Trends: Embedded Appellate Counsel

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When asked to write this article, I thought back 30 years, to the first time I was retained to act as an appellate monitor for the defense. It was a personal injury trial in Oklahoma City and the local trial attorney refused to make a record of objections to the jury instructions, informing me that "the judge doesn't like objections to the charge." I finally made them myself, incurring the judge's wrath along the way.

Since that time, monitoring or "embedded" appellate counsel have become more common, and the practice has gained more acceptance by trial counsel and judges. To my knowledge, however, no manual describes the practice, which is highly variable and adapts to a variety of cases, personalities and cost constraints. In an effort to help fill the void, I am happy to offer some of my own experiences, as well as thoughts on what to expect if you get a call from a client who wants to retain you as an embedded appellate counsel for the defense in an upcoming trial. Many thanks to my partners Susan Audey and Ben Sasse´, who contributed their own experiences and suggestions for this article.

What Is an Embedded Appellate Counsel?

Appellate attorneys at our firm become involved in large and complex cases as early as possible—providing advice on affirmative defenses in answers and suggesting evidence needed from depositions for dispositive motions—so that they have an in-depth understanding of the case by the time it goes to trial. While they continue their role at trial, I would not consider them to be "embedded" appellate counsel. As used here, the term refers to appellate attorneys who are not members of the trial attorney's firm, and who are retained by the client shortly before trial with the expectation that they will represent the defendant in any ensuing appeal from an adverse verdict.

The role of embedded appellate counsel has substantive and procedural components. Substantively, they do what all appellate attorneys do—formulate and apply a legal framework that is consistent with the trial team's defense. Procedurally, they assist trial counsel on three fundamental tasks: (1) ensure that the record reflects what actually occurred at trial; (2) protect a potential favorable verdict by minimizing trial court errors; and (3) prepare for a potential adverse verdict by preserving trial court error in the record.

Why Embed Appellate Counsel?

Parties to litigation do not embed appellate counsel because they have reservations about trial counsel. Quite the contrary. Just as they retained trial counsel based upon their highly skilled trial advocacy, so these clients recognize that certain situations call for the addition of a highly skilled appellate practitioner to the team. Finding the right fit may require going outside the trial counsel's firm. The client may also wish to seek counsel from a different firm to hear a fresh, and perhaps more detached, perspective on pending legal issues, prior judicial rulings, and ultimate outcomes.

Defendants usually retain appellate counsel because they want the best record possible in the event of an adverse verdict and appeal. The case probably has a high verdict potential and something may have happened—a partial summary judgment in favor of the plaintiff or exclusion of a key defense expert perhaps—that changes the liability or damages calculus. Or the defendant may simply feel that he or she is not getting a fair shake from the trial judge and wants to make sure the record is clear. Or if in-house or claims counsel has the responsibility of providing daily trial reports to others in the organization, they may prefer to have a seasoned appellate attorney summarize the key testimony, objections and rulings, as well as offer objective reviews of witness credibility and juror attentiveness.

In addition to high-stakes litigation, embedded appellate counsel may be retained when a trial will establish precedents for recurring legal issues. Bellwether cases, for example, may set the stage for the admission and exclusion of specific documents or entire categories of evidence in hundreds of similar cases. Or appellate counsel may craft directed-verdict arguments for first impression product identity or causation questions in an asbestos exposure

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case. Or an insurer may retain appellate counsel for a trial in which plaintiff's counsel is mounting "as applied" constitutional challenges to statutes that affect a large spectrum of cases, such as the employer-intentional-tort statute or damage caps.

Whatever the reason for the call, understand that you will be coming into the case as an extra set of ears and eyes, with an appellate perspective.

Getting Up to Speed

More often than not, a client seeking to embed appellate counsel at trial does not decide to do so until one to two weeks before trial is to begin. That means that you have a very short time frame for becoming familiar with the facts and issues in the case—a case others have lived with for months or years. And you have to do that at the same time you are frantically trying to clear your calendar for the next month.

I like to start with the docket, which gives a snapshot history of the case and its participants, and offers a glimpse into the level of contentiousness. Then confer with trial counsel, who can give you their perspective and strategy as well as fill you in on critical facts, witnesses, judicial rulings, and pending motions. Ask counsel if they have already provided a pretrial summary/status report for the client that outlines and evaluates the case—reviewing that will save a lot of time. Next, take a look at the original and most recent complaint to further get an idea of how the case has evolved. From there, summary judgment briefs and rulings highlight legal issues. Trial briefs and key motions in limine (including the judge's rulings on those motions, if any) provide information on likely evidentiary issues.

Once you have the basic facts and legal issues down, start thinking about the case's legal framework. Even if you know the area, treatises and restatements can provide a refresher course. A few targeted case searches using phrases from the secondary sources you reviewed, and reviewing the most-cited cases in the parties' dispositive motions and trial court orders, will help fill out the background principles. A firm foundation on the essential elements of relevant claims and defenses in the case is especially helpful if you are retained soon enough to provide input into in limine responses, the trial brief, or defendant's proposed initial jury instructions, verdict forms, and interrogatories.

Next, figure out what makes the most sense in terms of the level of your participation at trial. Although "embedded" means you are a part of the trial team, it does not necessarily mean you participate at trial. It may mean you only observe the trial. While I have represented defendants at jury charge conferences, assumed responsibility for making a record of objections to the charge, and even prepared and presented directed-verdict motions upon occasion, more often than not I do not participate directly in trial or even enter an appearance in the case. A certain detachment from the case keeps the focus where it belongs—on the trial team—and there may be some courtrooms where trial judges would not react favorably to the formal appearance of an appellate attorney on the eve of trial. Recognize, however, that if you are not making an appearance you cannot sign and file bench memos and will not be served with filings and rulings. Make sure a designated member of the trial team is forwarding those filings and rulings, and keep an eye on the docket.

If you are observing the trial, decide whether you will observe all or only portions of the trial. If the client is depending on you for a detailed account of the days' testimony and rulings, you will likely be attending trial on a daily basis. Preparing those summaries every night can be a valuable tool for becoming familiar with and assimilating the trial testimony, but it can also be an exhausting task at the end of a long day of testimony followed by meeting with the trial team on the next day's events.

An alternative is to not attend trial and review daily transcripts in the evening, if technology permits. Not only does that allow you to act as embedded appellate counsel from hundreds of miles away, but it is also much more efficient. By focusing on key witness testimony and colloquies, I can generally get through the transcript of testimony from an eight-hour trial day in two to three hours. Although you do not have the opportunity of instant communication, there are still ample opportunities to identify preservation issues and guide key legal arguments. Just make sure you meet the trial team and establish a level of comfort and familiarity before taking on the long-distance relationship.

In those cases in which you have more familiarity with the case, or when there are cost restraints, you may decide to observe only certain portions of trial or be "on call" for questions and consultations on evidentiary issues, rulings, directed verdict motions, and the like.

What Embedded Appellate Counsel Do

Always remember that the record you are helping to create must be consistent with the current trial strategy. The ultimate goal is a defense verdict, and the strategy for obtaining a defense verdict belongs to the trial attorney. I once had a partner who never mentioned damages in closing argument because he did not want to suggest there could ever be liability. While I let him know that such a strategy meant it would be difficult to argue excessive damages on appeal, I understood that that was his choice. It's okay to take issue with a trial attorney who refuses to put objections to a jury charge in the record, or a make a record of a judge who refuses to allow court reporters for bench conferences, but be very respectful of trial strategy and the trial attorney's relationship with the jury.

Below are some specific suggestions for putting those goals into practice.

(a) *Ensure a complete record*
Preserving error is important, but absent a complete trial record you may find yourself unable to demonstrate how the error, in the context of the trial proceedings as a whole, prejudiced your client. It thus behooves you to assist in ensuring that the record of the entire trial is complete and accurate.

First, make sure that the evidence is being recorded. Have the court reporter take down testimony as it is played on videotape or read from a deposition—don't rely on filed transcripts of this testimony. Second, make sure that rulings—and the basis for those rulings if possible—are recorded. That includes rulings made in chambers and bench conferences while the jury is in the box. If the judge refuses to allow a court reporter at bench conferences (it happens) make a record of the refusal and proffer a record of what was said at the bench conference during breaks. Sometimes you need to make sure that there is a decision to record. Trial judges may make an indefinite or wait-and-see ruling on directed verdict motions or evidentiary issues and you can be the extra reminder to trial counsel that a clear ruling is needed.

Remember that gestures, tone, and facial expressions do not get recorded, so counsel needs to note for the record that the judge has rolled his or her eyes at your witness's testimony, or that the plaintiff's attorney has collapsed to the floor in closing argument to channel an unborn child (yes, it happened).

(b) *Apply the legal framework*
The substantive role of embedded appellate attorneys tends to focus on the components of trial most closely related to purely legal issues—directed-verdict motions and jury instructions. You should anticipate being heavily involved in both, as well as jury interrogatories and verdict forms. But that role also includes bringing the appellate perspective to bear on a multitude of issues that arise during trial and require advice, argument, and/or or bench memos.

To be effective, you need observe the trial proceedings through the lens of the legal framework you developed in the days before trial began. Having that framework is invaluable when the unexpected—good or bad—happens (as it invariably does). When defense counsel elicits an unexpected admission from the plaintiff, a defense witness stumbles, a discovery violation comes to light, the trial judge reverses an earlier in limine ruling, or the plaintiff dismisses one or more claims, the trial team will figure out how to adapt the story for the jury. You need to be able to assess how the unexpected events affect the essential elements of the plaintiff's case, a prior in limine ruling, or jury instructions, verdict forms, and interrogatories. Be ready to advise trial counsel on how the "new" case operates legally, as well as factually.

Suppose, for example, that you know that both the existence and measure of breach-of-contract damages are at issue in the case and the plaintiff unexpectedly reveals in his direct examination that financial records were destroyed shortly after plaintiff filed his action. How will that affect a directed-verdict motion on speculative damages? It is also time to brush up on the elements for a spoliation defense in the particular jurisdiction, as well as the requirements for a motion to amend a complaint to conform to the evidence. And be ready to submit an adverse inference instruction as a fallback position.

Or perhaps an expert takes the stand and seeks to change or add to her opinion on general medical causation. Trial counsel is well acquainted with methods for seeking to exclude the new opinion and, should the objection be overruled, attacking the expert's credibility on cross. As embedded appellate counsel, you should be thinking about how that "new" opinion affects the specific medical causation testimony of another expert and, in the context of the law of the particular jurisdiction, whether the plaintiff has self-inflicted a fatal wound with inconsistent expert testimony.

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Jury interrogatories have ended up as land mines for many an appeal. In multiple-claim cases, how can they be formulated to show prejudice in a jurisdiction that recognizes the "two issue" rule? If there is a concern that the jury will return a verdict based on sympathy rather than fault, what facts can be elicited in interrogatories to demonstrate that the plaintiff has failed to prove an essential element of the case?

In short, be proactive without being intrusive. Have the confidence, born of good preparation, that you will be the person who figures out the legal hook for the fatal flaw in plaintiff's case.

(c) *Preserve error*
In addition to identifying and articulating error, you will need to keep abreast of the mechanics for preserving error.

I suggest, for both strategic and practical reasons, that you let the trial attorney handle evidentiary objections at trial. First, they are better at it—not only are trial attorneys more familiar with the rules of evidence, but they are also more familiar with the history and facts of the case that will determine the relevance, unfair prejudice, cumulative nature, or necessary foundation for specific testimony. Second, trial attorneys are in the best position to make the judgment of whether an objection will draw undue attention to the inflammatory testimony or irritate the jury. Finally, in those courtrooms where objections may only be made by one attorney, that is going to be the trial attorney and the trial attorney will not appreciate being poked in the ribs by an appellate counsel whispering "Object!"

Embedded appellate counsel do have a role in preserving evidentiary error. Reminding counsel to proffer excluded evidence, seek limiting instructions, and renew objections to evidence subject to a denied motion in limine are all part of ensuring that the record is complete and error is preserved. In a complex case, it is a good idea to have a chart of the in limine motions and the court's ruling on each to help keep track of the necessary renewals and proffers. Appellate counsel can also provide suggestions and advice as to whether certain testimony has "opened the door" to previously excluded evidence, or help formulate a continuing objection to a line of questioning that will ease concerns about the "bobbing attorney" syndrome.

In one trial I participated in, several hundred exhibits became admissible after the trial judge overruled motions in limine by both sides seeking to exclude evidence on particular issues. Rather than the cumbersome and time consuming practice of renewing objections to each document and associated testimony addressing the issues encompassed in overruled in limine motions, we stipulated that objections to the document and associated testimony would be preserved if either party filed an objection log the day after a document was introduced, listing the exhibit number, subject matter, and relevant motion in limine.

Suggestions and reminders at the end of trial, when trial counsel may be on the brink of exhaustion, can also be helpful. A checklist can be handy for tasks such as renewing a directed-verdict motion; reviewing completed interrogatories and verdict forms before the jury is excused to ensure consistency (and, in the case of a 6-2 split, that the same six jurors found fault, causation, and damages); and advising trial counsel on available options if there are inconsistencies. Embedded appellate counsel can also assist in damage control in the event of a verdict that puts trial counsel into shock. They may, for example, remind the trial court that R.C. 2315.18 deprives a court of jurisdiction to enter a judgment that exceeds damage caps and suggest a briefing schedule that precedes the entry of judgment. A cheat sheet on bonds and stays may also come in handy.

A Trend or a Phase?

While the practice of embedding appellate counsel has its critics, their voices have become more muted with time. The most mentioned criticisms are expense, the potential that the trial judge will take affront at the addition of someone anticipating error, and potential friction with the trial team.

Expense is a reason for being selective in the cases warranting the use of embedded counsel—not for abandoning the practice altogether. High-exposure cases with new frontier causes of action or cutting edge legal issues are especially well suited for embedding appellate counsel because those are the cases most susceptible to victory through a well-crafted directed verdict motion reviewed de novo by a court of appeals. Federal appellate courts in particular are becoming very strict about refusing to hear arguments challenging the sufficiency of evidence that were not included in initial and renewed motions for judgment as a matter of law, so appellate assistance at the trial level can be game changing. And it can be very difficult to prevail on appeal in state or federal court based on legal reasoning that differs from the argument presented to the trial court—appeals are won based on trial court error appearing on the record, not due to arguments appellate counsel wish had been presented to the trial court.

As for the second and third criticisms, the more experience the bench and bar have with embedded appellate counsel, the more comfortable they are with the concept. Some judges have been known to express appreciation for the concise and legally supported arguments presented by embedded appellate counsel, and have come to depend on them to avoid error. Be sensitive to the fact, however, that the different roles of embedded appellate counsel for plaintiffs and defendants may cause trial judges to view them differently. It is the nature of the beast that plaintiff's appellate attorneys tend to be more focused on eliminating or minimizing error (to hold on to a potential favorable verdict), while defense appellate counsel tend to concentrate on preserving error (in anticipation of a potential adverse verdict), which means plaintiff's appellate counsel will be more inclined to urge agreed-upon compromises for disputed issues while defendant's appellate counsel tend to voice more objections. Do not forget that you also have an important role in preventing error, and that a compromise in which both sides get something they desire may be of greater value than a preserved objection.

Appellate counsel can help foster trial attorney acceptance of embedded appellate counsel by remembering that trial strategy belongs to trial counsel. No urgent whispers at the trial table or tugging on suit coats at trial. The discreet passing of a note or a brief conference at breaks should suffice. And as with all endeavors, make sure that you work as a team with one chief cook and a common goal. Oh, and that Oklahoma case? A defense verdict obtained by a very talented trial attorney.

A long-time appellate practitioner and advocate of the appellate practice, **Irene Keyse-Walker** has argued hundreds of appeals in state and federal courts while serving as head of the appellate and legal issue practice groups at the former firm of Arter & Hadden LLP and at Tucker Ellis LLP. In 1998, Irene became the first Ohioan elected to the American Academy of Appellate Lawyers. She chaired OACTA's amicus committee during the tumultuous years of tort reform (1990-1996), before serving as President of the organization in 1999, and was honored to accept OACTA's Excellence in Advocacy Award in 2013.