Federal Court Practice: A Day in the Life of the Federal Court
The Appellate Perspective

Outline of Remarks of Senior U.S. Circuit Judge Frank M. Coffin
Holiday Inn by the Bay
May 11, 1990

I. In the District Court:

The importance of a record to preserve points of alleged error for the courts of appeals: objections, offers of proof, motions (preventive, curative, dispositive, and salvage), and requests for instructions.

In particular, the importance of a Rule 56(f) affidavit of need for a continuance to obtain further information relevant to summary judgment; the need for specificity in making objections; the essentiality of repeating a denied request for instruction after the charge has been given -- the latest First Circuit case on the need for objection after charge is Castrignano v. E. R. Squibb & Sons, Inc., Nos. 89-1650, 1733, slip op. (1st Cir. April 5, 1990); the general wisdom of giving the district court an opportunity to reconsider.

See generally Background Paper A: "Points in Litigation Spectrum Where Issues Must or Can be Raised" Parts I and II.

II. Post-Trial Motions:

A. A second shot:

1. Motion to reconsider -- give judge a second chance. Sometimes a motion requesting reasons for denying"(or giving) relief will serve the same end.

2. Motion to amend pleadings: this is late, but if no prejudice, may have a chance.

3. Motion for remittitur.

4. Motion for j.n.o.v. -- especially if judge was on fence in letting case go to jury.

5. Motion for new trial -- this is a long shot but is a rare anchor to leeward (e.g., if there is no evidence).

B. Interlocutory Appeal:

1. Rule 54b -- disposal of fewer than all parties/issues; certified by judge.

2. Sec. 1292(b) -- controlling question, certified by judge, allowed by appellate court.

C. Mandamus

-- Where no appeal is available; most urgent and important issue.
-- Rarely given.

D. Interlocutory Motions:

1. To stay a decree.

2. Enjoin a party pending appeal.

3. Bail pending appeal.

[Make all above to trial court first. Try to get reasons for denial stated, or, if you oppose granting, the reason for granting.]

4. Motions for summary

-- reversal
-- dismissal
-- affirmance

5. Motions to expedite appeal.

E. General Comments:

1. Be selective. Don't cry wolf.

2. Give trial court a chance; ask for reasons.

3. Be succinct. A staff attorney and motions judge will read your papers.

F. Possible Achievements:

1. If trial judge is way off base, quick victory.

2. If get stay, injunction or bail it presages victory.

3. It shows case is close; educates one or more judges; creates interest.

4. At a minimum, it may get expedited treatment.

III. Deciding whether to appeal:

The importance of client control and the accumulating case law on sanctions. Five cases in 1990:

Bay State Towing Co. v. Barge American 21, Nos. 89-1042, 1155, 1335 (1st Cir. Mar. 30, 1990). $7,500 attorneys fees awarded on appeal of Rule 11 sanctions.

Macdouglis' Cape Cod Marine Service, Inc. v. One Christina 40' Vessel, No. 89-1884 (1st Cir. Mar. 30, 1990) . Appeal of vacation of default judgment in rem for misrepresentation to court of nature of claims, hence, lack of proper notice. Double costs and $2,500 attorneys fees.

N.E. Alpine Ski Shops, Inc. v. U.S. Divers Co., Inc., No. 89-2017 (1st Cir. March 21, 1990). Cyr.. Claim of termination of distributorship agreement is wholly unsupported on record. Court characterizes appeal as "hoping for nothing less than a miracle." Awards attorneys' fees and double costs.

Brown v. Commissioner of Internal Revenue, 896 F.2d 10 (1st Cir. 1990). Per curiam. Hockey player given notice of deficiency with 230 others failed to prosecute his claim. Tax court repeatedly allowed additional time to settle and delayed trial date. Finally, court dismissed. Appeal of dismissal is deemed frivolous due to incomprehensible briefs and no suggestion of a legitimate basis for appeal. Double costs.

Cruz v. Savage, No. 88-1770 (1st. Cir. Feb. 20, 1990). Caffrey. This was an appeal from sanctions under Rule 11 for frivolous and vexatious litigation in a case involving an investigation, search and disciplinary proceedings against a high school student. The appeal itself was found to be vexatious in the same manner as the earlier proceedings, so not only were Rule 11 sanctions affirmed, double costs and $1000 attorneys' fees were awarded.

In addition, there are at least five cases in 1989. A long discussion of frivolous appeals is to be found in Applewood Landscape & Nursery Co., Inc. v. Hollingsworth, 884 F.2d 1502 (1st Cir. 1989), an opinion by Chief Judge Breyer.

Also of particular note is Lisa v. Fournier Marine Corp., 866 F.2d 530 (1st Cir. 1989), in which costs and attorneys fees were assessed against counsel personally.

Thomas v. Digital Equipment Corp., 880 F.2d 1486 (1st Cir. 1989); In re Public Service Co. of New Hampshire, 879 F.2d 987 (1st Cir. 1989); Lozano v. Banco Central y Economias, 865 F.2d 15 (1st Cir. 1989).

IV. Technical Preparation of the Appeal:

A. Timeliness Rule 4

Note that one must invoke subsection 5, excusable neglect, within 30 days after the 30th day after entry of the judgment or order appealed from.

B. Consolidation:

Rule 3(b) (consolidating cases)

Filing a consolidated brief, Rule 28(i) (a single brief is better than five).

C. Simplifying the Record

Local Rule 10 states that we encourage counsel to enter into stipulations under Fed. R. App. P. 30(b) that will avoid or reduce the transcript. Note also that Fed. R. App. P. 10(c) requires an agreed statement of facts in the absence of a transcript to be submitted to the district court for approval. We have seen many cases when there has been an unbelievable excess of transcript material supplied. Note that Local Rule 3 0.8 provides for "sanctions against attorneys who unreasonably and vexatiously increase the cost of litigation through the inclusion of unnecessary material in the appendix." On the other hand, care should be taken that essential material be included in the appendix. See Local Rule 30.1 noting that the court "may decline to refer to portions of the record omitted from the appendix." Fed. R. App. P. 10(b)(2) requires all relevant evidence if argument is to be made that a finding is unsupported by the evidence.

D. Be careful to specify in the notice of appeal all parties to the law suit. Mariani-Giron v. Acevedo Ruiz, 877 F.2d 1114 (1st Cir. 1989) ("A court of appeals lacks power to entertain an appeal from a party who is not specified in the notice of appeal. Torres v. Oakland Scavenger Co., ___ U.S. ___, 108 S.Ct. 2405, 2408-09 (1988) . . . .")

E. Motions During Appeal Process

Generally, rules allow 7 days but court tacks on 3 to cover mail time -- but if service is made in hand, the 7 day rule applies.

Court can act immediately on procedural motions, but don't be afraid to seek reconsideration if you think the decision too hasty.

V. The Brief:

A. The two major approaches to brief writing: text for the panel and footnotes for the writing chambers. Bear in mind that in addition to your brief, the judges will be reading briefs in 15 to 20 other cases, totalling 1 to 2,000 pages.

B. Note Rule 26.1 requires corporate disclosure statements to be filed with the brief. (A statement identifying a parent company, non-wholly-owned subsidiaries and affiliates.) The statement is to be included in front of the table of contents of the parties' principal brief.

C. Note Rule 28.2 (an insert in the hand out of the Federal Rules of Appellate Procedure and Locals Rules at page 18a) requires that counsel include in their briefs an addendum containing the opinion of the court below as well as any key jury instructions, exhibits or critical excerpts from the transcript.

D. Motions for extension of time for filing a brief are granted on only extreme showing of necessity. The current practice is to require the filing of a brief within one week of the motion.

E. The court is increasingly reluctant to grant enlargement of briefs over 50 pages. Indeed, counsel should endeavor to stay well below the 50-page limit.

F. Reply briefs which merely repeat arguments previously made are not helpful. On the other hand, a memorandum citing recent authority published since the briefs were written is appropriate.

VI. Oral Argument:

A. Prepare, retreat, and rehearse for both hot and cold court.

B. If there is good reason to seek additional time, file a well supported motion.

C. Ascertain level of court's comprehension; don't waste time on facts or procedural background if known to court; exploit first three minutes of argument; don't be led into blind alley (resort to "later," a reminder that you have two more issues to discuss, and ask for two more minutes if necessary).

D. Don't try to save bombshell for rebuttal; Local Rule 34.1(b), court's discouragement of advanced reservation of rebuttal time.

E. Catalog of typical and difficult questions from the bench. See Background Paper B.

VII. Post Argument;

A. Petition for rehearing

-- seldom effective; be selective

B. Petition for rehearing en banc

-- even less effective; be more selective

C. Motion for stay of mandate --

-- rarely granted -- but if issue was close and lack of stay would be irreversible, might grant. Note Local Rules 35.1 and 35.2, requiring specific expressions of belief and mandating sanction if without merit, or vexatious, multifarious, or filed for delay.

D. Motion to recall mandate

-- if good ground exists for asking court to reconsider.

Generally, all purpose advice: Don't be afraid to consult the clerk, Peter Scigliano or his chief deputy, Dan Loughry.

Background Paper A

Points in Litigation Spectrum Where Issues Must or Can be Raised

Prepared for Class in Appellate Process
University of Maine Law School by
Judge Frank M. Coffin

I. Pretrial

A. Complaint:

Must cover all claims, citing statute.

B. Pleadings and Motions:

-- Motions to dismiss under Fed. R. Civ. P. 12. Indeed, if not raised, defenses of improper venue, lack of personal jurisdiction, insufficiency of process or service are waived.

-- Affirmative defenses must be specifically pleaded.

-- Motions for summary judgment under Fed. R. Civ. P. 56. (Know and use Rule 56f -- Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order continuance. Don't try to argue an unfair limitation on discovery if you haven't made a 56f motion.)

-- Some motions must be made pretrial -- challenge indictment, motion to suppress, challenge to jury, discovery and severance.

-- Be sure to include in record on appeal any relevant memoranda to show that points were raised.

C. Pretrial Order:

Make sure you can comply with provisions concerning deadlines for discovery, identifying and deposing experts and other witnesses, exchanging exhibits, obtaining advance approval for demonstrative aids.

Make sure it reflects all your contentions.

D. Pretrial Hearings on Admissibility of Evidence and Acceptability of Legal Theories:

Make sure a reporter is present, or that a record is kept of your position, the judge's ruling and reasons.

E. Stipulations:

Time can be saved and a clearer record for appeal can be assured in some cases by stipulations.

F. Request for Admissions can serve the same purpose of developing the essential facts.

G. Prepare:

-- Memos on evidence issues; raise questions in advance.
-- Offers of proof.
-- Requests for instructions.
-- All of above involved research that will be relevant for appeal purposes.

H. The Rare Pretrial Interlocutory Appeal:

-- In criminal cases the U.S. may appeal, under 18 U.S.C. § 3731 (assuming no double jeopardy problem):

  -- dismissals of indictments
  -- granting of new trial after verdict
  -- order suppressing evidence or returning seized property
  -- order releasing a defendant or reducing bail pending appeal

-- When a criminal defendant claims double jeopardy
-- When a defendant invokes the Speech or Debate Clause
-- When a defendant in a civil rights case (42 U.S.C. § 1983) claims entitlement to qualified immunity as a matter of law based on the pleadings.
-- Separable, collateral, important rights which would not otherwise be effectively reviewable.

II. Trial

A. Objections:

1. In selecting a jury -- advance any grounds for objecting to a juror.

2. To evidence --

-- Timeliness
-- Specificity
-- Make sure judge understands, even ask to reconsider. Repetition may eventually succeed and is necessary to avoid waiver.

3. To sending a discrete issue to jury -- if there is insufficient evidence.

4. To proposed finding of judge, special verdict forms, and interrogatories.

5. To closing argument

6. To inconsistent jury verdicts -- before the jury is discharged.

Make objection or motion promptly; risk waiver of objection if delay until conclusion of argument.

B. B. Offers of Proof:

Think ahead and foresee your problem. Be as precise as you can. Cite authority. Make it of record. If judge doesn't allow, use a written motion to consider to get offer on record.

C. C. Motions:

1. Preventive:

-- To see original documents
-- To voir dire an expert or other witness
-- To subpoena a missing witness
-- For continuance, if you are unfairly surprised

All above illustrate the moral: don't leave any stone unturned . . . or a stitch in time . . . .

2. Curative --

-- For a curative instruction, after testimony or in closing argument
-- To strike -- if your objection was a little slow

3. Dispositive

-- Mistrial -- if evidence or argument poisons trial.

-- Directed verdict --

    -- Be specific as to defect of evidence
    -- At end of plaintiff's case
    -- Renew at close of all evidence
    -- This is predicate for motion j.n.o.v.

4. Salvage --

-- Amend complaint to conform to evidence
-- Reconsideration of earlier rulings (especially if evidence differs from proffer).

D. Requests for Instructions:

-- Be specific
-- Support by evidence
-- Cite case or statute authority
-- Renew after charge no matter what

(In non-jury cases, prepare proposed findings and objections to adversary's.)

III. III. Post-Trial

A. A second shot:

1. Motion to reconsider -- give judge a second chance. Sometimes a motion

requesting reasons for denying (or giving) relief will serve the same end.

2. Motion to amend pleadings: this is late, but if no prejudice, may have a chance.

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2. Give trial court a chance; ask for reasons.

3. Be succinct. A staff attorney and motions judge will read your papers.

F. Possible Achievements:

1. If trial judge is way off base, quick victory.

2. If get stay, injunction or bail it presages victory.

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IV. Appeal

A. Plain error can be argued if issue not preserved below:

1. Criminal case -- if manifest injustice.

2. Civil case -- hardly ever will plain error be noticed.

B. Jurisdictional issues (subject matter not personal jurisdiction) can always be noticed.

C. Occasionally a court will exercise its supervisory power to change long-standing practice.

D. D. Motion to expand record:

-- to show cause is moot
-- to show prisoner has escaped
-- to show whether or how issue was or was not raised below.

E. Letter bringing relevant new case to attention of court (and fellow counsel).

F. Petition for rehearing

-- seldom effective; be selective

G. Petition for rehearing en banc

-- even less effective; be more selective

H. Motion for stay of mandate --

Rarely granted -- but if issue was close and lack of stay would be irreversible, might grant.

I. Motion to recall mandate -- if good ground exists for asking court to reconsider.

Background Paper B

How did you get here, procedurally? Do you have a final judgment . . . on all issues? Aren't you premature?

Why are you here, jurisdictionally? Where's the diversity? Why isn't this case moot?

Where in your complaint (or your answer) have you raised the issue you argue here? Why isn't it noted in the pretrial order? Why didn't you amend?

What is our standard of review? Clearly erroneous? Abuse of discretion? Substantial evidence? De novo? Error of law? Why does your client have standing?

If you surmount those hurdles, and are able to talk about the merits, you may encounter the following questions:

Specifically what facts are disputed?

Did you make a specific objection below? When? What ground did you advance? Where is it in the record? [Be prepared for page cite questions.]

Did you make a specific request for instruction? After the judge's charge did you renew your objection?

Did you renew your request for directed verdict at the end of defendant's case?

When you were surprised at trial by evidence or a witness, did you ask for a continuance?

Did you bring the authority you cite to us to the trial court's attention?

Did you raise this issue with the trial court? How? At what page in the record?

Those are pretty standard questions. Here are some trickier ones:

If I understand your argument, you are relying entirely on _____ v. _____

What is your best case? Your strongest argument?

What is your weakest case?

Why didn't you deal with your brother's third argument?

How do you distinguish _____ v. _____?

Why didn't you cite our case of _____ v. _____?

What is the policy behind your argument?

How would you deal with this hypothetical? If we hold for you, then won't we have to hold for defendant in the hypo? Where do we draw the line?

You are arguing for an exception to the general rule. How do we do this on a principled basis? Help us conclude this sentence, "Despite the general rule barring this claim because of the statute of limitations, appellant is entitled to proceed because . . . ."

If we disagree with the court below, do we reverse or remand for further proceedings?

What remedy should we order?

Should we (if this is a federal court) certify this question of law to the state court?

Should we hold up our decision until the Supreme Court has acted on _____ v. _____?