

# Prepare to be Prepared: Embedded Appellate Counsel at Trial

by John O'Herron



Virginia trial lawyers are gradually becoming accustomed to appeals of right, and the ripple effects of the changed appellate landscape are taking root. These changes affect nearly every facet of trial litigation. Clients must now balance their empowered right to appeal with the increased cost of potentially appealing a verdict; trial courts know that their decisions are more likely to be subject to appellate review; and trial counsel know their entire litigation strategy must account for the inevitability and challenges of appellate review. And to cap it off, when a trial is complete, the unfamiliar territory of new appellate rules and procedures await. From start to finish, then, litigating a case is impacted by its future appeal of right.

Appellate practice is unlike trial practice and often requires a different frame of mind and a different toolbox for lawyers. And the appellate rules are replete with specific requirements that, if ignored, can sink an appeal before it begins. The inevitability and foreign terrain of appellate review thus present a strategic question for trial counsel: whether to make an appellate lawyer part of the trial team.

From the most obvious task of error preservation to preparing pocket briefs, appellate counsel can help situate a case for appeal and,

more importantly, help win at trial. Although cases and circumstances vary, the primary benefits of using embedded appellate counsel at trial fall under three categories:

- 1) situating the case for appellate review;
- 2) developing the legal strategy and arguments to win; and
- 3) freeing trial counsel to do what they do best.

## Situating the Case for Appellate Review

Preserving error for appellate review is likely the first thing you think of when it comes to appellate needs at trial. And it's no small task. Preservation rules do not fall into a "one size fits all" approach. Specific rules vary—both as to the timing and content of objections needed to preserve error—and trial requires an attorney to be vigilant in objecting at the right time. Delegating oversight of these responsibilities to appellate counsel makes this task easier and more precise. This can take the form of a preservation "cheat sheet" prepared by appellate counsel or having appellate counsel at trial to guide both the strategy and execution of preserving error.

Appellate counsel can also help ensure the record contains everything needed for appellate review. This can include confirming the court reporter is recording sidebars or

transcribing deposition testimony that is read aloud, tracking exhibits, determining whether and how an evidentiary proffer is to be made, and more.

But situating a case for appellate review requires more than just error preservation and record completion. From determining what standards of review will apply on appeal to gauging the relative strength of certain legal arguments, appellate counsel can help with the strategic decisions that frame a case for appellate success. Trying a case often involves weighing numerous pros and cons related to the presentation of both evidence and legal arguments. Understanding how an appellate court is likely to view a particular issue can help make those difficult decisions.

Embedded appellate counsel prove especially useful for drafting and arguing jury instructions. Preparing jury instructions early in the case is ideal so that they can be used to frame the discovery plan and trial strategy. Model jury instructions are not comprehensive, and many cases have unique factual or legal issues that require significant research and drafting a jury instruction from scratch. As claims and defenses shift with the evidence throughout the life of a case, an appellate counsel can re-tool these instructions as needed.

Then comes the critical juncture of arguing jury instructions to the court. From proposing instructions, objecting to your opponent's, and navigating the push and pull of argument, revisions, and more argument, preserving error and successfully framing the jury's deliberations can be a challenge. This is also a critical point in weighing success at the trial court against appellate review, and counsel must assess each instruction's benefits and risks.

Finally, appellate counsel can assist with post-trial needs to prepare a case for appeal. From post-trial motions, to bonds, to filing transcripts, the needs can be plenty. Trial counsel may be grateful to offload those responsibilities in the aftermath of trial.

### **Developing the Legal Strategy and Arguments**

Appellate lawyers are accustomed to the routine of exhaustive research, deep thinking, and careful writing. These nerdy and time-consuming skills come in handy in the

heat of trial preparation and trial. How do all these moving parts fit together? How does this or that piece of evidence fit into the whole picture we are presenting? How should we prioritize or present these arguments to win at both the trial and appellate courts? How do these issues fit into the broader legal landscape in Virginia? Appellate counsel can provide a fresh pair of eyes on the strengths and weaknesses of trial strategy.

*And the appellate rules are replete with specific requirements that, if ignored, can sink an appeal before it begins.*

Every case is different, but appellate counsel can bring these skills to the trial team in various ways. To name a few:

- Handling the briefing and argument of pre-trial and dispositive motions
- Preparing short legal briefs (“pocket briefs”) for use at trial
- Drafting objection scripts for anticipated evidentiary arguments
- Making proof charts for claims and defenses
- Ready trial motions such as motions to strike or to exclude evidence

By bringing an objective and bird's eye-view of the case, brief-writing experience, and an understanding of how appellate courts may rule, appellate counsel can sharpen and clarify the analysis that will lead to success.

### **Freeing Trial Counsel**

You know the feeling. Trial is approaching and between the documents, the witnesses, opening and closing, and your client, there's just not enough time. And the thought of putting all that to the side to devote hours to legal research and writing, or the jury instructions, or a motion to strike, only increases the worry. Or maybe you're at trial, quickly pivoting from witness examination, to client management, to a review of documents, to discussion with the clerk about where the annotated exhibit went, to thinking of how to respond to the curveball opposing counsel just threw. It is difficult to focus on the arcane rules of appellate error preservation or worry about a novel motion to strike amidst this chaos. Yet, at the same time, just one error could sink your

verdict on appeal.

Scampering from one trial task to the next can leave little time for the strategy, writing, or argument needed to maintain the big picture. Having appellate counsel on your trial team can ease these burdens. Consider jury instructions again. Before trial, the research and drafting needs can be significant. At trial, a whole different set of challenges can arise, whether that's the organizational and analytical clarity required to persuasively argue jury instructions or assessing the evidentiary picture on which your instructions are based. Making this even more challenging, these needs usually arise when trial counsel is preparing to deliver closing argument, a different sort of work requiring a different frame of mind.

Whether before or during trial, freeing trial counsel to focus on witness preparation, opening and closing, and other trial tasks can often be enough to justify having an appellate specialist on your team.

To be sure, not every case needs an appellate specialist on hand. Many trial teams are already well-positioned to frame their case for appeal and to prosecute or defend the appeal themselves. Many

cases and trial lawyers would benefit from the addition of an appellate practitioner to the trial team. Most appellate practitioners, in turn, benefit from earlier involvement in a case instead of getting involved after trial.

As Virginia shifts to appeals of right and practitioners realize the impact on trial litigation, embedded appellate counsel will prove a useful arrow in a trial attorney's quiver. ⚖️



A partner at ThompsonMcMullan, P.C., **John O'Herron's** practice focuses on motions practice in both federal and state courts and appellate litigation. He offers a variety of appellate services, including serving as embedded appellate counsel, briefing and argument, amicus curiae representation, and consultation regarding both pre- and post-trial motions. John maintains [RichmondAppeals.com](http://RichmondAppeals.com) and is the Virginia State Chair for the Council of Appellate Lawyers, a division of the ABA. He can be reached at [joherron@t-mlaw.com](mailto:joherron@t-mlaw.com).

## Norman A. Thomas, PLLC

Virginia Appellate Law Practice

A passionate and  
craftsmanlike  
approach to the  
practice of  
**appellate law.**

1015 East Main Street  
Lower Level  
Richmond, VA 23219  
(804) 303-9538  
[normanthomaslaw.com](http://normanthomaslaw.com)

## FREE HOUR of Legal Research

For New Clients Only

Use only the free hour, or apply the  
free hour to a larger project.

**Briefs • Trial Memos • Motions  
Legal Research**

**35** Full-Time Attorneys  
**50,500** Attorneys Served  
**173,500** Cases

**4,907** Virginia Attorneys have used

**National Legal  
Research Group**

CHARLOTTESVILLE, VA

Call for a free consultation  
**1-877-689-6432**

**Ad@nlrg.com**  
**www.nlrg.com**