

What It Means To Be A Federal Appellate Judge -- A Fable

Address by Senior Circuit Judge Frank M. Coffin
of the U.S. Court of Appeals for the First Circuit
to Luncheon for Newer Judges
February 8, 1993
National Workshop for Appellate Judges,
Washington, D.C.

Introductory Note:

Senior Judge Frank M. Coffin of the First Circuit addressed newly appointed circuit judges on the subject "What It Means to be a Federal Appellate Judge," at the 1993 National Workshop for the Judges of the U.S. Courts of Appeals. Professing himself unable to lecture his peers with a straight face, he read the accompanying fable which he claims to have found in an odd volume of anonymous writings which he purchased at a second hand book store.

Alex's Quest

Once upon a time, a young middle-aged lawyer, called Alex (short for *Advocatus Lex*), was approached by a judicial selection committee and asked if he would be interested in candidacy for an appellate judgeship. Alex confessed that he had never thought about it and in fact knew very little about the job, what it requires, what it gives, the benefits and burdens, in short, what it means to be an appellate judge.

So, he set forth to find out. He first went to the fount of all knowledge, one of his old law professors. The professor was clearly unenthusiastic, saying, "Oh Alex, I'm really disappointed. I had such high hopes for you. I always thought you were bright enough to teach. But I suppose judging is useful, so long as you don't become bored with such pedestrian work."

Shaken a bit, the pilgrim next consulted a community leader -- an editor of an important publication. What could he say about being an appellate judge? Long pause, then "Well. The only ones I know anything about are Holmes, Hand, and Cardozo. The reason I remember them is their pithy epigrams and elegant prose. I don't know a thing about what they decided, but, man, could they write!"

Not feeling helped by this footnote to fame, Alex called on the local civil liberties activist. This worthy was quick to respond. "Appellate judge? Wonderful. Go for it. We have too few good ones. They are in a position, if only they have the will, to be a powerful force for good."

Sensing that this view might be one-sided, Alex dropped in on the crusty, long-time executive director of the local chamber of commerce. He also wasted no time and used almost the same words in responding. "Appellate judge? Wonderful. Go for it. We have too few good ones. They are in a position, if only they have the will, to bring to the law some sense of stability and coherence."

Alex, sensing some disparity in these views, next approached an average citizen. Alex could tell he was an average citizen because he was wearing a shirt with a blue collar and the cap of an always losing baseball team, and investing his hopes in his Little League try-out pitcher-son. This citizen at first had trouble in focusing on appellate judges as distinguished from judges in general. Only when Alex mentioned the Supreme Court as an example, did he brighten up and say, "Oh yeah. I know who you mean. Those are the guys that let convicted criminals go scot

free, hate school prayer, love abortion, and encourage flag burning."

Alex decided to leave before a crowd gathered. He thought to himself that maybe he could get more balanced views from professionals who themselves were participants in the justice system. First he talked with a friend who was a trial judge. On being told the object of Alex's quest, he frowned, then laughed as he said, "Appellate judges? Alex, my boy, those are the chaps who ride down from the hills after the battle is over and shoot the wounded. They make it an art to take months to say why what a trial judge has to decide in twenty seconds was clearly wrong."

Next on the list was the local prosecutor. His assessment: "The trouble with appellate judges is that they live in an ivory tower. They make the job of a police officer as complicated as a game of chess."

Later, from the Public Defender: "The trouble with appellate judges is that they live in an ivory tower. In case after case they overlook the most unconscionable police conduct and haul out that overworked escape hatch, 'harmless error.'"

Alex, in talking with other lawyers he knew, who had argued cases on appeal, learned from some that appellate judges wrote insufferably long and over complicated opinions but from others that they ducked their responsibility by writing short, unpublished opinions or made decisions without any reasoning at all.

Finally, Alex was interested in knowing what the other branches of government felt about appellate judges. A legislator friend fairly exploded as she fumed about the insensitivity of appellate opinions that made a mockery of legislative intent. She added, "The reason our statutes are getting longer and longer is that we have to make sure the judges do their job in keeping the executive agencies under control." Then a long-time civil servant told Alex that the big problem with appellate courts was that they were far too intrusive and tried to second guess agency decision making.

By this time, Alex felt like a Gallup pollster. He knew what others thought, but what some thought was exactly the opposite of what others thought. All, however, had one thing in common: they were views from outside. He still had no idea of what appellate judging was like, where the frustration and pain were, or the joys and satisfactions. So he did what he should have done all along. He sought out the wisest appellate judge he knew -- old Judge Sage.

When Alex entered Judge Sage's chambers, he saw the judge at the far end of an old fashioned stand-up desk . . . the quintessential image of another age. But as the judge turned to greet him, Alex saw that he had been writing, not with a quill pen, but with a lap top computer. "I like to do this standing up," said the judge. "It keeps my opinions reasonably short."

Alex explained his quest. Judge Sage thought a bit and said, "Well, first of all, you should examine yourself to see whether you'd be best and happiest as an appellate judge rather than a trial judge, because openings for that job are likely to occur also."

Alex nodded and asked, "Is there any difference between them in demands and satisfactions?" Judge Sage replied, "Oh yes, indeed. To begin, there is or should be no class distinction between trial and appellate judges. Indeed, if we had to have only one level of judges, we'd have to say that the trial judge is the more indispensable. But in truth both are indispensable. Secondly, a wise decision on this issue is largely a matter of one's tastes and talents. Some judges I have known have been superb both as a trial judge and as an appellate judge. But generally, the qualities that go to make a trial judge truly outstanding are quite different from those an excellent appellate judge must possess."

"A trial judge savors the individualism of his or her role and challenges. The judge alone

is in charge of managing cases, governing the courtroom, running the trials, rendering decisions, based on the reasoning that best appeals. The trial judge stands out and is judged as an individual -- for alertness, quickness, soundness, knowledge of human nature, compassion, and courage. And of course the trial judge signs up for the agonizing chore of imposing sentence."

Judge Sage paused for a long moment, then said, "The calculus of demands and rewards for an appellate judge is more subtle. Individuality is of course prized. Thoroughness in preparation, brilliance in analysis, articulateness in questioning, elegance in writing are given their kudos. But the most meaningful accolade is to say of one that he believes an appellate task is well done when it is the product of a willing collegial consensus, that in arriving at consensus he has brought out the best in others, and has abided his own frustrations with tolerant good humor. For the quickness and decisiveness of a trial judge, the appellate judge must substitute patient reflection and the willingness to change one's mind. Instead of the more obvious courage required in making a decision that one knows will be unpopular with government, the media, and the public, the appellate judge's courage lies in being honest with the facts, faithful to principle, and persistent in pursuing an important issue to the point of exhaustion.

Judge Sage continued, "This is the burden of being one among several. The rewards for an appellate judge are considerable -- if you have the peculiar tastes and talents required. To begin, there is the quiet quintette of appellate activities: reading, listening, discussing, thinking, and writing. If you think of these with pleasure, chances are you'll be happy on an appellate bench. Then, there is the richness of adding a dimension to your own family." Judge Sage sighed happily and said, "I have had over 75 law clerks in my judicial life. They have not only kept me young in heart and on my mental toes but have become a permanent part of our extended family. The relation between a judge, particularly an appellate judge, and his clerks is one of the richest society has encouraged."

"Then there is the unique and complex relationship of an appellate judge with his colleagues. I've mentioned the burdens of collegiality. In these times particularly, it doesn't always come naturally. It has to be deliberately cultivated by listening carefully, going out of one's way to show one's concern for another's problems, suppressing one's pride of authorship, yielding on non-essentials. But when judges become real colleagues, they enjoy one of the rarest of human boons -- the ever ready advice and counsel of a peer who is as deeply interested as you in the integrity and excellence of your court -- and is equally caring for you.

Then Judge Sage stopped, faced Alex with a searching look, and said, "I doubt if I have said anything that has not been said many times by others. But there is one fact about appellate judging that, as I look at the world about us, seems more precious, more to be valued, than any other. The Greeks had, not a word, but a series of carefully chosen words for the good life: "The exercise of vital powers along lines of excellence in a life affording them scope." Indeed, we could add one other ingredient that goes the Greek formula one better: exercise of vital powers -- lines of excellence -- a life affording them scope -- for the public good. Alex, you should copy these words and put them in a corner of your desk blotter or some place where, when frustrations mount, you can read serenity back into your life."

"I say this is almost uniquely appropriate to the life and work of an appellate judge. When one looks at the pace and pressures of a legislator, particularly a U.S. Senator or Congressman, or those of a President, Governor, or high official in a department or agency, or those of a Chief Executive Officer or University President, one comes to appreciate the enviable opportunity of an appellate judge to work away at an important case long enough to reach the point where he feels he has 'gotten it right.' Who else, I ask you, Alex, has the luxury of having

an important problem to solve, a problem which is manageable in the sense that there has to be an answer, the time and resources to put one's best effort into the solution, and the assistance of colleagues as dedicated to finding the right solution as you are?"

Judge Sage paused and Alex got up to leave. But the old judge bade him stay a bit longer and continued:

"Alex, I can see that being an appellate judge interests you. I have only one thing more to say. If by good fortune you are selected, be wary. In my forty years on the bench I have seen great changes, changes in the type of cases, an arithmetical increase in appellate judges, a geometrical increase in cases, a revolution in technology -- as my stand-up desk and lap top computer testify. Despite these changes, I have felt able to give to important cases the same attention in depth that I always have.

"But, looking ahead, I am not so sure. It seems to me that, apart from being the best judge you can be, your other most solemn obligation is to try to preserve the essence of the work of appellate judges as I've tried to describe it to you. So these things I recommend to you:

First, develop your judicial nose in order to distinguish the issues and cases which deserve your best attention from those where the rightness of decision does not require elaborate writing.

Second, teach your clerks the same sense of priority. Spend time at the beginning of their term in showing what you like and don't like in substance and in style, then try to arrive at a relationship where your training and trust make detailed editing unnecessary. In other words, use your clerks to the best advantage.

Third, maintain a watchful eye for what I call overburden -- the taking on of obligations which, when all is said and done, are not worth the cost when measured by the time taken from the judging process. I know this may sound like heresy, but there comes a point where further involvement of time in chores of administration, in committee work and the preparation of reports, in meetings, conferences and workshops, exacts a toll in both a judge's ability to keep on top of his essential job and his serenity in trying to do so. In short, my fear is that when judges try to achieve state of the art in everything, the judiciary will have lost its essence and become, instead, a technocracy, a very impressive one, but a technocracy."

"These, Alex, are what I call your internal protection devices. But, more than ever, what kind of judging is possible depends on people who are not judges -- the lawmakers. In the substantive laws they enact and in their zeal for exercising oversight they have already changed the landscape. It is not my purpose to lament this, but only to say that as a new judge, you, unlike those of my generation, will have to find ways to develop a perceived community of interest with the legislative branch."

"And, finally, for the same reason and with the same aim of moving with the times while preserving the essence of appellate judging, your generation will be wise to consider yourself educators of and missionaries to the public. No longer, I fear, can we safely assume that people, their elected leaders, and the press automatically possess the understanding of the needs and limitations of the judiciary that is necessary if the vital essence of our work is to be preserved."

With that, the old judge stood up. The interview was over. But not quite. His eyes brightened as he said, "But I used the word 'wary' not 'worry.' If you are appointed, be prepared to enjoy. It's still the best job in the world."

And he turned back to his stand-up desk. As Alex took his leave, he heard the old judge singing, slightly off key, "When the saints go marching in." He could just make out the words, "I want to be one of their number."