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### Statement on the Functions and Future of Appellate Lawyers

The American Academy of Appellate Lawyers

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## BACKGROUND

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### STATEMENT ON THE FUNCTIONS AND FUTURE OF APPELLATE LAWYERS

The American Academy of Appellate Lawyers\*

#### INTRODUCTION

In this paper, the American Academy of Appellate Lawyers will discuss appellate lawyers as essential constituents in the community of appellate justice. We will first point out the dearth of literature about the effects of lawyers' activities on appellate justice. We will explore how effective appellate advocacy promotes the most important elements of justice and how ineffective advocacy disserves courts and society, not just hapless clients. As one federal appellate jurist put it, the first "constraint" on appellate justice is "reliance to quite a considerable degree on the performance of adversaries."<sup>1</sup> Lawyers affect justice in many ways beyond advocating in

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\* The American Academy of Appellate Lawyers was formed in 1990 to bring together outstanding appellate lawyers, to promote excellence in appellate practice, and to improve the quality of appellate justice. It currently has 270 Fellows from forty-four states and the District of Columbia. This paper was prepared by a committee of fifteen Fellows, presented to the membership at the Academy's Spring 2005 meeting, and adopted at that meeting.

1. Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 258 (W. W. Norton Co. 1994).

cases. We will review the roles of lawyers as courts' allies in promoting fair and efficient appellate justice, as guardians of the integrity of the appellate process, as observers who can fortify both bench and bar with information about problems and how to solve them, and as members of a primarily self-regulated profession capable of advancing and adopting reforms that improve the administration of justice. Finally, we will recommend reforms for study and implementation.

The topics of this paper connect directly with the agenda of the 2005 National Conference on Appellate Justice. To illustrate, tracking the three sessions of the Conference: (1) a specialized appellate bar is a resource for appellate courts' relations with the public and for interpreting the appellate process through the media; (2) appellate lawyers are indispensable participants in addressing the volume and quality of appellate cases, including by increasing the probability that clients' decisions whether to appeal are properly informed, by volunteering as appellate settlement officers, and by volunteering as counsel, managers, and mentors in pro se cases; and (3) by intentionally nurturing the market trend toward appellate specialization, courts and the organized bar can enhance the judicial tools<sup>2</sup> for reaching good dispute resolutions and writing good precedent.

#### A HISTORY OF IGNORING LAWYERS' ROLE

Visualize a literature of baseball limited to teaching players to play and explaining how umpires make calls. Imagine nobody covering how players affect the essence of the game, either by individual behavior or through their union. That silly vision is a perfect analogy for the real world of literature about the appellate process. Except to target lawyers for improvement, the published work ignores the role of appellate practitioners.

The written materials from the Appellate Justice: 1975 conference barely mention the role of appellate lawyers in the structure and future of appellate justice. The most prominent statements about lawyers are in the last recommendation on the

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2. See John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 896 (1940) (quoting Oliver Wendell Holmes, Jr., and arguing that lawyers must bring judges the "implements of decision.").

last page of the last volume.<sup>3</sup> There, the council recommends that “[E]ach court should have a mechanism for formulating, implementing, monitoring, and reviewing appellate procedures. This mechanism should include three essential elements....”<sup>4</sup> The first was publishing the court’s operating procedures. The second was a rule making procedure that allowed notice to the bar and an opportunity to comment. The last was creating an advisory committee including academic and practicing lawyers.<sup>5</sup>

Articles, pamphlets, and books proliferate imparting how to practice in appellate courts. Extending back at least fifty years, this literature generally repeats the same basic principles about briefing and oral argument and records judges’ persistent laments that lawyers violate those principles.<sup>6</sup> New ideas and perspectives are rare.<sup>7</sup>

How lawyers do what they do is little studied.<sup>8</sup> How appellate lawyers individually and collectively affect the administration of justice appears not to be studied at all. Shortly after *Appellate Justice: 1975*, Thomas B. Marvell published two chapters of reasonably empirical analysis about who appellate lawyers are, what they do, and how they feel about their work.<sup>9</sup> Marvell reported observations in a journalistic style, but he did not discuss the systemic and social consequences of how lawyers present cases.

Lawyers can no longer be the blind spot in visions of the future of appellate justice. Lawyers’ roles must be better understood in order to develop solutions more effective than

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3. Advisory Council for Appellate Justice, *Appellate Justice: 1975—Materials for a National Conference*, vol. V at 130 (Nat. Ctr. for St. Cts. & Fed. Jud. Ctr. 1974) (*Supplement, Proceedings, and Conclusions*).

4. *Id.*

5. *Id.*

6. See e.g. Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A View From the Jaundiced Eye of One Appellate Judge*, 11 *Cap. Univ. L. Rev.* 445, 446 (1982).

7. See e.g. Alex Kozinski, *The Wrong Stuff*, 1992 *BYU L. Rev.* 325.

8. “Although many lawyers struggle to tame the vast, raw mass of facts presented by a new legal matter, law school classrooms and legal thought remain dominated by appellate cases and the doctrine centric conception of what it means to ‘think like a lawyer.’ That narrow, focus has caused the academy to miss important differences in the ways lawyers approach different kinds of problems and to mistakenly confuse appellate lawyering for all of lawyering.” Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 *Vt. L. Rev.* 1, \*3, see \*52 (Fall 1998).

9. Thomas B. Marvell, *Appellate Courts and Lawyers* (Greenwood Press 1978).

recycling another generation of ignored or unlearned practice guides.

#### THE ADVOCATE'S RELATIONS WITH THE COURT IN APPEALS

An ethical, well-informed appellate lawyer is the first line of defense against irrationality, waste, and pettiness in the appellate process. The appellate advocate's most important systemic function is guiding clients in deciding whether to appeal—and advising whether to appeal or what to brief requires the appellate lawyer to frame issues for decision. Appeals occur because people and organizations—clients to the lawyer—want to improve their positions in specific ways. Framing an issue consists of translating a client's goal into a remedy the law allows, identifying the legal theories that can support the remedy, and finally determining whether the theories plausibly can be applied to the record. Proper issue framing economizes the appellate process by censoring both excellent arguments that achieve no benefit for the client and meritless arguments that would support the client's goal but cannot be advanced on the record. When no credible issue advances the client's goal, the result should be no appeal at all. Because the issue framing function bears so heavily on appellate system efficiency and because it provides an indispensable translation of client goals into appellate arguments, it should be treated as a central focus of study and improvement.

State and federal appellate rules require briefs to set forth the record in light of the standard of review. From the lawyer's perspective, this process ties closely to issue framing. Only that portion of the record relevant to the argued issues needs to be summarized. The value of the lawyer's record condensation varies with the size of the record. It is not very important to the process when the appeal arises from an early dismissal based on the pleadings. In contrast, when the record derives from a long trial or administrative proceeding, focused and accurate treatment of the record substantially enhances the efficiency of the entire appellate process.

The appellate lawyer also must present the applicable law. Of all appellate lawyering functions, this one is the most traditional and the most effectively taught in law school. Most

appellate courts have research attorneys and electronic research tools that allow them to compensate for bad research by the advocates. Nevertheless, good work by the lawyers can lead the court efficiently through the proliferation of precedent and secondary authority that has become the database of the law.

In the discussion of issues, lawyers must analyze how applicable law applies to the facts of the case. Here, a lawyer acts as a traditional solver of legal problems.<sup>10</sup> Together with issue framing, this legal analysis provides the most expansive opportunities for creativity both in advancing the client's cause and in advancing development of the law. Poor legal analysis does not deprive appellate judges of the tools to resolve a case, but it may deprive them of insights valuable to their law-declaring function.

Collaterally to framing and arguing the issues, appellate lawyers identify topics for the law-declaring function. Either through a single adversary's ethical duties or the combined effort of opposing lawyers, the appellate process should identify conflicts in relevant precedent. Briefing should identify conflicts between precedent and the text of regulations, statutes, or constitutional provisions. Either a single case or the flow of cases should identify needs for precedent to guide trial judges, to guide lawyers, or to allow parties in commercial and social transactions to project the legal consequences of their actions. The flow of appellate cases should identify persistent problems in pretrial procedures, jury instructions, special verdict procedures, and other trial court processes.

Appellate lawyers identify public policy arguments that guide the law-declaring function. Thorough and thoughtful presentation of the private and public implications of a proposed rule or exception sharpens the court's decision making process. Speaking from their own background in a field or from their clients' expertise, lawyers often are better equipped than judges and research attorneys to explain the law's impact on the lay world. Effective appellate advocacy gives appellate courts the tools to make precedent responsive to changed or reevaluated conditions.

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10. See Weinstein, *supra* n. 8, at \*3, \*52.

When an alleged error is something other than misapplying substantive principles, the aggrieved party usually must explain the harm caused by the error. Although discussion of harm always must refer to the cold record, prejudice or harmlessness often turns on elusive nuances. As a master of the entire record who usually communicates with both a client and trial counsel, the appellate lawyer provides the court with indispensable perspective—from both sides—of how the trial court's challenged action affected the case.

In concluding a legal argument, an appellant's counsel must identify and support a remedy. This analysis connects back to the initial process of framing the issues so as to achieve the client's goal. Of course, the appellee can direct the court to a different remedy. Without proper remedy analysis, the court is left asking "So what?" and searching its own resources for directions. A persistent complaint of trial judges about appellate judges is imprecision in dispositional directions. They hate to read, "We remand the case for proceedings not inconsistent with this opinion." Proper remedy briefing improves the administration of justice by equipping the appellate court to give clear and case-pertinent instructions.

Although oral argument is not as important to dispositions as it once was, effective advocacy sharpens the focus on the most important issues. By understanding how appellate courts work, preparing properly, and responding to a court's questions, the advocate helps judges shape both dispositive opinions and dissents. A prepared advocate who exercises good judgment about what parts of the record will be important to the court also can prevent embarrassing misunderstandings from creeping into opinions.

During the course of an appeal, appellate counsel can identify supervisory problems that affect the fairness of the overall proceedings. Difficulties may occur in the completeness or correctness of the record. Only the parties, through their counsel, have the knowledge and motivation to inform the appellate court of such problems. Sometimes a trial judge should not hear a matter on remand. Again, the party more aggrieved is in a unique position to identify grounds for case reassignment on remand, which often are unrelated to the error that requires remand. One judge's repeated difficulties may identify a need

for intervention. An appeal of dubious merit may be motivated by improper grounds that cannot be identified from the record. Only a party seeking relief from misconduct can deliver those facts to the appellate court. Similarly, only the parties through counsel can bring the court's attention to material events after judgment that may affect standing to appeal.

The discussion above focuses primarily on the role of a party's advocate. Lawyers also file briefs for amici curiae. Many controversies exist about amicus briefing, but even its strongest critics agree to some need for amici. Good amicus briefs can provide controlling or pertinent authority missed by the parties. They also can inform the court of perspectives different from parochial party interests and of how law made in a potential decision could have consequences that the parties have no desire to disclose or explore.

#### GUARDIANS OF INTEGRITY

Appellate lawyers are in the forefront as guardians of integrity of the appellate process. As a fiduciary for a client in a particular case, the lawyer must be sensitive to and raise issues about the integrity of decision making, including conflicts of interest, judicial competence, decisions that stand on inaccurate statements of the record, and decisions based on theories not argued by the parties. In the broader context, the lawyer is an advocate for general client interests, including low cost, quality, and structural fairness. To illustrate, structural fairness at the intermediate appellate level includes publishing and subjecting to review all opinions that make law or exceptions to law. Without publication, a risk exists that difficult and controversial issues can escape scrutiny, and stare decisis could be avoided. Until the advent of electronic reporting of unpublished intermediate appellate opinions, appellate lawyers were uniquely placed to observe inappropriately unpublished decisions. Even with widespread electronic publication, the advocates of a case and those who closely follow developments in a "home" court are most likely to observe and have an interest in exposing issues of integrity in the process of deciding whether to publish opinions.



## CONSTITUENTS AND ALLIES

Appellate lawyers and judges share the desire to make appellate justice more effective for themselves, parties, and society in general. Judges need allies in the bread-and-butter politics of capturing assets for the judicial branch. Advocating the interests of courts in legislatures and public opinion can be a difficult task. Criminal justice needs are hard to advance from the perspective of defendants because persons accused or convicted of crime are not a popular or powerful constituency. Whatever one may think about the merits of tort reform, the opposing forces use public relations strategies that probably impair the image of the justice system. State and federal judges generally are not powerful lobbying interests in their respective legislative budgeting processes. And appellate courts—particularly intermediate appellate courts—are the least understood part of the judicial branch.

Appellate lawyers have been and can be effective lobbyists for adequate numbers of judges and supporting staff, for adequate salaries and benefits, for court technology, and for court facilities. Lawyers can and do provide a voice for an independent judiciary in a time of polarization.

Lawyers want to understand how judges think, both individually and as a class, and professional activities are one of the few legitimate means for lawyers to observe judges. Volunteer lawyers provide direct court function support in many jurisdictions. Most federal appellate courts sponsor programs through which lawyers volunteer to step into potentially meritorious pro se appeals, usually in exchange for a guarantee that the merits panel will allow oral argument. Several state appellate courts use screened panels of volunteer appellate lawyers as court-annexed settlement or mediation officers. Only a knowledgeable appellate practitioner can be expected to succeed in such a role because appellate settlement almost always requires challenging parties' evaluations of their probability of success and often requires educating inexperienced counsel about standards of review and appellate remedies.

Lawyers want to convince judges to adopt user-friendly rules and practices; judges should want to do so, because user-

friendly processes are more likely to produce friendly users and user-friendly products. Lawyers, especially in private practice, help drive information technology developments in courts. Client demand and profitability tend to pull technological innovation faster in the private sector than efficiency campaigns or individual initiatives can push it in the public sector. Courts can adopt technological innovations after they have proved successful in law offices. Indeed, in areas like electronic filing of briefs and records, courts must depend on private sector development of computer applications that will deliver a usable product at a reasonable cost.

Appellate lawyers can and do perform a public education function. Lawyers educate clients about appellate courts in the process of evaluating an appeal and selecting issues. Readers of this paper universally understand that appellate courts do not take new evidence from witnesses, but many members of the public learn that fact first from an appellate lawyer explaining the process. Courts in some states hold occasional “outreach” sessions in which they invite high school and college classes to attend arguments after studying cases on the calendar. Lawyer volunteers are valuable to these programs for creating study guides, appearing in classes to prepare students, and conducting post-argument classes.<sup>11</sup>

Some bar association groups publish practice guides when commercial publishers have not identified a profitable market. Others produce basic appellate procedure handouts that appellate court clerks can provide to parties representing themselves.

The development of appellate communities in states or circuits with a substantially specialized practice is much more diverse than envisioned in the few lines addressing bench-bar relations in the *Appellate Justice: 1975* papers. State bar associations and most large metropolitan bar associations have appellate court committees. The Litigation Section of the

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11. See e.g. California Supreme Court, Special Oral Argument Session, <http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/documents/educators.pdf> (Dec. 7-8, 2004) (formal study guides prepared for a California Supreme Court outreach session) (accessed June 30, 2006; copy on file with Journal of Appellate Practice and Process); Mary J. Deits & Lora E. Keenan, *Getting To Know Us: Judicial Outreach in Oregon*, 6 J. Appellate Prac. & Process 237, 244-48 (2004) (report of less formal outreach program conducted by the Oregon Court of Appeals).

American Bar Association has an appellate practice committee, and the Appellate Judges Conference of the ABA brings practitioners and judges together in both organizational activities and programs. Several peer-reviewed societies exist, including ours, the California Academy of Appellate Lawyers, Illinois Appellate Lawyers Association, and the Washington Appellate Lawyers Association. The Fifth, Seventh, and Eighth Circuit Courts of Appeals have their own voluntary membership bar associations. Informal coalitions of judges and practitioners have organized regular luncheon meetings to promote civility.<sup>12</sup> Working cooperatively, courts and lawyer groups can implement management initiatives (including mediation and settlement programs), technological initiatives, appellate education programs, civility programs, and rules changes. Reciprocity of respect is essential to these developments.

Lawyers and courts are allied in developing rules of appellate practice and in assuring adherence to those rules. Greater cooperation in this function should enhance the adjudicative function. Most ethics rules do not address appellate practice issues directly. For example, while many rule sets require all lawyers to cite controlling adverse authority to a tribunal and forbid outright misrepresentation of facts, we have not found a rule set that directly addresses unprofessional descriptions of the testimony in an appellate record.

#### PERSISTENT PROBLEMS IN APPELLATE PRACTICE

The published “how-to” literature leads to an inference that courts are not consistently receiving the appellate work product they deserve. Occasional direct survey evidence supports the same conclusion.<sup>13</sup> Our members’ experience is similar. Appellate lawyers cannot demand a place at the table of designing appellate justice without acknowledging that reforms are needed in their part of the process.

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12. See Elliot L. Bien, *Toward a Community of Professionalism*, 3 J. App. Prac. & Process 475 (2001).

13. See e.g. Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. App. Prac. & Process 141 (2002); David Lewis, *Common Knowledge about Appellate Briefs: True or False?* 6 J. App. Prac. & Process 331 (2004).

Unfortunately, too many appellate briefs reflect ignorance of critical elements of the appellate process, including concepts of standard of review, prejudicial error, and remedy. Lawyers who do not understand these concepts are incapable of performing the vital issue selection process and therefore present cases with too many issues, the wrong issues, or no legitimate issues at all. These briefs and the oral arguments supporting them show little or no understanding of how appellate judges analyze cases and make decisions. Without that understanding, the lawyer cannot orient to good advocacy in the appellate environment.

Appellate judges and critical lawyers also report persistent writing problems including verbosity, poor organization, and foggy expression.

External factors create some of the problems in appellate practice. For example, in criminal defense practice, the advocate must preserve issues in intermediate appellate courts for higher review or potential future habeas corpus proceedings, even when the outcome in the intermediate court is foretold. An issue foreclosed by horizontal or vertical stare decisis must be supported fully by a factual statement and legal analysis to prevent a later finding of waiver. Obviously, both the advocate and the court would prefer a section in the brief reciting issues preserved in terse summary, but this option requires changing statutes, higher court precedent, or both. This kind of defect presents opportunities for bench-bar cooperation to improve appellate justice.

Economic factors also impinge on effective appellate practice. In some states, appointed criminal defense counsel are not adequately compensated, trained, or both. Other states have found solutions that should be shared by courts and appellate lawyers nationwide. On the civil side, the tradition of the trial lawyer who handles a case from first interview to last order of the highest available court dies slowly despite the growing understanding that few lawyers can optimize both trial and appellate skills. Appellate briefing may go to the bottom of a trial lawyer's work pile or to a subcontractor who is invisible to the court. The practice of pyramiding driven by leverage-based compensation systems in some large firms can result in litigation

partners assigning critical elements of appeals to junior lawyers who do not understand the process.

Sadly, these problems are not new. Appellate judges and experienced practitioners have been writing and teaching the same basic principles of appellate advocacy for at least fifty years. Nevertheless, appellate courts are flooded with defective briefs that violate those principles. From coast to coast and border to border, appellate judges consistently report that specialized appellate practitioners generally deliver useful, competent work product but that trial lawyers who do their own appeals often fail the needs of both their clients and the courts. Why? It is time to recognize that books, articles, and courses on appellate practice do not reach most trial court lawyers and general practitioners. Appellate process does not interest them, and they view continuing education in the field as not cost effective. And rightly so. It makes no economic sense to invest the time and money required to develop the writing habits, problem solving habits, technology support, and judicial information base of an appellate lawyer when one's expected appellate practice consists of infrequent efforts to revive failed cases and hold onto trial victories.

#### RECOMMENDATIONS FOR IMPROVING THE FUTURE FUNCTION OF APPELLATE LAWYERS

Any serious consideration of the future functioning of appellate courts must analyze and project the roles that lawyers can and should play. Well planned programs can materially enhance practitioners' contribution to the adjudication process and to the effectiveness of appellate courts as social and governmental institutions. Broadly, such programs fall into two areas: those that systemically improve appellate legal services and those that forge effective alliances between bench and bar.

First, the appellate justice system, and the justice system as a whole, should recognize and develop appellate practice, particularly in intermediate appellate courts, as a specialty separate from general litigation. This is an evolving phenomenon. On the civil side, sophisticated clients understand that specialization leads to reduced expense, realistic evaluation, and the potential for better results. This word is spreading into

broader markets. On the criminal defense side, states like California have succeeded in rationalizing cost while providing appropriate quality by using rated, supervised panels of specialized lawyers. The trend will continue with or without formal action. Nevertheless, the best way to address continuing shortfalls of attorney performance is to augment the market evolution of appellate specialization by developing processes that require lawyers who appear in appellate courts to have certain basic knowledge of what they are doing. Lawyers who focus significantly on appellate practice beyond the cases they try have the incentive to develop expertise by experience, reading, and course work. They also have the incentive to participate in all the other functions that make lawyers important to the future of appellate justice, including training and mentoring novices.

Second, appellate judges and court administrators should develop and cultivate bar organizations to help improve practice in appellate courts, relationships among practitioners, and lawyers' relationships with judges and court staffs. Fostering these relationships inevitably will help increase the usefulness of lawyers' work product for judges, educate all participants in the system about others' needs, and expand the resources of appellate courts in their relationship with legislatures and the public.

More specifically, we suggest the following measures.

#### *State Bar Specialization Programs*

All states that certify legal specialists in any field should develop a certified appellate specialty. States that do not certify legal specialists should develop a specialization program, including appellate practice.

#### *Federal Appellate Court Admission Standards*

The intermediate federal appellate courts should adopt rules for admission that require demonstrating a minimum level of competence in appellate practice. The Devitt Committee's work

provides useful precedent, just as its reception in much of the country teaches that this proposal is controversial and requires strong will and perseverance to implement.<sup>14</sup>

### *State Appellate Court Competence Standards*

State appellate courts should develop relations with regulatory agencies and bar associations that lead toward adopting rules that require demonstrating a minimum level of competence as a condition to briefing and arguing cases in appellate courts. Rules should grant automatic qualification for persons certified as appellate specialists by the state's lawyer regulatory body or by the lawyer regulatory body of another state in which the person is admitted to practice; to persons employed by public agencies to represent the state specifically on appeal or to represent convicted indigents specifically on appeal; and to persons certified by nonprofit indigent appellate defense management organizations as qualified for appointment. Persons not automatically qualified should be required to establish successful completion of certain minimum training delivered by providers certified by the state's lawyer regulatory body or the court.

### *Federal Circuit Bar Associations*

All intermediate federal appellate courts should develop or further cultivate circuit bar associations devoted to improving appellate practice and relationships with appellate judges and court staff.

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14. See *Final Report of the Committee to Consider Standards for Admission to Practice in Federal Courts to the Judicial Conference of the United States*, 83 F.R.D. 215 (1979).

### *State Court Bench Bar Organizations*

State appellate courts should cultivate relations with nonpartisan professional associations to develop constituency groups devoted to improving appellate practice and relationships with appellate judges and court staff.

### *Expand Resources*

Among programs for circuit bar associations and other bench-bar groups, more courts can use experienced appellate lawyers as court-annexed settlement and mediation officers. Courts that do not offer pro bono programs for potentially meritorious pro se appeals should consider doing so. Such programs can be expanded by offering experienced appellate lawyers as volunteer mentors to pro bono lawyers who do not have mentors available to them in their practices.

### *Outreach, Ethics Rules, and Education*

The circuit and state bar groups should provide educational and public informational programs on the appellate process. They also should work for the adoption of additional ethics rules that address unique concerns of appellate practice. They should provide forums for exchange of views on the decision making process.

## CONCLUSION

We close by stating that we offer our suggestions not to benefit those who currently specialize in appellate law but to benefit the courts and the public by multiplying the numbers of able appellate practitioners and enhancing the quality of appellate practice. Specialization, admission, and qualification programs of the kind we suggest have the purpose and must be designed to assure minimum competence, not market limitation. The Academy is one of several peer reviewed national law societies. Generally members of such groups in private practice are in high demand and do not benefit competitively from



formal specialization programs. Regulatory oversight and certification can augment the inevitable flow of legal markets toward specialization without conferring significant economic benefit on anyone except those who make the commitment to keep up with the times. There is no unfairness in this.

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