Breaking the Mold: Working with Embedded Appellate Counsel on the Offensive

Litigation and Dispute Resolution

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Cheat Sheet

- **Think appellate before the verdict.** Embedding appellate counsel during trial helps preserve the record, prevent reversible errors, and protect high-stakes wins.
- **Challenge the law when it hurts your business.** In cases governed by unfavorable precedent, appellate counsel can identify when — and how — to push for a change in the law.
- **Use procedural tools strategically.** Certification requests, Rule 15(b) amendments, and Rule 60(a) corrections give companies leverage to clarify unsettled law, preserve defenses, and fix costly errors early.
- **Turn litigation into long-term strategy.** Embedded appellate counsel help transform trial victories into durable, precedent-shaping outcomes that serve the company's broader legal and business interests.

The best time to retain appellate counsel for a contentious case is well before the final judgment. By that time, errors that may have been avoided — or issues left unpreserved — are baked into the record.

Rather, institutional or high-profile litigants are embedding appellate attorneys *with* a trial team early in the case. In-house counsel managing high-stakes matters do so to improve the chances of not only obtaining, but also of protecting, a favorable outcome.

This early involvement is especially important for cases whose outcome can have long-term consequences, such as preventing significant damages, challenging precedent or settling multi-jurisdictional matters important to the business.

While the trial team best focuses on presenting the case for an immediately favorable outcome, embedded appellate counsel concentrates on retaining that outcome. They safeguard the record, identify preservation issues, and think several steps ahead.

But appellate counsel can do much more by being *proactive* rather than just reactive. In assessing how to take advantage of embedded appellate counsel in that manner, in-house counsel should also assess their cases to determine whether:

1. there is an opportunity to change or challenge precedent;
2. certification of a legal question to a state court is available for cases in federal court;
3. a Rule 15(b) amendment at trial is appropriate; and
4. whether any clerical errors in a judgment can be corrected under Rule 60(a) before appellate review.

Change or challenge precedent

Sometimes, the law on an important — and dispositive — legal issue in a case is completely unfavorable to not only that pending case, but also a company's business in general. In these instances, embedded appellate counsel can be essential, especially if a company seeks to *ask for a change of the law itself*.

Following precedent is an important institutional concept, but it is not untouchable in the right circumstances. When an unfavorable appellate opinion is neither long-standing nor heavily relied upon in other cases, appellate counsel should not be deterred to ask a change of law.

For instance, in *State v. Ballance* (N.C. 1949), the court reaffirmed the doctrine of *stare decisis* — the idea that settled legal principles should be followed. Yet even *Ballance* acknowledged that precedent holds only when it rests on sound reasoning.

Important signals that a jurisdiction's court of last resort may be open to revisiting a prior ruling include whether the makeup of the court has changed since the unfavorable opinion was filed, or whether members of the court who previously dissented from that unfavorable opinion now form a majority of the court. A prior, well-crafted dissenting opinion of an appellate jurist who may be in a controlling position now could provide the roadmap to success.

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Any argument for a change in the law should explain why the current rule was built on a faulty

foundation and through its error has damaged — and continues to damage — the integrity of law of that jurisdiction. Fixing that harm through appellate counsel can add substantial value to a favorable outcome.

Regardless of outcome, just challenging the ordinary thinking that a case must be decided within the boundaries of existing common law injects a powerful dynamic into the litigation. The opposing party must now assess a real risk that it could lose the case based on a legal theory previously considered an easy victory. If that legal rule is important to the opposing party's business, it will need to devote even more time and resources to hold the line.

Using a certified question in federal court

Sometimes, in federal cases, applicable state law may be unclear or unsettled. In these situations, embedded appellate counsel can add strategic value by seeking certification of a legal question to the state's highest court. Certification allows that court — rather than a federal judge — to define what the state law means.

Every state except North Carolina provides for a certified question, and that can be advantageous in the right setting. While leaving the question to federal courts can render that state's law even more uncertain, certification gives the state's highest court the opportunity to shape the law directly — a powerful advantage when the issue may affect the company's operations or the broader business community.

Appellate counsel taking affirmative steps to bring clarity to unresolved questions of state law can simultaneously reshape the state's law in a manner that best serves the long-term interests of their corporate clients. Thus, certification provides another example of a forward-thinking strategy which refuses to accept the *status quo*.

Amendments under Rule 15(b)

There are also important opportunities to reshape the case at the trial level, without also reshaping the law. Amendments under Rule 15(b) of the Federal Rules of Civil Procedure (FRCP) and similar state counterparts may be a plaintiff's tool used to amend the complaint to match the evidence at trial — generally by adding a theory of liability the defense was hoping to avoid.

Under those rules, "an issue not raised by the pleadings" will be treated as if it were raised, provided it is "tried by the parties' express or implied consent." The touchstone of blocking a Rule 15(b) amendment is prejudice to the non-moving party. Such prejudice typically happens when the party opposing the amendment does not know that the unpled issue is going to be tried and lacks a chance to oppose that issue at trial. Thus, a Rule 15(b) amendment stands a better chance when the claim sought to be tried by implied consent shares several similar elements to a claim formally plead such that much of the evidence already matches up.

While Rule 15(b) can create new challenges for defense counsel, it can be a powerful tool for the defense too. Sometimes, appellate counsel may be retained too close in time to trial to make a formal pre-trial amendment to the pleadings under Rule 15(a) possible. But a careful study of the pre-trial record might reveal, for example, that unpled defenses poised to be game changers — such as contributory negligence or superseding cause — have been an actual topic of discovery or motion practice.

Trying the case on those affirmative defenses by citing their elements and various burdens of proof as early as the opening statement can flip the script on plaintiffs, requiring *them* to offer sufficient showing of why the amendment should fail. If plaintiffs don't object, this will set a toehold for the Rule 15(b) motion. And if plaintiffs are prepared at trial with evidence to challenge those defenses, a subsequent Rule 15(b) motion to amend is now more likely to be granted.

But even if the court denies the motion, a new appellate point of contention — one that may require a new trial — is preserved for later appellate review.

Are there clerical errors?

The objective under Rule 60(a) of the FRCP and its state counterparts is to create the cleanest order that appellate counsel can best defend on appeal. Rule 60(a) is an effective way to nip potential problems (with a largely favorable order) in the bud — ultimately improving chances for success down the road.

The rule allows a trial court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." The rule is designed to allow trial courts to fix problems with their orders that may look large, but are actually just simple mistakes based on typographical, copying, or mathematical errors.

So long as the amendment made under Rule 60(a) does not materially alter the substance of the order, and what was plainly intended, it should be upheld.

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There are a treasure trove of items that qualify as clerical errors under Rule 60(a), some of which draw critical distinctions and make an important impact. For example, a US Fourth Circuit panel affirmed a district court's use of Rule 60(a) to modify its own dismissal order entered without prejudice, to a dismissal order *with prejudice*.

Such amendment indicates that the trial court intended all along for its dismissal order to end the case. Seeing that Rule 60(a) amendment through, as a defendant, could save substantial time and resources fighting about that issue on appeal and enduring a potential remand.

Dealing with clerical issues as soon as possible, and before an appellate court considers the case, could thus make a real difference later. Such action seeks to avoid a potential remand due to the appellate court's uncertainty about a particular finding or commensurate conclusion. After all, appellate courts are not fact-finding courts. Rule 60(a) is a proactive tool to ensure that any perceived small problem does not become a larger problem later.

Future-proofing trial wins through embedded appellate insight

As the complexity of cases and size of jury verdicts continue to increase, in-house counsel must not only think about favorable outcomes at trial, but also about ensuring that those outcomes will last, as well as opportunities to make long-term favorable changes to case law. The question isn't just whether your team can prevail at trial; it's whether that victory will survive appeal and shape the legal

landscape your business operates in.

Embedded appellate counsel help bridge that gap. They ensure trial success is both defensible and durable, while identifying opportunities to advance favorable precedent or close gaps in unsettled law. For corporate legal departments managing high-stakes litigation, this approach isn't merely procedural. It's strategic — a way to safeguard outcomes, reduce exposure, and influence the evolution of the law in ways that serve long-term business interests.

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