsel of record, the name at the top of the signature block, the oralist. But generally speaking, an appellate team consists of that lead attorney and some number of "second-chair" attorneys—for example, one or more junior partners or associates. This article examines the role and responsibilities of those attorneys occupying the "second chair." The discussion below should assist not only the young practitioner still learning about the appellate process, but also the most senior and experienced appellate attorney in organizing his or her appellate team and in clarifying his or her expectations for any second-chair attorney on that team.

First(-Chair and Second-Chair) Principles

To define the role of the second chair, we must begin with some understanding of an appellate team's overall goal. I reductively would summarize that goal as follows: To serve the client—effectively and ethically—by effectively and ethically persuading the appellate court. To achieve this goal, in most respects, the roles of the lead attorney and the second chair do overlap. For instance, collectively, the appellate team will strive to produce to the court a persuasive brief and a persuasive oral argument. But at each step of the appellate process, there are significant differences between the specific tasks for which the lead attorney and the second chair will be responsible. The most obvious illustration is the oral argument. The lead attorney will deliver the oral argument to the court, while the second chair will sit silently at counsel's table.

Most importantly, at every step, an effective second chair must coordinate closely with the lead attorney. For example, the lead attorney on your appellate team may prefer to discuss thorny factual or legal issues as you—the second chair—identify them in your research, rather than to learn about them when he or she reads your first draft of the brief. Your lead attorney also may prefer to review an outline before you put pen to paper, drafting that brief. At the oral argument, your lead attorney may want you to jot down notes on a single piece of paper, rather than pass him or her several notes, or he or she may not want any notes at all. To

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succeed in your position as second chair (recall the overall goal), and regardless of any of the specifics discussed below, you must ensure that you are providing your particular lead attorney with the support that he or she needs, in the manner that he or she prefers, to put him or her—and thus your appellate team—in the best position to persuade the court and serve the client.

Legally, your job is easy to grasp, but it can be devilishly complicated in its execution. Stated simply, you must catalogue all of the cases and relevant legal authorities, good and bad.

With those principles in mind, let's discuss the specifics of the second chair's role and responsibilities.

Research

In all likelihood, your lead attorney will rely on you for research more than anything else. You need to own that responsibility. Here, "research" includes both factual and legal research, as well as preliminary (*i.e.*, before any brief is filed) and continuous (*i.e.*, until the mandate issues) research. I've put factual research before legal research because, while it is perhaps less glamorous, factual research arguably deserves more attention from the second chair. As the second chair, you must master the record, and you must do so as soon as possible: You must know everything good in the record, and everything bad, and you must know where everything is in the record (good, bad, or otherwise). You must sift through the record and separate what matters from what doesn't. Preliminarily, you won't be able to draft the brief properly until you've done so. More importantly, as the appeal progresses—and in particular when the case is argued—you'll need to rely on that mastery. Practically speaking, your lead attorney will not have sufficient time to do a deep dive into the record. That's your job, and you must be ready to convey the necessary facts when called upon to do so (*e.g.*, in a memo, in the draft brief, or when the lead attorney whispers in your ear during the oral argument). For example, if the other side argues in its brief that there is no record support for a given proposition, it immediately will be your job to identify the facts with which to respond. Do your homework before the other side—or the panel at the oral argument—puts you and the lead attorney to the test.

Legally, your job as the second chair is easy to grasp, but it can be devilishly complicated in its execution. Stated simply, you must catalogue all of the cases and relevant legal authorities, good and bad. You also must determine which legal authorities are worth citing on appeal, and which authorities the other side is likely to cite. Start with the key authorities from the trial court. On which key authorities and bases did the court rely? What did trial counsel on your side cite? What did the other side cite? Then ask, what else is out there? On which other authorities did those key authorities from the trial court proceedings rely, on which authorities did those next-level authorities rely, and so on? And, were there authorities that the parties missed in the trial court? Then, consider whether anything has changed, legally. Keycite the authorities that you've collected. Review recent publications on the legal issue to get a sense of whether the law is "moving," and if so, in what direction.

When you think that you've covered the waterfront, conduct your own independent research to confirm. Work from the ground up, and think creatively. Might there be a (properly preserved) legal argument from the trial court that would be more effective with a different spin, or supported by different legal authority? You may find that trial counsel had a sound legal basis, but that through your research you have found much broader (or more nuanced) grounds for an argument. And, if you represent the appellee, try to develop alternative grounds for affirmance. Consider a motion to dismiss granted under the reasoning of *X v. Y*. If you find case *A v. B*, which you think would be more persuasive to the appellate court, then weave both cases into your draft brief; don't limit yourself to the universe defined by *X v. Y*.

Finally, the law is not static. Your exhaustive, preliminary crash course will be sufficient to draft the brief, but you'll need to keep up with any developments in the law until the mandate issues. (If you use Westlaw, you may want to set up an "alert" to help you track the case law regarding a particular legal authority or issue.) Your lead attorney certainly will know if one of the principal cases on which you rely in your brief happens to be overruled while your appeal is pending—and your legal research should anticipate that risk! But only you may know—and must know—if, for instance, a key foundation for one of the other side's principal cases is called into question by a court in some far-flung jurisdiction.

Again, research probably is the second chair's most important job. Early in the appeal, only you will know all of the facts and all of the law. Over the course of the appeal, you will help your lead attorney "educate" himself or herself on all of those factual and legal minutiae. As explained above, you and the lead attorney will have to determine how much of that knowledge (usually and eventually, almost all of it) you convey, as well as when and how it is conveyed. But the lead attorney is counting on you to supply the appellate team with the factual and legal building blocks necessary to the team's producing a persuasive brief and oral argument.

Theory of the Case

Your lead attorney (and the client) will have much to say about your team's theory of the case on appeal, but this goes hand in hand with your research. You will be the one who, in the first instance, must test the lead attorney's theory of the case against the facts and the law. For example, the lead attorney, trial counsel, and the client all may strongly believe that a particular motion in limine was wrongly denied in the trial court and that the corresponding evidentiary error almost certainly entitles the client to a new trial. But, in your preliminary factual research, you may reach the conclusion that the evidentiary objection was not properly raised and preserved

in the trial court. Speak up! (And consider whether, in this situation, the lead attorney would prefer that you walk into his or her office, or send him or her an e-mail, or just hold it under your hat until your next scheduled meeting.) Better yet, before discussing the issue with the lead attorney, see if you can develop a procedural argument that the objection somehow was preserved—*i.e.*, explore the outer limits of the law in your jurisdiction.

Remember that you are the one building up the facts and the law necessary to a successful appeal, and you should do so with an eye toward your *own* theory of the case. What do you think is your appellate team's "Roman I" (or best) argument? What does your lead attorney think? Does your vision for a persuasive, successful appeal match that of the lead attorney? If it doesn't, you almost certainly should discuss any difference of opinion with the lead attorney. Don't surprise him or her with a draft brief that has his or her favorite argument slotted last, or that instead features a brand-new argument that you cooked up during your research. Here, you must operate as something of a "check" on the lead attorney—*e.g.*, if the facts or law really doesn't support his or her theory of the case—but you should not, independently, steer the team in a new direction.

The First Draft of the Brief

The first draft of the brief is where all of your good research (factual and legal) meets all of your deep thinking and theorizing about the case and then is reduced to writing. You have the ball. Run with it. That said, I'll here reiterate the importance of coordinating with your lead attorney. Does he or she want to see an outline beforehand? How polished or rough should you make the first draft? How closely should the first draft adhere to the word or page limit? Once the ground rules have been established, your job again is simple: Write the most persuasive first draft that you can, recognizing that the filed brief likely will look very *very* different from your proto-brief.

With that reality in mind, you should keep careful notes regarding any strategic calls that you make as you're drafting the brief. For example, if you decide to cite the *X v. Y* case but not *A v. B*, then, sooner or later, you likely will have to explain to the lead attorney why that is; he or she may ultimately agree or disagree, but at this stage you need to have an idea of why you made the drafting choice that you did. In part, the value of the first draft comes from continuing to educate the lead attorney about the case—*i.e.*, all of your good research and theorizing reduced to writing. Much of that educational value will come from explaining to your lead attorney why you made the strategic decisions that you did in drafting the brief.

Also, even though your lead attorney will deliver the oral argument, you must draft the brief as if you'll defend it *yourself* before the panel—just as you defended your senior thesis. You are accountable! The lead attorney will not be able to look behind every record citation and every case citation in the draft brief and needs to trust that the arguments in your draft brief are well-founded.

Revising and Refining the Brief

Have thick skin. Your lead attorney does not think that your writing stinks. He or she will have different stylistic preferences. He or she will find certain facts or legal authorities more persuasive than you do, and others less so. Don't sweat it. That's all part of working on an appellate team, and—with the right frame of mind—it may be the most enjoyable part. The lead attorney will be testing his or her theory of the case against the facts and law as you've presented them in the draft brief; at the same time, you'll be melding your theory of the case with the lead attorney's overall vision and his or her interpretation of the relevant facts and law. Increasingly, the lead attorney will begin "downloading" facts and law from you. You quickly will learn where your research may have been deficient; if you don't know the answer to a question from the lead attorney, say so, and then figure out the answer as soon as possible.

Process-wise, continue to coordinate with your lead attorney. If you're briefing by "committee," the lead attorney may want to discuss changes proposed by the other attorneys on the appellate team before you enter them into the draft brief. Don't blindly assume that you should make every change that is proposed because, for instance, some changes may be inconsistent with the lead attorney's theory of the case. Logistically, how does the lead attorney want you to incorporate any changes to the draft brief? He or she may prefer that you track all changes in a redlined document, or he or she may just want to review a clean version of the brief after you've entered a complete "round" of changes. In addition, as you edit, move, and delete arguments and sections in the draft brief, you may want to keep a separate "cutting-room floor" document. For example, the lead attorney initially may say, "Let's cut the laches argument." If, weeks later, he or she says, "I've decided we need to add back in laches," then you can start by reinserting the argument that you previously had drafted.

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Crucially, you must keep in mind the appellate team's goal (*i.e.*, effective and ethical persuasion). If your lead attorney—or the briefing committee—makes changes to the draft brief that you think weaken your arguments, then say something. Recognize that, in the end, a particular drafting choice will be the lead attorney's decision, but it is not your role to always agree with him or her. If you think that certain edits (perhaps unintentionally) stretch a legal authority too thin, then it is your *duty* so say something. Keep the brief honest.

Finalizing and Filing the Brief

As you finalize the brief, take the time to revisit your preliminary research and your own (personal) theory of the case, as well as your first draft. What does the near-final draft look like? Are all of your key facts and legal authorities included? Have you accounted for any changes in the law? And don't let the editing process obscure the forest through the trees. Given your unique knowledge base, does the near-final brief tell your appellate team's best "story"? Does it properly account for any weaknesses in the facts or law that you identified in your research?

Ask yourself about the factual and legal issues that the briefing did not fully explore for one reason or the other. If your lead attorney conducts a mock argument, the mock judges certainly will raise such questions.

As the near-final brief becomes more and more final, consider how the other side will respond. You will know all of the bad facts and will have read all of the bad cases. For example, if you haven't already, now is the time to tell your lead attorney about that one case that you found (decided in 1952 in a different jurisdiction), which completely contradicts the fundamental premise of one of your arguments, and which you really hope the other side doesn't find and cite in response. You and the lead attorney may decide to work it into the brief in a footnote, or you may leave it out altogether, but don't let him or her see it for the first time when it is cited prominently in the other side's brief.

Last but not least, double check the rules in your jurisdiction before you file the brief. Is your brief compliant? You will have worked hard on the substance. Don't ignore the form.

Preparing for the Oral Argument

When your lead attorney prepares for the oral argument, he or she will need to know (almost) everything that you learned in your research. You long ago mastered the facts and the law, and you must help make the lead attorney a master as well. You and the lead attorney cannot prepare for every question that the panel possibly may ask, but you sure can, and will, try. Remember that your legal research never stops. What cases do you need to track? What cases is the other side tracking? Is there anything worth submitting to the court as supplemental authority after the close of briefing? *See, e.g.*, Fed. R. App. P. 28(j). Be prepared for the other side to submit a 28(j) letter, and anticipate what your responsive letter would look like.

Ask yourself about the factual and legal issues that the briefing did not fully explore for one reason or the other. If your lead attorney conducts a mock argument, the mock judges certainly will raise such questions. Talk to the mock judges—before and after the mock argument. What other thoughts or questions did they have that may not have been addressed in the "official" mock argument? There may be very "weedsy" factual or legal questions that come up, and you may be the only one who knows the answer, or at least knows where to start looking. Run down all of that information as soon as possible, and continue to assist the lead attorney with his or her education on the minutiae of the case.

Separately, I'd note that you should begin preparing for the oral argument the minute that you begin your research. As you conduct your research, and draft and edit the brief, keep a running list of potential questions that the panel may ask at the oral argument. Your list should be dynamic and will change over the course of the appeal. (For starters, you should try to address as many of the questions as you can in your draft brief.) Be sure that your lead attorney is prepared with good responses to all of the potential questions on your list.

The Oral Argument

During the oral argument, your job as second chair takes on a sense of urgency that is defined by continuously answering a single question: What does your lead attorney need to succeed? That's it. Now is not the time to revisit any disagreement regarding, for instance, your theory of the case. In the courtroom, the appellate team speaks with one voice, and it's the lead attorney's.

Start with what to bring. At a minimum, bring the appellate record and the key legal authorities. What qualifies as a "key" legal authority? Your safest bet is to bring everything cited in the briefs, if you physically can transport that volume of materials. If you can't, do your best to anticipate what the panel may ask and what your lead attorney may need to respond.

When the panel asks your lead attorney a question, it is his or her job to answer, not yours; instead, you should be thinking about the materials that the lead attorney may need to answer most effectively. What's the best fact in the record for that point? What's the best case? Does the lead attorney have that record or case citation at his or her fingertips? You also should be thinking about the direction of the panel's questioning. What is likely to be the next question asked of the lead attorney? What materials would he or she need to answer that question, and does he or she have those materials at his or her fingertips?

Recognize that your lead attorney has a very limited amount of time to persuade the panel (say, 10 minutes). If the lead attorney asks you a question—for example, while the other side's oralist is at the lectern, "Does that case really say that?"—then you need to answer quickly, succinctly, and clearly. On the fly, the lead attorney then will have to build your answer into his or her argument to the court. Plus, if the other side is at the lectern, then the lead attorney needs to listen to that argument and the panel's questions. So give your answer, and let him or her get back to listening. Relatedly, do not bombard the lead attorney with notes while he or she is sitting next to you at counsel's table. At this point, he or she will know the case even better than you do, and he or she (hopefully) will have a ready response to everything that the other side may argue. In fact, you and the lead attorney probably will be thinking of the same responses anyway, so passing notes often will be unnecessary and distracting.

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Do take good notes. The oral argument may be something of a blur for your lead attorney, and afterward he or she likely will want to review all of the questions that the panel asked—typically, to try to get a sense of which way the panel might be leaning in its decision-making.

Otherwise, you have the second chair. Sit in it. You may think that you need to stand up and approach your lead attorney to tell him or her something while he or she is at the lectern. Think again. While there may be extraordinary exceptions to this rule of thumb, getting out of your (second) chair, unless you're asked to do so, will be extremely distracting to the lead attorney and the panel. Likewise, be mindful of your mannerisms. For example, you don't need to shake your head at everything the other side's oralist may say; again, you'll only distract the lead attorney, and, if they notice, the panel members won't like it either. Consider that many appellate teams don't even have a second lawyer in the courtroom. You are there only because the lead attorney has decided that you can help him or her deliver a persuasive argument, so give the lead attorney everything that he or she needs and otherwise try to be "invisible."

After the Oral Argument

Your legal research never stops! After the oral argument, ask yourself, are there any recent decisions that would be helpful in a 28(j) letter? Are there any recent decisions that the other side may submit to the court? Until the mandate issues, you need to keep up with the law. (And keep your fingers crossed for a good result!)

Conclusion

The "second chair" is more than an extra seat at counsel's table in an appellate courtroom. If you're a young lawyer interested in appellate litigation, then make yourself a valuable part of your lead attorney's appellate team. At every step of the appellate process, you have a unique role to play in helping the lead attorney serve the client by persuading the appellate court. And it won't be long before you find yourself sitting first-chair and relying on that same support from the second-chair attorneys on your own appellate team. FD