

**A modern approach to appellate advocacy: using the latest technology to annotate transcripts, organize appellate records and effectively use e-briefs in trial and appellate courts.**

**Leane Capps Medford ©**

My trial and appellate practice focuses on complex civil cases.<sup>1</sup> As a result, the appellate records I work with often involve weeks of trial testimony and hundreds of exhibits. Many times, I only have time to read the entire record once. As a result, I had to develop a way to make sure I identified the critical testimony and exhibits in a manner that allowed me to integrate them into a brief without constantly referring back to the entire record or looking for an elusive sticky note.

In addition, because many of my trials and appeals are outside of Texas, I had to develop a system that allowed me to always have my entire record with me on my laptop. But having the electronic record with me was not enough. I had to be able to effectively use that information to write briefs and motions from a hotel room or sitting on a plane. The system I developed over a number of years relies on annotative software, electronic exhibits and summary charts. Eventually, I used it in all my cases, not just when I was traveling, because I found it was a superior method to memorialize my work product and was more efficient.

When I introduced e-briefs to the system, it became even more effective and efficient. I then started using e-briefs to assist the court and as an advocacy tool. One of the benefits of the system is that you can tailor it to the needs of each case. You can combine any of its elements to meet the size of the record and budgetary restraints.

**Using Technology in the Trial Court**

**Use software to annotate key evidence during trial and persuade the court.**

Using annotation and trial presentation software in the trial court provides a number of advantages to the appellate practitioner.<sup>2</sup> Before trial, I import copies of all the designated and pre-admitted exhibits and all the deposition transcripts, which have been synchronized with any video and linked to the deposition exhibits. I also arrange for a daily, real time trial transcript.

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<sup>1</sup> Leane Capps Medford is a member of ELROD, PLLC a trial boutique specializing in complex civil litigation. Before joining ELROD, she was a partner for seven years at Rose Walker, LLP, where she was the head of the firm's appellate and insurance litigation sections. Leane specializes in complex commercial, aviation and insurance litigation and appeals.

<sup>2</sup> I have always used Visionary, [www.VisonaryLegal.com](http://www.VisonaryLegal.com). There are a number of other software options available, but since I am not as familiar with them, this paper assumes that any other software has the same capabilities.

During the trial, whether as trial or appellate counsel, I import the daily copy of the trial transcript into my annotation software so that I can annotate key testimony and exhibits that support the elements of my client's case. I create an issue builder for each claim and capture the testimony and exhibits that support the claim as the case unfolds.

Annotations made during trial are never going to be as extensive as the annotations made to the final trial transcript post trial. But taking the time during trial to build issue builders with key testimony and exhibits allows you to quickly access that evidence to support or respond to a motion for judgment as a matter of law and/or prepare for the charge conference.

It is much more powerful and persuasive to show the court during the hearing on a motion for judgment as a matter of law the exact testimony of CEO Smith than summarizing the testimony or asking the court to recall it. In a lengthy trial, Smith may have testified days or weeks before this critical hearing.

Similarly, it is much more persuasive to bring all the testimony and exhibits that establish a particular point together and show it to the court. The same summary can also be played to the jury at closing and serves as the basis for your next round of annotations to prepare or respond to post trial motions.

**After trial, use linked transcripts to prepare and respond to post trial motions and to assist the trial court.**

After trial, I use a linked trial transcript to prepare and respond to post trial motions. A linked trial transcript allows you to easily and effectively learn the trial record. Linked transcripts allow the user to see the exhibits associated with the testimony as it unfolds in the transcript. We learn better when we see exhibits with their associated testimony, just like the jury. A linked transcript can also assist the trial court by providing all the testimony and exhibits in a more usable format that allows the court to quickly access critical exhibits and testimony.

**File e-briefs of your post trial motions to assist the trial court.**

I am strong advocate of using e-briefs of post trial motions. Trial courts never have enough resources. Busy trial judges and their law clerks will welcome a post trial motion or brief that links to the trial transcript, the exhibits and the case law. Filing an e-brief also allows trial judges and their law clerks to review post trial motions when they are not in chambers. Providing this resource to the court may therefore expedite the court's decision.

## Using Technology in the Appellate Courts

### Use software to annotate the trial transcript.

When I read a trial transcript my goal is to read the entire transcript once. I create issue builders that mirror the outline of my brief and the issues raised by the appeal.<sup>3</sup> The scope of the annotations is very broad because the testimony and exhibits that I capture and add to my issue builders can easily be deleted, copied, and moved. If I have a question, I mark it with an electronic “post it” note. At the end of the day or week, I can print all of my notes and follow up on them.

As I go through the entire transcript, I look at each linked exhibit. If the exhibit is important to the testimony I have captured and placed in an issue builder, I also capture the exhibit. At the same time, I can annotate the critical portions of the exhibit (blow up, highlight or add notes to a document) and take “snapshots” (screen captures) of the critical portions of the exhibit for the appeal. I save my “snapshots” with the original exhibit to remind me what was important about the exhibit. I also in many cases, however, the trial testimony does not always fully develop the importance of all the admitted exhibits. As a result, I take the review of exhibits a step further.

### Electronically organize, analyze, and categorize your exhibits.

In a large document case, particularly a commercial dispute, the trial transcript does not always reflect all the facts, inferences, and other juicy items in the admitted exhibit. Often, there is additional information in the admitted exhibits that can be used to support your position on appeal, assuming they were admitted without limitation.

I have used two methods to extract all the necessary information from the exhibits and insure I use them effectively in the brief. One is to create a document database that includes all the exhibits with fields that can be filled in with specific information on each exhibit. The second is the creation of a Microsoft Word table or an Excel spreadsheet. Either way, I collect the following information regarding each admitted exhibit:

- The exhibit number;
- Title of the document;
- Whether there was an objection to its admission;
- Whether it was admitted for a limited purpose;
- Date of the document;
- Author of the document;

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<sup>3</sup> Another advantage of using annotative software and issue builders is that if you can send them to other attorneys outside your firm who have the same software. For example, an attorney in Houston can create the issue builder on exemplary damages and send it to his co-counsel in Dallas.

- List of “cc” and “bc” recipients of the document;
- Date it was admitted at trial and witness (es) it was used with;
- A section for my comments on how to use it in the brief.

Once the database, table or spreadsheet is done, I can sort it by date, exhibit number, author, recipient, etc. This information can be used in every aspect of your briefing. For example, as I write the statement of facts, I can sort and refer to the list in chronological order and make sure that every important document relevant to the time period I am discussing is used. As I continue to work on the brief, I check off the exhibits I decided to use as I integrate them into the brief.

This information can also supplement the trial testimony. For example, I can sort for every exhibit authored or received by a key trial witness to make sure all the exhibits associated with the witness are used, even if they were not admitted with that witness on direct or cross. This is a particularly useful tool in business tort cases when intent issues must be proven by circumstantial evidence.

**Electronically organize and analyze the clerk’s record, then cull it down and scan the key documents.**

Typically, the clerk’s record is littered with documents that were designated as a cautionary measure, but have no relevance to the appeal. As a result, I do not automatically import all the documents in the clerk’s record into the document database of my annotative software. I review the index; identify the key documents that I may actually refer to in the brief, such as the live pleadings, motions in limine, post-verdict motions and the judgment, and then import these documents. Having the critical portions of the clerk record in one place allows me to repeatedly refer to these documents while the larger paper version of the clerk’s record takes up filing space. Just like exhibits, documents from the clerk’s record can be annotated and saved as a screen capture.

**If you are the appellee, hyper-link your opponent’s brief before you start writing and print a small, concise record.**

If I am the appellee, I scan and hyperlink the appellant’s brief before I start writing. It allows me to quickly identify the testimony and exhibits the appellate is relying upon and links all the case citations to a copy of the case and the pinpoint citation in the brief.

I also print my issue builders and organize them in the order of my brief. I add the issue builders to a notebook with my analysis of the exhibits and start writing. My record is now a manageable size and can travel with me anywhere.

### **Provide the court with e-briefs.**

E-briefs are very efficient and effective tools in appellate courts because they present the court with almost everything it needs to decide the appeal in one place with links to the cases cited by the parties.

I generally advocate providing the appellate court with copies of all the briefs in electronic form, not just your client's brief. Although some clients may not want to pay to link an opponent's brief, failing to provide the court with all of the briefs in electronic form is shortsighted for at least two reasons. First, the court may not appreciate having half of the case electronically available and having to turn to the paper record for the rest. Second, if your opponent's brief takes liberties with the record by mischaracterizing testimony or the case law, linking your opponent's brief can be a powerful advocacy tool. If the linked version of the opponent's brief quickly reveals that its factual and legal statements are inaccurate, your opponent's brief may make a first impression that is difficult to overcome.

### **Use technology to prepare for oral argument.**

Your annotations software, case database, e-briefs, tables issue builders are also effective tools to prepare for oral argument. I take my case database and e-briefs with me to oral argument so that I can quickly pull up any trial exhibit, search for a key term in the trial testimony, or review a case cited by the opponent.