

Tips For Appellate Counsel Working With A Trial Team

By **Brandon Boxler** (February 23, 2023)

Anyone who practices in the trial courts knows that trials are roaring back. Court calendars are packed with trials that were postponed during the pandemic, creating opportunities for appellate lawyers to get involved with trials.

Yes — appellate lawyers. It is no secret that appellate counsel are increasingly embedding with trial teams, especially in high-exposure cases and disputes involving particularly complex or novel issues.

For instance, Elon Musk and Tesla had appellate counsel on their legal teams when they went to trial this January in the U.S. District Court for the Northern District of California in *In re: Tesla Inc. Securities Litigation*.^[1]



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Additionally, the Harvard affirmative action case pending before the U.S. Supreme Court — *Students for Fair Admissions Inc. v. President and Fellows of Harvard College* — stems from a trial where both sides had appellate counsel.^[2]

And even if appellate counsel have not entered an appearance in a case, they often consult with trial teams behind the scenes and play supporting roles in the background.

Much has been written about the typical work of embedded appellate counsel. They can provide a fresh pair of eyes on tough questions, develop novel legal arguments, and identify and preserve issues for appeal.

They also can research the viability of claims and defenses; advise on case strategy; and draft *Daubert*,^[3] dispositive and other major motions.

But some cases go to trial, and much less has been written about the role of appellate counsel during trial. Even less has been written about how appellate counsel can serve in that role effectively.

This article focuses on the often-overlooked work of appellate counsel during trial. It provides tips for how appellate counsel can successfully integrate into a trial team and use their unique litigation skill set to help clients willing to fight a case to verdict — and beyond.

Get in the Trenches

Appellate lawyers love to research and write. They thrive on hunting for the perfect case, crafting a novel legal argument or wordsmithing a brief so it sings all the right notes.

These preferences align well with practicing law in the appellate courts, where attorneys rarely interact with witnesses or experts. After all, the process of handling an appeal often starts with reviewing a written record and ends with preparing a written brief. And if the case is set for oral argument, the preparation almost exclusively focuses on the written record developed below and on appeal.

Appellate counsel embedded with trial teams must resist the urge to default to information gathering the appellate way. There is a lot to learn beyond the written record.

Embedded appellate counsel can gain valuable insights from talking to the trial lawyers, fact witnesses and experts. What concerns do the trial lawyers have with the case? What questions are the witnesses worried about being asked when cross-examined? What evidence does the team want to prevent the jury from hearing?

Having these conversations with the trial attorneys and witnesses will not only provide perspective about how a case developed into its current posture, but also will reveal opportunities to change the current posture to benefit your client.

For example, if the trial lawyers are concerned about how to rebut certain testimony, consider arguments for excluding the testimony, requesting a limiting instruction, or proposing a jury instruction that downplays the importance of the testimony.

If the trial court admits adverse evidence over your client's objection, consider ways to make a better record for reversal on appeal. That probably means arguing that the perceived error was not harmless, so have the trial attorneys explain during a sidebar why the error has hamstrung your client or otherwise changed the course of trial.

On the other hand, if the trial court excludes evidence your side tried to admit, prepare an offer of proof — whether written or oral — to make a record of what the evidence would have shown. And, more importantly, explain why the evidence is critical to the merits so you can argue on appeal that the exclusion was not harmless.

To see around the corners of a case, you need to know what the corners are. The best way to gain this perspective is to be an active participant on the trial team.

Attend meetings with the trial attorneys. Join while they prepare a key witness. Listen to them practice their closing argument. Hear what concerns keep arising, and think carefully about how a targeted motion, objection or jury instruction could help.

In short: Get in the trenches. See the case from beyond the glare of a computer screen. The more you learn about how the evidence and arguments will unfold at trial — and why — the better positioned you will be to ensure that the record develops in a way most beneficial for any appeal.

Focus on Preservation, Not Perfection

Guard against the desire for perfection. There is no time for that.

The goal is preservation, not perfection. If preserving an issue for further review requires a written motion or brief, of course make sure the arguments are well-researched, clear and persuasive.

But do not let perfect become the enemy of good. There are simply too many issues and too little time.

In a typical appeal, attorneys can run down every issue, find the best cases and edit a brief until no word is wasted. That is impossible during trial. Instead of having weeks or months to develop arguments, there might be only a few days, a few hours or even a few seconds. And instead of three or four issues, there might be 30 or 40.

The combination of limited time and a seemingly limitless number of issues can be

overwhelming to many appellate practitioners. But remember that the goal at trial is to preserve arguments, not make perfect ones. Save the deep dives for when you come up for air after trial.

If you believe you need a written brief to make a record on a particular issue, tell the judge. So long as the issue does not need to be resolved immediately, most judges will allow counsel to file a short brief at night so the issue can be argued the next morning. Even if the judge declines your request, you have planted a flag in the record that you can point to on appeal.

Have Tough Conversations

You have a fresh pair of eyes. Use them.

An embedded appellate counsel will not know the case as well as the trial attorneys who have been living with it for years. That is a good thing. If you see a potential roadblock or a pathway to victory that has not been explored, ask the team about it.

That does not mean appellate counsel should nitpick the work that has been done on the case or second-guess every decision the trial team has made. But if you have questions about why the team made a particular strategic decision, ask them. Usually, there is a very good answer.

But sometimes there is not a very good answer. An issue might have fallen through the cracks during the heat of discovery. Or maybe an argument was too weak to raise on the record that existed months ago, but the record has changed. Or maybe the issue was simply overlooked.

Do not hesitate to reopen doors that seem closed and take a look around.

A good trial lawyer will welcome these conversations. They might not lead to discovering a new winning argument, but they will help refine trial strategies and give the trial attorneys confidence in their positions. And confidence matters at trial.

Prepare to Win

The most obvious role of embedded appellate counsel is to preserve errors for appeal. But you might get the verdict you want. You need to prepare for that, too.

Rather than focus solely on ensuring the record contains arguments to help overturn a disappointing verdict, spend time analyzing how you can improve the record if your client wins.

Pay close attention to the jury instructions. They often become targets of attack on appeal. Do you have a firm basis for every instruction you propose? If not, find more support or rework the language so it stands on firmer ground.

Prepare carefully for jury selection. Draft a bench brief or similar outline of what the trial attorneys should do if certain issues arise.

What are the magic words they need to elicit from a prospective juror to support a successful challenge for cause? What should they say if your opponent raises a Batson challenge and argues that the trial attorneys struck potential jurors because of their

race?[4] How can you make the best record for appeal to show the challenged jurors were stricken for a neutral reason?

Give the trial attorneys some guidance on what they should — and should not — say so they do not make a misstep in the heat of the moment.

Scrutinize the verdict form. Analyze it from the lens of your opponent. If the jury decides in your favor, will your opponent find ambiguity somewhere? Does the verdict form create avoidable opportunities for the jury to reach an inconsistent verdict? Identify potential problems and address them before the case is submitted.

Revisit shaky pretrial rulings that favored your client. If the trial judge might have erred in a way that benefited your side, think about what you will need in the record to argue on appeal that the error was harmless.

You might need to advise the trial lawyers not to make certain arguments, not to elicit certain testimony or not to emphasize certain exhibits during closing argument.

It is good to win at trial. It is better to win in a way that will withstand appeal. Analyze all paths to victory and find ways to eliminate roadblocks on those paths.

Stay in Your Lane — Mostly

Remember that your role is to support the trial attorneys. Before trial, have a conversation with them. Each case is different. Understand how you can best help in the particular case and add value without getting in the way.

As an appellate counsel, you have a unique skill set. The trial attorneys have unique skill sets too. Make sure you complement each other and create a working dynamic that plays to everyone's strengths.

That said, trials are complicated, stressful and unpredictable. No matter how many lawyers are on the team, there is always more to do. Unexpected things will happen.

As an appellate counsel, it might be tempting to view certain trial-related tasks as outside your lane. That is usually true. Your time is generally best spent drafting a bench brief, not preparing a witness.

But remember that the client hired you to help win the case. That is your top priority. So if getting outside of your appellate lane will help win, do it. Roll up your sleeves and help prepare a witness, sketch a cross-examination outline or double-check the exhibit list. Serve as a pressure release valve for the trial attorneys.

Remember, you are on a trial team. Trials require all hands on deck. Get on the deck with the team.

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[1] *In re Tesla Inc. Securities Litig.*, No. 18-cv-4865 (N.D. Cal.).

[2] See *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199 (U.S.); see also *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019).

[3] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

[4] *Batson v. Kentucky*, 476 U.S. 79 (1986).