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The Newsletter of the NYSBA Committee on Courts of Appellate Jurisdiction SPRING 2025

When Perfecting Isn't Perfect

Give a Hoot: Moot!

Lifting the Fog of Oral Argument

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Spring 2025

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IN THIS ISSUE

When Perfecting Isn't Perfect

BY ANDREW DEBBINS

In concurrent appeals from a single order or judgment, the appellants shall perfect the appeals together, so says 22 NYCRR 1250.9(f)(2). But what happens when the appellants disagree?

Say, for instance, one appellant wishes to perfect its appeal as quickly as possible in order to avoid the consequences of the motion court's order below, but another appellant wishes to prolong the appeal process for strategic reasons. If the eager appellant files its brief and record on appeal, but the reluctant appellant does not, is the appeal perfected?

The Fourth Department said yes and scheduled the appeal for argument in *Salter v. Meta Platforms, Inc.*, CA 24-00524. It involved an order that resolved seven motions to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action made by each of seven defendants-appellants. At the request of five of the appellants, the Fourth Department consolidated the appeal with five others arising from related cases for purposes of perfecting and arguing the appeals.

Soon after, six of the appellants filed and served the record on appeal and their principal briefs. The seventh, however, did not file and serve its brief and instead requested an extension of time to perfect its appeal. The Fourth Department granted that request and one day later, entered an order scheduling the appeal for argument and the respondents to file and serve their brief within 30 days. The scheduling order also put the respondents, whom I represent, in a position where they would be required to respond to the six appellants that filed their briefs before the seventh filed theirs. This posed a risk of prejudice because many legal issues were common to the seven appeals from a single order.

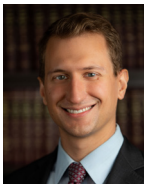
A plain reading of 22 NYCRR 1250.9(f)(2) seems to suggest that the appeal was not perfected at the time the Fourth Department entered its scheduling order because the appellants had not "perfect[ed] the appeals together." Indeed, in later motion practice concerning the deadline to perfect and briefing schedule, the seventh appellant took the position that its appeal had not been perfected. I agreed and wondered whether under 22 NYCRR 1250.9(f)(2) none of the seven appeals had, in fact, been perfected!

So, was the seventh appeal scheduled for argument before being perfected? Certainly it would not be argued during a term different from the others. Could a reluctant appellant push the eager appellants' concurrent appeal to a later term?

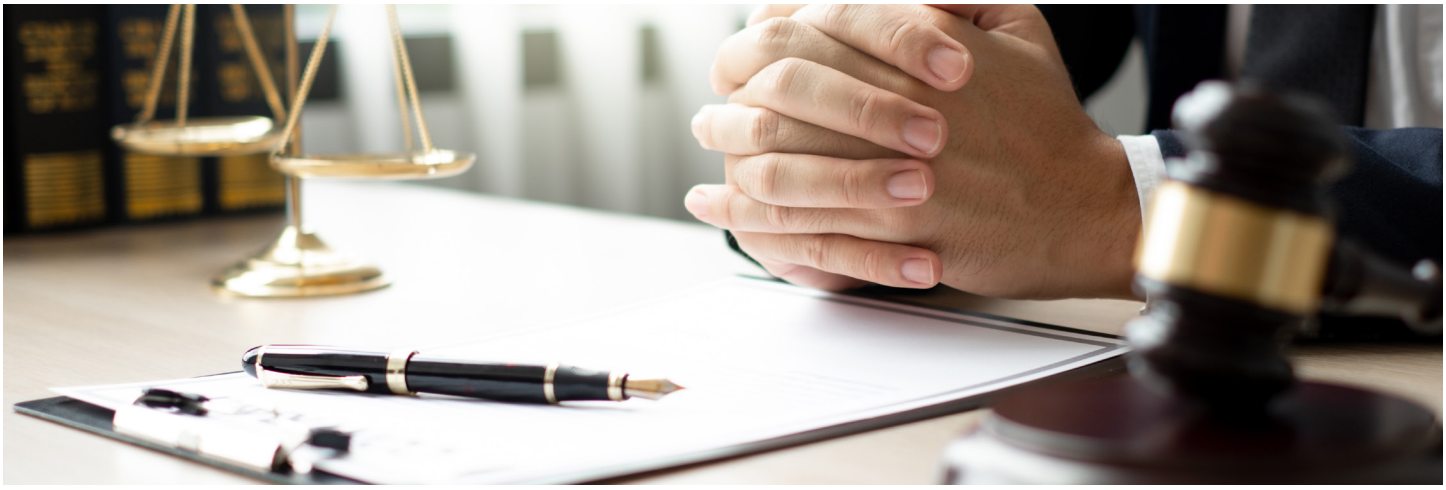
Ultimately, 22 NYCRR 1250.9(b) provides the solution. Upon the seventh appellant's motion, the Fourth Department extended its time to perfect its appeal but ordered that no further extensions would be granted. This permitted the appeal in CA 24-00524 to be fully briefed without pushing the argument over the term. The timing of briefs aligned differently in another one of the consolidated appeals, however, and upon motion of the eager appellants, the Fourth Department pushed argument over the term anyway.

After navigating this scenario — and spending much time scratching my head while reading 22 NYCRR 1250.9(f)(2) — I realize the Court handled it so as to best move its docket. If the seventh appellant filed nothing at all, never perfecting its appeal, the concurrent appeal could be argued as the Court had scheduled. If the Court had waited to issue the scheduling order until either the seventh appellant filed or its deadline to do so had passed, the appeal would no doubt be argued during a later term, causing unnecessary delay if the seventh appellant filed nothing in the end.

The upshot is that 22 NYCRR 1250.9(f)(2) assumes the appellants can agree, but when they do not there may be an opportunity for sharp practice by keen appellate attorneys to advance their clients' interests. Lawyers should trust the Appellate Division, however, to resolve any ambiguities in a way that will expedite appeals rather than slow them down in the interest of justice.



Andrew M. Debbins is a trial attorney and appellate practitioner at Connors LLP in Buffalo. He is a member of the Committee on Courts of Appellate Jurisdiction and Western District of New York Local Rules Committee



GIVE A HOOT: MOOT!

BY ROGER SACHAR

During the January 2025 annual meeting of the NYSBA Committee on Courts of Appellate Jurisdiction, *Leaveworthy's* indefatigable editor, Mark Diamond, asked for articles for the publication's next issue. A few minutes later, Henry Mascia gave a timely review of the Moot Court Program Committee that he chairs.

For those unfamiliar with the program, it is utterly free and available to any NYSBA member who will be arguing a case before an Appellate Division or the Court of Appeals. Like any moot court, participants engage in a practice session of their cases before a panel of moot court judges. The benefit is that the 'judges' are all experienced appellate practitioners or former appellate court justices.

I was scheduled to argue before the Court of Appeals and decided to jump at the opportunity. A couple of prior arguments before our state's highest court, and twenty or so appearances before the First and Second Departments, left me fairly confident in my appellate skills and that a moot might not be all that helpful. But I asked for one anyway since I was curious to see if it would provide any useful insight.

My moot court panel was comprised of Hon. Karla Moskowitz, Timothy Murphy, and Mark Diamond, each of whom had the kindness to read not only the parties' lengthy appellate briefs but several amici curiae briefs as well. They came armed with plenty of questions for what was nearly an hour-long "appellate argument" dry run that approached my appeal from several different angles and in many respects, mirrored the questions the members of the Court of Appeals would eventually ask. Mooting my argument was so exceedingly helpful that I recommend it to anyone arguing before the Court of Appeals or anyone who may not be accustomed to Appellate Division appearances.

The Court of Appeals is a hot bench, meaning that advocates get questions within the first few seconds of arguing. When I prepare for oral argument, I go through and outline every possible question I can think of (usually in conjunction with colleagues in my practice area) and draft potential responses. I followed that same process with the moot court panel. Not only did the participants think of questions I had not thought of, they also gave me feedback on how to craft better responses to the ones I did envision. When it came time to repeat the process a week or so before I was due to appear before the Court of Appeals, I had better questions and better answers.

The moot court program does not just benefit attorneys arguing before our state's most important appellate tribunals; it helps those who serve on the panels as well. I asked Justice Moskowitz for her thoughts and she perfectly summarized things as follows: "Just as appellate judges gain insights, not only from listening to the appellants' arguments but from each other's questions," she told me, "we 'judges' who moot appellants' arguments also benefit from the experience. We learn more about effective appellate brief writing and argument than about the specific case. It's a win-win."

Edward Markian, who runs the moot court program, also shared his opinion: "Just from word of mouth the number of moot requests is growing. Experience shows that it will grow even more with outreach to attorneys with cases before the Court. It would be helpful to have additional panelists in place before expanding the program."

The moot court program benefits everyone who participates. Should I ever again have the privilege of arguing before the Court of Appeals, I will certainly ask for a moot. And, although Shakespeare's Henry VI once said, "forebear to judge, for we are sinners all," I think in this instance The Bard can be safely ignored. I've already told Ed that I would be honored to serve as a moot court judge any time I am needed. I strongly encourage any member of the NYSBA to take advantage of the Moot Court Program. You can reach Ed at emarkarian@magavern.com.

Roger Sachar is a partner at Newman Ferrara LLP, specializing in class action and shareholder derivative litigation. He regularly argues before New York State's appellate courts.

Lifting the Fog of Oral Argument

BY ROBERT HERBST

Your client has waited more than a year for this oral argument. The result could make or break the company. Others in the industry are watching because the outcome could set precedent. Your firm is watching because a win could make it the industry expert and bring in new business. You will be facing a hot bench from one of the most sophisticated courts in the country. The judges understand the importance of the case. You will need to bring your A game. How can you bring an A+ game instead?

Of course you will review the briefs and record. You will reread the cited cases and check for recent decisions. You may do a moot court with your colleagues or the New York State Bar Committee on Courts of Appellate Jurisdiction.

But you want to have every advantage to cope with the fog of oral argument. To give yourself an edge, you should train your body as well as your mind. As the ancient Greek philosophers understood, a healthy body will support a healthy mind.

This view is backed by modern science. Physical activity causes the development of new neural connections in the brain. It also increases blood flow to the brain, supplying it with oxygen and flushing out waste. Being physically active lowers your blood pressure and makes you more resilient and mentally tougher. You will be able to more easily handle the stress of oral argument and ignore distractions. If your mind is focused and your pulse is not racing, you will be better able to focus on the questions the bench will pose and come up with quick, smart answers.

To be fitter, you don't have to run a marathon or bench press 300 pounds. The CDC recommends you engage in 150 minutes a week of moderate intensity exercise along with two strength training sessions. Every little bit helps and even five minutes of physical activity here and there throughout the day offers benefits that add up.

Nor do you have to do traditional exercises such a jogging or lifting weights, although those are great and efficient. Take the stairs instead of the elevator. Park at the far end of the parking lot and walk. Stand up and stretch for a few minutes every hour when working at your computer. Take a walking meeting outdoors. Walk down the hall to speak with a colleague rather than send an email. Weed the lawn. All of these will make you fitter.

Athletes talk about slowing the game down and being in a state of flow. Zen archers say the arrow shoots itself. They achieve this by being mentally and physically prepared and then letting that preparation run. Being physically fit will lower your stress and enable you to focus when all eyes are on you. Your argument preparation will take over, the fog will lift, and you will bring your A+ game.

Robert Herbst is a former Chair of the NYSBA Subcommittee on Attorney Physical Health as well as the Committee on Courts of Appellate Jurisdiction. He was a member of the NYSBA Task Force on the Treatment of Transgender Youth in Sports. An expert on health, fitness and attorney well-being, he is a 19-time World Champion powerlifter, a Guinness World Record holding strongman, and member of the AAU Strength Sports Hall of Fame.

Appellate Scrutiny of Probation Conditions

BY SAM FELDMAN

More than 10,000 people are sentenced to probation in New York State each year, and each of these probation sentences includes a set of conditions the probationer must follow. For the duration of the sentence — usually two to five years — the probationer must obey the law as well as these conditions, and even an allegation by a parole officer of a violation can result in the probationer's immediate jailing.

In recent years, these probation conditions have started to receive more appellate attention, resulting in holdings on novel issues and development of this often overlooked area of law. Although historically, probation conditions were rarely challenged on appeal, attorneys representing defendants on appeal have every reason to scrutinize them closely. These conditions can result in jail time for those who violate them and affect the daily lives of those who abide by them.

While many criminal defendants are relieved to be sentenced to probation rather than prison, only a slight majority of probationers successfully completed their probation terms as of 2023, the most recent year for which data is available from the New York State Division of Criminal Justice Services. Some of the remainder had their probation revoked due to new offenses, but revocations for "technical violations" — violations of probation conditions — were more common.

Fortunately, attorneys don't need to wait for a violation to challenge probation conditions. Challenges to probation can be brought on appeal from the criminal conviction and do not need to be preserved by an objection at sentencing. *See People v. Hakes*, 32 NY3d 624, 628 n.3 (2018). Nor are appellate challenges to probation conditions barred by a valid waiver of the right to appeal. *See People v. Fishel*, 128 AD3d 15, 18 n.1 (3rd Dept 2015).

While probation conditions are sometimes challenged on procedural grounds, New York law provides few procedural requirements to point to. For example, in federal court, the oral pronouncement of sentence controls, so the Second Circuit has struck down supervised release conditions included in the written judgment that were not pronounced orally. *See United States v. Washington*, 904 F.3d 204 (2nd Cir. 2018). In New York, however, the rule is different, and courts need not —and generally do not — orally pronounce the conditions of sentencing. *See People v. Scott*, 226 AD3d 443 (1st Dept 2024). New York courts have also rejected challenges to probation conditions on the grounds that they were not specified in the plea agreement (*See People v. Brazeal*, 2025 NY Slip Op. 00976 (2nd Dept Feb. 19, 2025)) or that the defendant's lack of knowledge of them rendered a guilty plea invalid. *See People v. Gravino*, 14 NY3d 546, 559 (2010).

However, New York courts have recognized substantive standards that probation conditions must meet. The New York Court of Appeals first considered the legality of a probation condition (other than restitution) in *People v. Letterlough*, 86 NY2d 259 (1995) where the sentencing court had ordered a defendant convicted of driving while intoxicated to affix a fluorescent sign saying "CONVICTED DWI" to his car as a condition of probation. The Court held that Penal Law § 65.10(1), which authorizes courts to impose a list of various probation conditions or fashion their own, permits only "rehabilitative" conditions. The sentencing court was therefore within its authority to impose as a condition that the defendant participate in a substance abuse program, but not the "CONVICTED DWI" condition, which was intended to warn the public and punish the defendant by shaming him, neither of which were rehabilitative goals.

The following years saw increased appellate challenges to probation conditions as either not rehabilitative or not, in the words of *Letterlough*, "tailored to the particular defendant's case." Often the challenged conditions were fashioned by the sentencing courts themselves, as distinct from the standard conditions listed in Penal Law § 65.10.

For example, appellate courts upheld conditions requiring a sex offender to have no contact with minors, *People v. Griffith*, 239

AD2d 705 (3rd Dept 1997) and requiring a teenager who bragged about assaulting someone on MySpace to not use a computer except for educational purposes. *In re Ashley D.*, 55 AD3d 605 (2nd Dept 2008). However, courts struck down conditions requiring probationers to consent to undergo a polygraph examination, (*In re Brandon W.*, 28 AD3d 783, 784–85 (2nd Dept 2006); consent to the release of an otherwise-confidential presentencing report, *Fishel*, 128 AD3d at 18–19); and refrain from riding public transit when the probationer had no history of misconduct on public transportation, *People v. Alvarez*, 233 AD3d 619 (1st Dept 2024).

In recent reported decisions, appellate attorneys have more often challenged standard conditions of probation. These conditions come preprinted on a standard probation form, so that they apply either by default or if the court checks a box next to the condition or fills in a blank space.

For example, the standard probation form used in New York City courts includes 30 numbered conditions, eight of which apply only if the box is checked or filled in. One of the most frequently challenged conditions in recent years is Condition 28, which if checked requires the probationer to consent to searches of their person, vehicle, and residence and seizure of illegal contraband. Appellate courts have upheld this condition or its equivalent outside New York City when the probationer has a history with drugs or weapons (*See People v. Fields*, 84 Misc. 3d 19 (App. Term, 2d, 11th, & 13th Jud. Dists. 2024); *People v. King*, 151 AD3d 1651 (4th Dept 2017)) but have rejected it where the probationer's offense and circumstances have no connection to drugs or guns. *See People v. Fernandez*, 233 AD3d 627 (1st Dept 2024); *People v. Dranchuk*, 203 AD3d 741 (2nd Dept 2022); *People v. Saraceni*, 153 AD3d 1559 (4th Dept 2017). Similarly, courts have upheld a condition requiring the probationer to abstain from alcohol only when there is evidence that he or she has an alcohol problem. *Compare King*, 151 AD3d at 1653 with *Saraceni*, 153 AD3d at 1560.

In rarer cases, attorneys have challenged default conditions that are preprinted on probation forms with no checkbox and taken verbatim from the list of conditions that a court "may" impose in Penal Law § 65.10(2). Of course, probation conditions "are not dictated by or limited to the language contained in preprinted forms" but must be "established in each case by the sentencing court." *People v. Cesar,* 131 AD3d 223, 230–31 (2nd Dept 2015). Nevertheless, courts rarely deviate from these default conditions or question their appropriateness.

In one case, the Appellate Division, Fourth Department, rejected a challenge to a condition requiring the probationer to "refrain from frequenting unlawful or disreputable places or consorting with disreputable persons" on the ground that it was "taken verbatim from Penal Law § 65.10(2)(b) and is therefore a lawful condition of probation." *Saraceni*, 153 AD3d at 1560.

This year, however, the Second Department appeared to split from the Fourth Department in *People v. Sobers*, 2025 NY Slip Op 00992 (2nd Dept Feb. 19, 2025). As the assigned attorney at Appellate Advocates for the defendant in that case, I challenged the standard condition set forth in Penal Law § 65.10(2)(f) that requires the probationer to "[s]upport his dependents and meet other family responsibilities" on two grounds: that it was not tailored to this defendant's case, and that "meet other family responsibilities" was unconstitutionally vague.

For this constitutional challenge, I drew on federal decisions holding an identical federal condition of supervised release unconstitutionally vague: *United States v. Evans*, 883 F.3d 1154 (9th Cir. 2018) and *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015). In *Evans*, the Ninth Circuit questioned the meaning of "family responsibilities": "Does it mean that [the probationer] must wash the dishes after dinner? Does it mean he must attend his children's soccer games? If a relative comes to [the probationer] with a problem, does the condition require him to do his best to give good advice rather than ignoring him or her?"

The Second Department did not reach this novel constitutional issue and instead struck the condition on statutory grounds because it held that the condition, although set out in the Penal Law statute, was not reasonably related to the defendant's rehabilitation. Other attorneys are beginning to challenge

the "family responsibilities" condition, as it is imposed on all probation sentences and often has no connection to the defendant's offense or circumstances.

Given the high stakes associated with probation conditions, attorneys for defendants in criminal appeals should carefully scrutinize conditions, including those listed in Penal Law § 65.10. Some of these conditions, like those requiring probationers to avoid "injurious or vicious habits" or "consorting with disreputable persons," were drafted long ago and may not be appropriate or even intelligible in modern cases.

Sam Feldman is a senior staff attorney at Appellate Advocates, where he represents indigent criminal defendants before the Appellate Division, Second Department, and New York Court of Appeals.

PUBLICATIONS

THIRD EDITION

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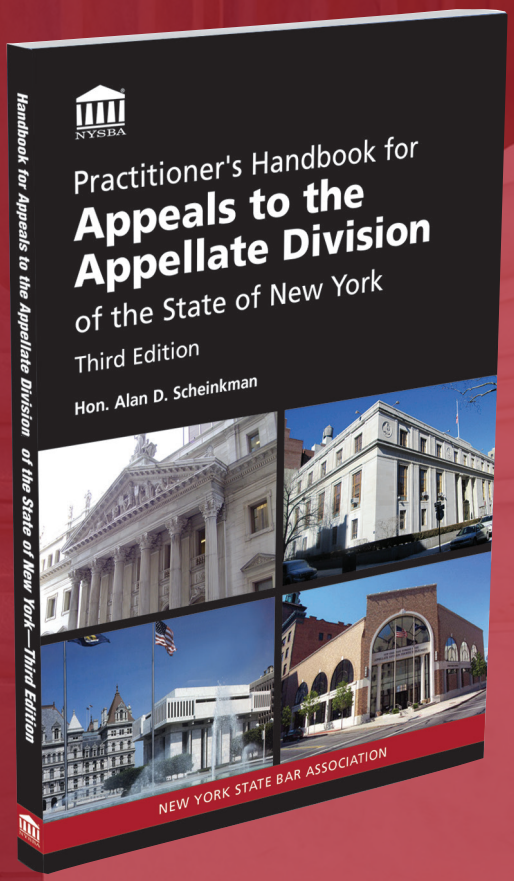
Practitioner's Handbook for

Appeals to the Appellate Division

of the State of New York

Hon. Alan D. Scheinkman



Written by Hon. Alan D. Scheinkman and reviewed by members of the NYSBA Committee on Courts of Appellate Jurisdiction (CCAJ), *Practitioner's Handbook for Appeals to the Appellate Division of the State of New York*, Third Edition, is an invaluable guide for handling appeals to the four Appellate Divisions. It covers all aspects of taking a civil or criminal appeal to the New York State Appellate Division, including panel assignments and calendaring, correcting defects, cross appeals and joint appeals, and 'poor person' appeals.

The taking and the perfecting of a civil or criminal appeal includes meeting inflexible time requirements, getting the record and briefs together, and bringing the appeal to argument or submission. The Practice Rules of the Appellate Division came into effect after the release of the extremely popular second edition, but important nuances still exist between Departments. The third edition covers these changes as well as other important developments.

ARE YOU ARGUING AN APPEAL BEFORE THE APPELLATE DIVISION OR COURT OF APPEALS?

If you answered "yes," consider participating in the Committee on Courts of Appellate Jurisdiction's Moot Court Program. This program offers NYSBA members who are scheduled to argue a case before the Appellate Division or the Court of Appeals the opportunity to moot their argument before a panel of experienced appellate attorneys and former judges. Following the moot, the panel will provide the attorney with helpful feedback and suggestions.

For more information on the CCAJ Moot Court Program, and to obtain and complete a form to request a moot argument, go to nysba.org/committee-on-courts-of-appellate-jurisdiction-moot-court-program/.

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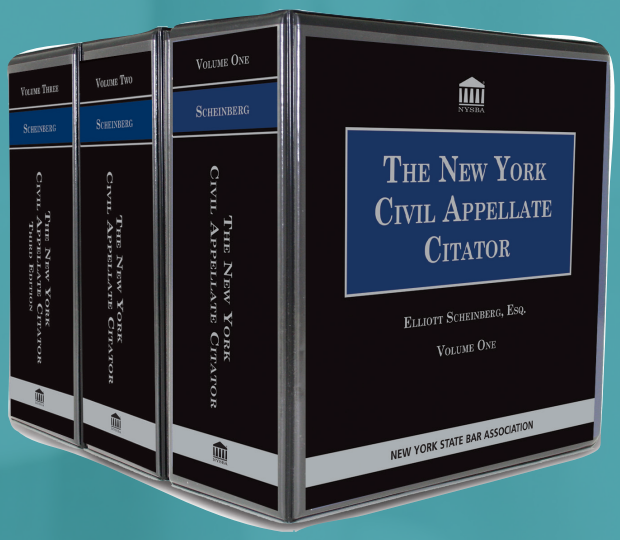
The New York Civil Appellate Citator

By Elliott Scheinberg, Esq.



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New York State Bar Association
Committee on Courts of Appellate Jurisdiction
Mission Statement

Adopted September 15, 2020

- **Engage** attorneys, members of the judiciary, judicial staff, academics, and other interested parties in discussion of current issues in appellate practice;
- **Report** on the need for statutory and procedural rule changes to improve the administration of justice in state and federal appellate courts located in New York;
- **Educate** attorneys and pro se litigants about the subject of appellate practice by producing educational materials and sponsoring programs to enhance their skills in perfecting, briefing, and arguing appeals, and engaging in appellate motion practice; and,
- **Act** to promote access to appellate courts and assist the administration of justice by, for example, supporting programs to aid indigent litigants with pending appeals.