

Behind the Curtain: Appellate Strategy for High-Profile Litigation

Comprehensive Written Materials & Program Outline

I. Introduction

A. Overview of the Program

- Appellate strategy begins at the moment a case is filed—not after judgment.
- High-profile litigation presents unique pressures:
 - Media attention
 - Public perception
 - Emotional narratives
 - Evolving or unsettled law
- Goal: equip litigators to avoid appellate pitfalls and collaborate strategically from start to finish.

B. Core Themes of the Program

- Collaboration between trial and appellate counsel.
- Shaping and preserving the record in real time.
- Understanding judicial processes behind the scenes.
- Managing narratives both in court and in the public arena.
- Lessons from high-profile and nationally recognized cases.

II. The Art of Appellate Advocacy: Excellence, Impact & Memorable Performances

A. What the Best Appellate Lawyers Do

(From Q1 – “Most memorable and impressive things an appellate lawyer has done”)

Appellate CLE Questions

- Winning on the force of **exceptional briefing**:
 - Concise, targeted arguments.

- Avoiding boilerplate; respecting limited judicial time.
- Crafting oral arguments that offer **new structure or perspective**, not repetition.
- Changing a justice's mind at oral argument—rare but possible.
- Delivering persuasive advocacy even when facing adverse authority (e.g., winning despite “5 cases dead set against” the lawyer).

B. Why Briefing Matters Most

- Majority of decisions made from briefs, as draft opinions often exist *before* argument.
- Oral argument is a second chance—use it wisely, creatively, and responsively.

III. The Biggest Mistakes Litigators Make on Appeal

A. From the Court’s Perspective

(From Q2)

Appellate CLE Questions

- Lack of civility—damages credibility immediately.
- Failure to answer judicial questions directly.
- Reading from scripted arguments; ignoring the flow of dialogue.
- Allowing nerves to override responsiveness, adaptability, and candor.

B. Structural & Strategic Mistakes

- Over-briefing and over-arguing (“more is less”).
- Raising too many weak issues instead of a few strong ones.
- Poor record citations or inadequate knowledge of the record.

IV. Building the Appellate Record: What Trial Lawyers Overlook

A. Recurring Record Problems

(From Q3)

Appellate CLE Questions

- Trial teams assuming the appellate lawyer will “fix it later.”
- Failure to create a proper record for:
 - Objections
 - Offers of proof
 - Rulings outside the jury’s presence
- Inadequate clarity on key evidentiary or legal disputes.

B. Why Early Cross-Pollination Matters

- Trial counsel should consult with appellate counsel **before key tactical decisions** are locked in.
- Early identification of:
 - Legal issues needing preservation
 - Ambiguities requiring clarification
 - Pretrial motions that shape appellate posture
- Knowing the record cold—an essential but often neglected skill.

V. When to Bring in Appellate Counsel

A. Optimal Timing

(From Q4)

Appellate CLE Questions

- In complex cases, appellate counsel should be involved **well before trial**.
- At minimum, after discovery; ideally, during prefiling or pretrial strategy.
- Benefits of “embedded” appellate counsel:
 - Issue preservation
 - Strategic motions
 - Avoiding waiver
 - Shaping jury instructions and verdict forms

B. Collaboration Models

- Pretrial consultations.
- On-call appellate advisor during trial.
- Continuous communication channels between teams.

VI. Moot Court & Oral Argument Preparation

A. The Role of Moot Arguments

(From Q5)

Appellate CLE Questions

- Still widely used for major cases (Cal. Supreme Court, Courts of Appeal).
- Best practices:
 - At least **10 hours of substantive preparation**.
 - Simulate panel questioning styles.
 - 2-hour moot structure:
 - 1 hour: argument + questioning
 - 1 hour: detailed debrief and iteration
- Moot decisions:
 - Based on strategic importance, complexity, and stakes of the case.

B. Preparing for Oral Argument

- Do NOT repeat your brief verbatim—reframe and sharpen.
- Understand the draft opinion may already exist; your goal is to **shift perspective**.
- Be direct, succinct, and responsive.

VII. The “Secret Sauce”: What Actually Happens Behind the Scenes

A. Court Operations Before Oral Argument

(From Q6)

Appellate CLE Questions

- Case assignment ~90 days before argument.
- Chambers attorneys prepare draft summaries/opinions.
- Justice reviews and collaborates with staff attorneys.
- Draft opinion circulated to the panel ~30 days before calendar.
- Week-before-argument conference: panel discussion of every case.

B. After Oral Argument

- Justice completes or revises draft opinion.
- Circulated for concurrence or dissent.
- Opinion filed within statutory deadlines (typically 90 days from submission).

C. Key Insight

- Because a draft opinion often exists before oral argument, **briefing quality is critical**.

VIII. Emotional Dynamics, Public Perception & High-Profile Pressure

A. Managing Emotional Responses

(From Q7)

Appellate CLE Questions

- Judges and lawyers must maintain resilience and professionalism.
- Results—good or bad—cannot be taken personally.
- Emotional reactions are inevitable, but must not influence legal reasoning.

B. Judicial Perspectives on Publicity

(From Q8)

Appellate CLE Questions

- Most cases are anonymous, but some gain public traction.
- High-profile nature rarely changes judicial analysis.
- Courts strive to treat all cases through the same procedural lens.

- Public pressure or opinion should **not** affect appellate reasoning.

C. Managing the Public Narrative

(From Q9)

Appellate CLE Questions

- Courts cannot comment on pending cases—judicial silence is mandatory.
- Lawyers must develop media strategies carefully:
 - Cultivated, professional relationships with the press.
 - Controlled release of information.
 - Distinct separation between public messaging and legal briefing.

IX. Reversal Risks: Evidence, Jury Instructions & Standards of Review

A. Evidence Rulings

(From Q10)

Appellate CLE Questions

- Rarely cause reversal due to deferential review (“abuse of discretion”).
- Reversals more common when evidence improperly excluded, not admitted.
- Importance of detailed offers of proof to preserve error.

B. Jury Instructions

- **Most common basis for reversal** in civil appeals.
- Trial judges are aware, but counsel must:
 - Request instructions on the record.
 - Object to omissions or inaccuracies.
 - Seek instructional conferences outside jury presence.
- In high-profile cases, a single flawed instruction can shift the entire appellate posture.

X. Strategies for High-Profile Appeals

A. Narrative Control

- Balance between legal argument and public story.
- Avoid letting media narratives seep into legal briefs.
- Ensure client messaging aligns with litigation strategy.

B. Preserving Credibility with the Court

- Civility and professionalism—non-negotiable.
- Accuracy in describing the record.
- Avoid hyperbole or emotional rhetoric.

C. Collaboration in Sensitive and Public Cases

- Establish a joint plan between trial and appellate teams:
 - Issue preservation.
 - Media strategy.
 - Record management.
 - Jury instruction strategy.
 - Anticipating potential appellate hotspots.

XI. Case Studies & Hypotheticals

(Optional for program delivery, included for completeness of written materials)

- How appellate courts handle emotionally or politically charged subject matter.
- Hypotheticals illustrating record preservation failures.
- Examples of narrative misalignment between trial and appellate teams.
- Success stories where early appellate involvement shaped the outcome.

XII. Practical Checklists for Attendees

A. Trial Counsel Checklist

- Consult appellate counsel early.

- Make a clean record for objections.
- Preserve instructional and evidentiary issues.
- Keep emotion out of briefing.
- Know your record meticulously.

B. Appellate Counsel Checklist

- Evaluate the record as it is being created.
- Identify preservation risks.
- Prepare for high-profile media implications.
- Conduct targeted moot arguments.
- Craft concise, strategic briefing that respects judicial time.

XIII. Final Takeaways

- High-profile appeals require discipline, coordination, and strategic clarity.
- Most appeals are won or lost in the briefing, not the oral argument.
- Collaboration between trial and appellate counsel is essential—not optional.
- Publicity is rarely relevant to judicial reasoning but always relevant to client management.
- Preparing for appeal from day one is the best insurance against preventable error.