

Taming the Monster Appellate Record

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My firm, and my appellate practice, focuses on commercial cases. As a result, the appellate records I work with often involve at least a month of trial testimony and often hundreds—if not thousands—of exhibits.

For the appellate practitioner, the “monster” record in any type of case presents as many unique challenges as it does opportunities. Admittedly, as an avid advocate of technology, I may have a different perspective on learning the monster record than others. But these techniques have worked for me and I hope they will be informative and helpful to anyone faced with a monster record.

Try to learn and preserve the record before judgment.

Although incorrectly considered a luxury by some appellate practitioners (or a turf war to some trial lawyers), I am a staunch advocate of using appellate counsel from the first pleading, through the trial and into the appeal. Any case that is actually tried these days is likely to be appealed. If it is won on summary judgment, or dismissed on the pleadings, it is also likely to be appealed. As a result, the best time to learn the record is through your involvement during trial or litigation. That way, you not only learn the record, you also help make it and hopefully shape it in your client’s favor for the appeal.

Being involved at the trial level also helps your learn the record as you go. During trial, I receive along with the trial lawyers, daily copies of the transcript that I load on my annotation software, along with the exhibits, to identify and annotate key issues as the case progresses. I also identify and annotate key testimony and exhibits to be used in support of, or opposition to, a directed verdict and post-verdict motions.

Making sure the record is correct is also a task that every appellate lawyer should take on at trial. When depositions are played or read, I make sure the court reporter is taking the testimony down and review it after that day of trial.

I was once involved in an appeal after the verdict where I discovered the trial lawyers never noticed the court reporter was not taking down the videotaped testimony as it was played. I learned later that this was the court reporter’s policy unless asked to do otherwise. As a result, I had to try to reconstruct what was played based on the parties’ designations, counter-designations and the court’s ruling on objections. It cost my client a great deal of money and the record was certainly not helpful to the court.

Given the current technological advances, I now ask that we download the video depositions immediately after they are played to the jury and have them admitted as individual exhibits at the end of the day.

In a case with numerous exhibits, I also ask the court and the opposing side to allow a third-party contractor to scan the court's exhibits while the jury is in deliberations or in the days following the verdict. This serves two purposes. It memorializes the extensive exhibits that were admitted closer in time to the trial in the event there is a disagreement or some of them are lost. It also allows me to return to the office with a disk of all the exhibits to load on my annotation software, which I can now annotate, search and use to prepare and respond to any post-trial motions.

I just got the record. Now what?

In many cases, however, your first introduction to the monster record is after the verdict or judgment. How do you learn the record, understand it, summarize it in a statement of facts and be ready for any question at oral argument? Use technology and common sense to divide and conquer.

Talk to the trial lawyer.

You should never jump into a record cold or assign someone from your office to do so. Your client will probably not be happy with the bill or with you. The first thing I do is meet with trial counsel and often the client. I get the trial lawyer to articulate what went right—or wrong—in the trial or the hearing. This allows me to focus on the issues and to ask the right questions about preservation of error, reversible error and the like. As every appellate practitioner knows, trial counsel's list of trial injustices and issues is usually much more lengthy than the list of reversible error or the issues for review, but it is the best place to start.

Ask for a list of key witnesses and exhibits.

After I talk to the trial lawyer to identify the potential appellate issues, I ask them to provide me with a list of the witnesses who provided the key testimony in support of each side's elements and defenses and a list of the key exhibits in the case. I then have the trial testimony and exhibits loaded on my annotation software.

Take a snapshot of the trial.

Before I start annotating, I have my appellate paralegal take a snapshot of the record. She prepares, in 5-10 pages, a list of the date of each volume of the trial transcript, who testified (and on what pages) and what occurred before and outside the presence of the jury. With my handy summary in hand, and the

information from the trial attorney, I can quickly get a feel for the scope of the record and what lies before me.

**Start annotating all the relevant testimony
and exhibits in your software.**

Before I read the key testimony and exhibits provided to me by the trial lawyer, I read the opening and closing statements. It gives me an idea of where the case started and where it ended. Like looking at the beginning and end of a book, it gives me an idea of what to look for in the middle. I then begin to annotate the key witnesses and exhibits provided by the trial lawyer.

Go back into the record and annotate the rest—add electronic post-its for issues you want to go back to or follow up on later.

Once I have the overall theme, and I have read the key testimony and exhibits, I go through and read the rest of the trial record from start to finish—*but only once*. This is possible if you use annotative software. If testimony is relevant to more than one issue I annotate it as to every issue as I go. At the same time, I build an annotative hierarchy with all the relevant exhibits. 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 them out and follow up on them.

If a case is sufficiently complex that I know I may need to read through the key aspects of the record twice, I highlight or make a list of pages that are immaterial to the appeal, such as long-winded bench conferences, unimportant witnesses or objections that are not the subject of the appeal so I do not waste time with them later.

Electronically organize, analyze and categorize your exhibits.

In a large document case, particularly a commercial dispute, the record rarely reflects through the direct and cross-examinations of witnesses all the facts, inferences, and frankly, juicy items in your opponent’s documents. There is usually a wealth of information that was admitted into evidence (and therefore the jury is assumed to have considered) that can help you in your appeal, particularly when faced with a factual sufficiency challenge.

I have my appellate paralegal go through the exhibits and create an Excel spreadsheet listing the following:

- Date of the document;
- Author of the document;
- List of “cc” and “bc” recipients of the document;
- Title of the document;
- Date it was admitted at trial and witness(es) it was used with;

- Whether it was admitted with or without objection or for a limited purpose;
- Topic or “re” line; and
- A section for my later comments on how to use it in the brief.

Once the spreadsheet is done, I can sort it by documents generated during a particular time period, by author, by recipient, etc. I use this information in at least three ways. First, I look at each document once and enter a comment on whether to use it, and if so, for what issue(s). After I do this, I save the original spreadsheet as a new document and delete the exhibits I have not focused on. I use this shorter version as my “key documents” list and merge it with the one provided to me at the beginning of my review by the trial lawyer.

Next, 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. Finally, for key witnesses in the case, I sort by their name to determine if there are any additional significant documents they authored or received that should be included in the statement of facts or the argument section. This is a particularly useful tool in business tort cases when intent issues must be proven by circumstantial evidence. If the case warrants it, I will then pull the key exhibits and put them in chronological or topical order.

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

In a monster record case, much of the clerk’s record is merely customary motions and discovery issues that have no relevance to the appeal. As a result, I also have my appellate paralegal prepare an Excel spreadsheet that lists the court filings by date and title that includes the volume and page numbers in chronological order.

This way, if I know I want to refer to the defendant’s first amended answer, I just look on the chart, pull the citation and leave the paper record in the cabinet. This is also a useful tool to determine if documents or pages are missing from the record. It is at this stage of the process that we usually find any problems and ask for a supplemental record.

I do not automatically scan the clerk’s record into my software. I print 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 scan this limited amount. I can then repeatedly refer to these documents in my computer while the paper version of the clerk’s record lies around taking up filing space.

Are you the appellee? Scan and hyper-link your opponent’s brief.

If I am the appellee, and the case warrants the expense, I scan and hyperlink my opponent's brief. This allows you to see and quickly identify the testimony and exhibits that your opponent is focusing on. It also allows you to print and review these pages of trial testimony and exhibits and put them in the larger context. It is an excellent resource to prepare for oral argument.

Compare the evidence cited by your opponent to your exhibit spreadsheet.

This is also a good opportunity to compare the exhibits cited by your opponent to your Excel spreadsheet of exhibits. Does your opponent cite one memo authored by the CEO but not discuss the two following memos? Does your opponent not discuss critical documents produced by the company on the same issue during the same time period? There is a lot of information that can be learned about the weaknesses in your opponent's case if you organize and analyze your exhibits in this manner. I highly recommend it.

I am ready to begin writing, what do I do with all this stuff?

Before I begin writing, I print my annotations and review them. This is how my "paper record," which now only fills a notebook, is created. I then print all my exhibit and clerk's record charts and start the writing process. If I did my job correctly, I have tamed the monster record down to a manageable size. Indeed, it usually fits in my briefcase.