Embedded Appellate Counsel at Trial

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With increasing frequency, trial teams include appellate counsel. Nilam A. Sanghvi and Bruce P. Merenstein, *Appellate Lawyers Learn to Play Well with Others*, Delaware Lawyer, Fall 2013, pp. 12-13. But merely including an appellate lawyer on the trial team does not guarantee success or that the relationship between trial and appellate counsel will be conducive to success. This paper addresses some considerations at play when embedding appellate counsel on the trial team as well as ways to help ensure a good relationship between trial and appellate counsel, giving the case the best chance of success – whether at trial or on appeal.

Why Embed Appellate Counsel with the Trial Team?

The most obvious reason to engage appellate counsel during trial is to assist with error preservation. Trial counsel is busy developing facts to persuade the jury, considering objections to evidence, assessing the credibility of witnesses, and analyzing the continuing likelihood of success as the evidence develops and the reaction of the jury is seen. When objecting, trial counsel has just a second or two – if that – to analyze the question asked to determine if objectionable, the specific objections that could be lodged, and the viability of the objections (i.e. whether the trial court will sustain the objection and if not what the jury will think about the objection at that stage in the case). *See* Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 Pepperdine Law Review 245-246 (2002)(discussing the short time that counsel has in deciding to make an objection). Early engagement of appellate counsel can assist trial counsel with deciphering what objections will matter at the next level and how to present those objections to properly preserve error for appellate review.

Even beyond that, the rules seem almost designed as traps for the busy litigator. *See* Diane Bratvold and Amie Penny, The Importance of Error Preservation, For the Defense, March 2011, pp. 8-10 (discussing some of the peculiarities of error preservation). To preserve error regarding the sufficiency of the evidence, a party in federal court must not only move for a judgment as a matter of law before submission of the case to the jury but also renew that motion after judgment is entered. Fed. R. Civ. P. 50. But by the time the court enters judgment, the trial lawyer is busy explaining what happened and why an adverse judgment is being entered as well as dealing with all the fires in his or her practice that developed while in trial. Having embedded appellate counsel is helpful in simply reminding trial counsel of the steps to preserve error – even those inadvertently "forgotten" in the heat of battle.

And while courts have tried to remove some of the tricks regarding certain aspects of error preservation, problems still lurk in the wings. For example, in the 10th Circuit, a motion in limine can preserve an objection to the admissibility of

evidence in certain situations, i.e. when the issue has been fairly presented to the trial court, the issue is one that can be finally resolved pretrial, and the trial judge has unequivocally ruled. *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993). Yet, despite the apparent rule in the 10th Circuit, confusion still exists regarding the effect of a granted limine point, as illustrated by the recent case *United States v. Fonseca*. In that felon-in-possession-of-a-firearm case, the defendant convinced the trial court via an oral motion in limine to preclude admission of evidence of other gun sales. 774 F.3d 674, 679 (10th Cir. 2014). Evidence came in about Fonseca's involvement with other gun sales without objection. *Id*. The effect of the motion in limine became vitally important – if it counted as an objection, a more favorable standard of review applied; if it did not, then the almost unwinnable plain error standard applied. *Id* at 682. Ultimately, the 10th Circuit found that the limine point did not preserve error because it was granted and not denied – an objection is required if someone violates a granted limine point. *Id*. at 683. And in other jurisdictions, a motion in limine preserves nothing for review; in Texas state court, for example, a contemporaneous objection to the offending evidence is still required. *Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.3d 331, 335 (Tex. 1963).

But even beyond just mechanically preserving error for future review, appellate counsel can assist trial counsel by offering a fresh perspective view of the case. Trial counsel has lived with the case for years, and appellate counsel sometimes can offer a new view of the case based on the overview. One such perspective is guiding the development of the law. Appellate counsel should be aware of issues and trends in appellate courts and can suggest ways to present a case to fit within the trends. One historical example is the development of challenges to expert testimony: institutional players like the National Chamber of Commerce planted seeds that questioned the way in which courts evaluated the admissibility of expert testimony, and then lawyers in specific cases applied the concerns that germinated from those seeds to the specific facts developed in their cases to result in *Daubert* and its progeny. By being aware that appellate courts are considering the issue, appellate lawyers can help trial counsel prepare the case not only to fall within the issue but also in a manner likely to be persuasive in the end.

But even more importantly, the appellate lawyer's role is to help win the case. On the one hand, a win below certainly makes it easier to win on appeal – the standard of review will typically be more favorable to the appellee, and statistically the majority of appeals are affirmed. Thus, the appellate lawyer should operate under the perspective that winning on the trial court is beneficial to preserving a win down the road. Moreover, some trial courts – fairly or not – view the appellate lawyer as having a little extra credibility. Not to say that trial lawyers lack credibility or should operate in a manner to reduce their credibility with the trial court. But many appellate lawyers have experienced the trial judge treating the appellate lawyer as almost (but not quite) as a court-appointed neutral instead of an advocate for a party, asking for the appellate lawyer's thoughts or research on an issue instead of assigning the task to the parties. Maybe it is as

simple as the perception that the appellate lawyer's recommended course is the path most likely leading to the case being affirmed. Or maybe it is the belief that any path recommended by the appellate lawyer is one that can be defended on appeal. Regardless, one key reason to embed appellate counsel with the trial team is to increase the chances of victory.

Even beyond a fresh perspective or simple error preservation, appellate lawyers have unique skill sets that could be invaluable to a trial team. While facts matter on appeal, the law plays a central role, requiring the appellate lawyer to hone the skill of looking at the big picture. Many trials turn on nuanced issues of fact about which party is in the wrong (as well as, of course, proof of the elements of the cause of action); appeals, on the other hand, are not as concerned with who is right or wrong in the traditional sense. The appellate lawyer has to develop a sense of perspective, cutting away the chaff that may have been essential to convincing a jury but largely irrelevant to an appeal. Moreover, the appellate lawyer typically has not lived with the case for years and tends to be emotionally detached from the "right or wrong" question.

What Types of Cases Merit Appellate Counsel at Trial?

Increasing the size of the trial team is expensive. The appellate lawyer has to learn enough about the case so that he or she can properly advise the trial team. And that added cost is not appropriate for every case. Obviously, a case with large damage exposure justifies embedding appellate counsel at trial.

But even much smaller cases could merit bringing appellate counsel to trial. In the wake of the financial crisis, issues arose regarding the assignment of loans between banks initiating home financing and the last owner of the loan. Questions arose over the propriety of the assignment and "robo-signing" of the documents involved. There, even with low dollar-figure foreclosure, appellate counsel could be justified because bad precedent with that one loan could change the collectability of an entire portfolio of loans. In other words, certain cases involving a significant business process could justify appellate counsel at trial.

Another type of case that could warrant appellate counsel early in the litigation is the one where the law is either not clearly developed or contrary to the client's position. In these cases, appellate counsel will frequently be knowledgeable about statements, frequently in dicta, from appellate courts that signal dissatisfaction with the current law on the subject. And appellate counsel will be familiar with the sources relied on for legal developments in the jurisdiction and help formulate appropriate arguments relying on those sources.

A final example where appellate counsel could be warranted below is the case where, for unknown reasons, the client cannot seem to catch a break – the opponent wins every ruling, while your client is just taking a beating. Obviously, appellate counsel in that instance would serve the role of hyper-technical error

preservationist. Sometimes trial occurs merely as an avenue to reach the appellate court. And maybe involvement of appellate counsel may implicitly suggest to the trial court that a perception of unfairness exists, which could serve to tip the scales of justice back to even.

How to Select Appellate Counsel?

The obvious answer is that the client should retain the right lawyer for the job. Is that the lawyer down the hall, i.e. in the same firm as the trial lawyer? Is that someone the trial lawyer does not know – perhaps even from a different city or state? Most trial lawyers would probably prefer appellate counsel from their own firm. Appellate counsel would be easy to speak with – they are likely just a few steps away. Plus most trial lawyers are more comfortable with their colleague – he or she is a known quantity. Yet adding someone from outside is, at times, met with trepidation. Some trial lawyers fear that the appellate counsel will nitpick the work on the case and second-guess every strategic decision made. Some trial lawyers worry that the appellate lawyer will try to steal the client. In essence, some trial lawyers worry that the appellate lawyer will not have their back.

While those fears may exist, the reality is that they are probably unfounded in almost all respects. Appellate lawyers realize that strategic choices have to be made. The appellate lawyer frequently deals with the record that exists with the understanding that what exists is often a product of strategic decisions as opposed to malpractice. And many appellate lawyers disavow knowledge of the standards for legal malpractice (albeit within the confines of the disclosure rules in the ethical canons). Plus most appellate lawyers have no interest in stealing clients, operating instead under the belief that forging long-term relationships with trial lawyers and firms will be more conducive to future appellate business.

Yet, with that said, there is still some natural tension between using someone within the trial lawyer's law firm or someone else. It might be as simple as the fact that trial lawyer is not familiar with the chosen outside appellate lawyer and thus not as comfortable with that selection. The level of trust has not been developed with the outside lawyer that exists within the same law firm. In the end, the debate over this tension is academic: the client ultimately chooses who the appellate lawyer will be. Appellate lawyer and trial lawyer then must act responsibly to carry out the respective roles entrusted to them by the client.

What Makes for a Successful Relationship between Trial and Appellate Counsel?

Foremost in the development of a successful team is the realization that everyone is in this together, i.e. a team approach. Everyone needs to check their egos at the door.

Even with everyone acting as a team, conflicts may develop. The client, therefore, must set a clear chain of command. Clients actively involved in the management of litigation will be the final arbitrator of disputes between trial and appellate counsel. Not every client actively manages the file, and in those circumstances, the client still needs someone to act as the final decision maker and should make expectations known from the beginning as to whom that will be. But conceptually a conflict is something that trial and appellate counsel should work to resolve without involving the client. Each side should give his or her perspective on the issue and explain why he or she recommends a particular course. With the mere understanding of the rationale of each side, most conflicts resolve themselves.

A corollary to a chain of command is having a defined role for the appellate counsel. In some cases, it may be as simple as providing advice about the jury charge, while others may involve a much more active participation in monitoring trial and offering suggestions on error preservation. A clearly defined role helps both trial and appellate lawyers know what is expected and how they can fulfill their obligations in this unique arrangement.

Even with a chain of command and a clearly defined role, conflicts should be minimized. Appellate lawyers should understand the natural tension between preserving error and the trial lawyers' desire not to highlight harmful evidence or be viewed as keeping information from the jury. Creative solutions – motions in limine or continuing or running objections to evidence, for example – may minimize the trial lawyers' worry about the jury's perception of events while at the same time preserving error. Another approach would be attempting to exclude the evidence wholesale, which may preserve error in jurisdictions where a limine point will not. *See Huckaby v. A.G. Perry & Sons, Inc.*, 20 S.W.3d 194, 203 (Tex.App.—Texarkana 2000, pet. denied) (discussing the distinction between a motion in limine and a motion to exclude or pretrial ruling on admissibility). Such creative solutions require planning, i.e. collaboration between the trial and appellate lawyers, to anticipate evidentiary problems and develop solutions.

Moreover, appellate lawyers should not view their role as to meddle with the trial. In almost any case where the client feels a need to involve appellate counsel at trial, it should be assumed that the trial lawyer has sufficient skill to handle the case. And appellate counsel should temper any desire to control the litigation because that role likely belongs to the trial lawyer. Instead, the appellate lawyer should stick to the role given.

Perhaps most importantly, the appellate lawyer needs to realize that the true definition of the role that appellate counsel plays when embedded with the trial team is to *help* the trial team and make their lives easier. With an appellate lawyer arguing the jury charge, the trial lawyer can focus on closing arguments. By developing a creative solution to error preservation – like a continuing or running objection – the trial lawyer does not have to worry about objecting to each

nuanced version of the objectionable evidence or about how the jury perceives the constant objections.

Are There Any Rules or Other Considerations?

One rule that exists in some courts that can affect how to use appellate counsel is the one-attorney-one-issue/witness rule. Courts have this rule to keep a variety of different lawyers for the same party chiming in on a topic or asking questions of a witness. The rule also lets the court know which attorney on the team to ask a question about a particular topic. But that rule can create logistical problems if the trial lawyer has started addressing a topic and then the appellate lawyer has additional insights. Instead of a free flowing discussion, one lawyer passes notes or whispers to a colleague, creating an awkward situation for all involved. Thus in locations where this rule exists, trial and appellate counsel need to plan who is taking what particular issue to avoid any potential problems. And abiding by the rule throughout the course of litigation may result in the court being a little flexible on the one or two critical issues in the case, letting trial and appellate counsel speak briefly on the topic. Moreover, even in courts where the rule does not exist, counsel, in shared arguments, should make it clear to the court who is addressing what issue so that the court knows which questions to ask which lawyer.

Another important consideration is where to station appellate counsel: at counsel table, in the gallery, or back at the office. The difference between having appellate counsel in the courtroom or in the office is a fundamental consideration to having them on the trial team at all. At the office is less expensive and allows the appellate lawyer to be involved only as needed. Of course, the downside is that appellate counsel is not present for all error-preservation opportunities and cannot offer insight into the ins and outs of evidence preservation. And trial lawyers can be very particular about what the jury perceives – they fear that having a large team can be viewed as "ganging up" on the other side. Being in the courtroom but not at counsel table offers better ability to preserve error, but the conversations among counsel are likely limited to breaks. In many situations, especially with good planning, that scenario is perfect – the trial team, as perceived by the jury, is one person smaller. Nevertheless, it is not hard to envision that case where nothing has gone right and presence at counsel table could be beneficial or even necessary.

Conclusion

Having an appellate lawyer assist with the trial team is a natural extension of traditional appellate work. In the end, the appellate lawyer's role should be to make the trial lawyer's job easier. Almost every trial lawyer can envision a circumstance where having someone handle a particular issue makes trial easier. An appellate lawyer arguing the jury charge and certain objections allows the trial lawyer to focus on closing argument and other critical aspects of the trial from a

jury's standpoint. A successful relationship between trial and appellate counsel depends on a chain of command and clearly defined roles as well as a team approach to achieving the ultimate goal: winning.