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## AMPHIBIANS AND APPELLATE COURTS\*

*Leigh Ingalls Saufley\*\**

“Congratulations on finding part-time work!” So I was greeted one fine fall day in 1997, immediately after Governor King had announced that he would nominate me to a position on the Maine Supreme Judicial Court. The greeting came from a hard-working attorney and was only partially in jest. Over the following weeks, I would hear the theme echoed by other attorneys and by my colleagues in the trial courts. Although I was aware from my conversations with the Law Court justices that they believed themselves to be working hard, I began to wonder whether there was truth to the perception that the Law Court is a good place for jurists looking for partial retirement. The other constant refrain went something like this: “After all your exciting times in the trial courts, aren’t you going to be bored in this new position?”

The answer to that question turns out to be a resounding NO! Upon my confirmation, I was immediately inundated with work, and I am still waiting for that part-time job to materialize. Some of you by now have heard my emphatic responses to the typical questions. No, I’m not bored; the job is fascinating, and I’m constantly busy. No, it’s not part-time work; I’m working more hours now than I ever did before. No, I don’t feel more isolated; I’d be happy for more days of solitude to catch up on writing.

In fact, my response to those questions now includes a question of my own: Why aren’t my colleagues and the Bar actively addressing the untenable workload of the Law Court? It is no secret that an appellate court cannot always produce high quality opinions when it has too many cases before it. It is no secret that the quality of the Law Court’s work has been under attack for some time now. It seems clear to me that the occasionally shallow analyses or contradictory opinions issuing from the court are due in great part to the simple fact that the justices do not have the time to fully consider and debate important issues of law. The pressure to get the opinions out and move on to the endless stream of new appeals results in a product that does not always inspire pride or respect.

I have a theory about all of this. Most of us have heard of the “boiled frog” theory of society’s response to violence. For those of you who don’t recognize this syndrome, let me explain.

Scientists say that if you place a healthy frog in a shallow pan of boiling water, it will instantly sense disaster and leap out of the pan. Place that same healthy frog in a shallow pan of warm water, and it will bask in environmental delight. If you then slowly turn up the heat, the frog will acclimate to the rising temperature and will remain in that pan until boiled to death.

Now, at the risk of sounding as if I were comparing my colleagues to amphibians, I believe this same syndrome may be at work in the courts right here in Maine.

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## 1. THE NUMBERS

The caseload of the Law Court, not unlike the trial courts, has expanded significantly over the last twenty years. Unfortunately, as with those frogs, the heat has been turned up so gradually that no dramatic effort to leave the pan has occurred. In 1977, the year I began law school, there were 326 total filings in the Law Court.<sup>1</sup> The workload of the Law Court at that time was thought by the Legislature to be significant, and a seventh justice was finally added to the six-person court. The Law Court issued 164 signed opinions that year.<sup>2</sup>

Ten years later, in 1987, the number of filings had risen to 565.<sup>3</sup> By 1997, the filings were up to 724 annually.<sup>4</sup> In the several years before that, the filings topped 1,000 a year (probably due to the temporary influx of workers' compensation cases).<sup>5</sup> There were 778 filings in fiscal year 1998.<sup>6</sup> The Law Court issued 259 signed opinions and 159 memorandum decisions.<sup>7</sup> In twenty years, the number of cases receiving appellate review by the court has increased by 138%. Since 1977, no justices have been added, very little staff has been added and, I suggest, the complexity of the cases has increased.

Still the frogs of the court make no attempt to escape the pan or even turn down the heat. Why? I believe it has been a matter of priorities. During the same time that the Law Court has slowly been buried under the advancing avalanche, the trial courts have been completely inundated. Family matters and personal protection proceedings deserve and have received large amounts of the system's resources. The Maine Superior Court has been required to handle increasing numbers of complex dispositive motions within a workload that has not let up. The statistics indicate that Maine has fewer trial judges per capita than most other states. Consequently, it is difficult to seek changes for the benefit of the Law Court when the trial courts' needs are so urgent.

Nonetheless, the stark realities of numbers in the State's court of final appeal are daunting. In my first approximately six months on the court, we heard 114 oral arguments and conferenced 181 cases on briefs. In addition, we reviewed 120 petitions for review of workers' compensation matters. Separately, I reviewed, as part of a two or three judge panel, thirty-nine petitions for sentence appeals, and thirteen post-conviction petitions. On top of that, each justice has a number of individually assigned administrative committee assignments and bar discipline matters, and each one of us participates in judicial education programs, bar association programs, including legal education programs, and other events such as moot court competitions, mock trials, and local school projects.

While those numbers mean little in the abstract, in real life they add up to more hours of work than I have ever been called upon to do in my career. Therefore, after reeling from the number of hours consumed by this new job in that first

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1. See 1987 ME. JUDICIAL DEP'T ANN. REP. 45.

2. See *id.*

3. See *id.*

4. See 1997 ME. JUDICIAL BRANCH ANN. REP.

5. See *id.* Filings in 1994 were 1,038.

6. See 1998 ME. JUDICIAL BRANCH ANN. REP.

7. The Author thanks the Office of the Clerk of the Maine Supreme Judicial Court for providing this information.

six months, I sat down with a calculator to determine why I couldn't seem to keep up without giving up enormous chunks of family time.

And here is the answer. If you consider only the full appeals, that is, those heard in oral argument or conferenced on briefs, the cases totaled 295 during that twenty-six-week period. The total number of work days available to the court in those twenty-six weeks was at most 115 days. Thirty days (six weeks) were consumed with oral argument, and six days were used in conferencing on-briefs cases (on-briefs cases are allotted a half day, twice a month — typically, twelve cases are conferenced at a time). Removing those thirty-six days for arguments and conferences, seventy-nine days were available for reading, preparation, research, writing, and completion of all other work. Assuming a ten-hour day, 790 hours were available for those tasks.

A great deal of those hours are, or, I suggest, *should be*, spent in preparation for oral arguments or conferences. Some cases require many hours of preparation. Others, to be blunt, can be absorbed in a couple of hours or less. I had assumed that I would need approximately three hours for the preparation of a case of average difficulty. That time would include reading the briefs, reviewing the important cases on point, reading the bench memo, and reviewing the record. That estimate, however, turned out to be wholly unrealistic. If a justice averages three hours per case for preparation, those 295 cases will consume 885 hours — more than the total work hours available for the entirety of the court's work.

The problem now becomes obvious. No justice can spend an average of even three hours per case preparing for arguments or conferences. Cut preparation time back to an average of two hours (590 total hours) and you return twenty working days to that six-month period — just over three days a month. In those three days, each justice will be responsible for circulating six or seven opinions; reviewing and responding to other justices' circulating opinions; addressing motions for reconsideration; attending to post-conviction matters, sentence reviews, and workers' compensation petitions; presiding over bar discipline and other single justice matters; participating in the various board and committee meetings scheduled each month; and attending to the host of other responsibilities of a justice of the Supreme Judicial Court. And keep in mind that the Chief Justice, who doesn't limit his participation on day to day case work, does all of this while simultaneously carrying an extraordinary administrative load, including many speaking engagements and public appearances, not to mention motorcycle trips with the governor.

These numbers are so significant that I'm going to repeat them. If a justice spends only two hours to understand and prepare each case, the justice has three days available each month to do all the rest of the court's work.

It may be easier to look at the workload with a snap shot approach. The court's month begins with a week of oral arguments, typically twenty-five cases. That is an intense and exciting week. The week before arguments is usually consumed by preparation for those arguments. Again, if each justice averages only two hours per case for preparation, those twenty-five cases for oral argument will consume an entire week. (I cannot imagine preparation for that week actually requiring only fifty hours. Most of us spend many evenings and weekend days surrounded by briefs.)

The other two weeks of the month require preparation and conference of approximately twenty-five cases on-briefs. Although there is a perception that less effort goes into those cases, that is not always the case. The on-briefs cases are, if our screening mechanism has worked, of less complexity than those scheduled for oral argument. Accordingly, those cases should not require the same amount of preparation time that the cases selected for oral argument receive. However, because we will not have the benefit of oral argument to disabuse us of any misconceptions, it is even more important to fully understand the record and issues. Balancing preparation time with the myriad other tasks at hand therefore becomes a not-so-delicate art. In what's left of those middle weeks, we handle workers' compensation petitions, sentencing review petitions, motions for reconsideration, post-conviction matters, single justice assignments, and administrative matters. And when we get a free moment, we try to write opinions, respond to circulating opinions, continue research on difficult issues, attend meetings, and hold hearings.

## 2. THE RESULT

Enough numbers. Simply put, the caseload of the court is so high that there is very little time for reflection, discussion, debate, or even heated arguments. Those briefs you work so hard on may receive an average of less than two hours of thought and consideration by your audience. Those difficult, complex, or troubling issues you have discussed endlessly with your colleagues will have to be dealt with by a court that has little time for similar conversations, discussion, or debate. Most troubling to me, the talented group of people that make up the Law Court have no time to integrate those talents.

Less obvious, but still troubling, is the subtle pressure that may exist to concur with the assigned-writing justice. To do otherwise adds yet another piece of work to an already overloaded desk. Yet, it is the proposal and circulation among the justices of a thoughtful dissent or concurrence that is one of the most effective methods of sharpening and improving the analysis of the Law Court on its way to issuing an opinion. In fact, I have been surprised to find that many dissents are never published. They serve to focus the court and are often responsible for altering and, hopefully, improving the published opinion.

In addition, I have found that there is simply no time to read the transcripts in cases to which I am not assigned. I came to the court fully intending to read the transcripts of all cases in which a factual issue, jury instruction, or evidentiary ruling is at issue. I now confess publicly: I can't do it. I make the time to do so in cases that are assigned to me and in those cases where a significant controversy has been generated. But none of us can do it in all the cases we'd like to. This places extraordinary responsibility on the shoulders of hard working law clerks who often have had little actual experience in the courtroom and may not always understand what they are reading. It also places pressure, appropriately, on the parties, to make very clear exactly what their points are on appeal. Unfortunately, counsel and the parties are not always as thorough or, and I hesitate to say this, as straightforward, as they should be in references to the record.

My biggest complaint is the lack of significant conference time for the court as a whole. The brief twenty-minute conference held immediately following oral

argument, while more than sufficient in many cases, is woefully inadequate in others. And, we have not been able to find a way to meaningfully reconference cases after a proposed opinion is in circulation. We are always working on new approaches, but options are limited by the sheer lack of time.

### 3. THE GOOD NEWS AND THE BAD NEWS

All of these factors combine to rob the Supreme Judicial Court of its opportunity, as they say in some other branch of government, to be all that it can be. I have not, however, written this article merely to complain. There is good news and bad news here.

The bad news is obvious, and I will not belabor it except to add these few points. The press of business can result in equal time for issues of unequal importance and can lead the Law Court to inconsistent or shallow analysis. It may also deprive the court of the time to look to the big picture and consider the long range effects of the language or approaches in certain critical opinions.

It is also the case that very little time is available for the non-authoring justices to edit a colleague's opinion for style, depth of analysis, or grammar when the circulating opinion arrives at the result agreed upon by the court. While we all attempt to assist the author as much as possible, most opinions are stylistically the product of only one chambers's efforts.

The good news is that the members of the court have little time for the petty bickering or squabbles that occur in other appellate courts. We are forced by the sheer volume of work to rely on each other and work well collegially. There are no "coalitions." The justices I work with today on a joint dissent will tomorrow be dissenting to one of my own opinions. And, just as we have little time for reflection, we have no time to make mountains out of molehills.

But the best news for the Bar is that an overworked court presents hard working, well-prepared attorneys with excellent opportunities to make a real difference for their clients.

### 4. SOME PRACTICAL SUGGESTIONS

Toward that end, I offer the following suggestions.

- *Do not squander your credibility.*

*Do not ever misquote cases or the record.* Be absolutely vigilant about such practices in your office. Failure to do so may lose much for your clients and your reputation. It is never worth it.

- *Do get straight to the point in your briefs.*

Remember that every justice has a pile of briefs on a table awaiting review before the upcoming arguments or conference. The brief that sets out the issues succinctly and quickly will be the most successful. Remember what we learned about working with juries? Use primacy. It works with judges. Get right to the point. The first issue addressed is the most likely to have the greatest impact.

- *Do not be subtle.*

If the court cannot rule for you without overruling or limiting prior opinions, say so. If a prior opinion of the court went too far or misstated the law, say so.

- *Do not use the buckshot approach hoping something will stick.*

Some very good arguments have been lost in a sea of extraneous issues. If your client is expecting your brief to be a lengthy and erudite tome, educate him or her on the necessity of brevity and clarity.

◦ *Do quote the specific errant instructions or rulings.*

Remember that not all justices will have time to read even the important parts of the record. It is imperative that the erroneous instruction or inadmissible testimony be set out clearly in the brief. Summaries of evidence with references to the record, even correct ones, are often ineffective.

◦ *Address the weak points in your argument head on.*

If there is a piece of evidence, a procedural glitch, or a piece of instruction that goes against your argument, make sure you also include it and directly address why it does not save the case. When opposing counsel or, worse yet, the law clerk, points out the flaw in your analysis or recitation of the record or precedent, you've lost the battle.

◦ *Do make your briefs physically and visually readable.*

This may seem like a petty point, but it adds up over time. Never use smaller than twelve point type for text. Bind your briefs with comb or spiral bindings that allow the brief to sit open on a desk.

◦ *Make sure your appendix is useful.*

All appendices should be organized effectively, page-numbered, and indexed. Remember that we have little time to hunt for important documents. Each time the reading justice has to stop and search through a poorly organized appendix for a crucial document, phrase, or map, the point you were making in your brief (and maybe winning on) begins to fade from view. Although I hesitate to suggest anything that will increase the paper overload in the Clerk's office, it is also helpful, if there is one seminal case on point, to include that one case. Remember that the press of time means that many of us are reading your briefs at home where we may not have ready access to library materials.

◦ *Do not engage in ad hominem.*

We all know the old adage: If the law is with you, argue the law; if the facts are with you, argue the facts; if neither is with you, call the other guy names. As soon as I see an attack of any kind on the other party, opposing counsel, or the trial judge, I begin to discount the merits of the argument.

◦ *Remember to make your record in the trial court.*

It still surprises me how often appellants will assert that a crucial ruling was made "off the record." Any time a trial judge makes a ruling of import in an unrecorded context, simply ask that judge to briefly restate the ruling when you are back on the record. If necessary, make a brief statement on the record setting forth your position and continuing objection. This can be done in a straightforward manner without wasting time or annoying the trial judge.

◦ *Make your jury instruction requests early and in writing.*

Errors in jury instructions will rarely result in reversals if the request for the correct instruction was either not made at all or not made in time for the trial judge to give it meaningful consideration. Prepare and present your requests for jury instructions *before you make your opening statement*. This will have the effect of focusing you and the court on the elements of the charge or cause of action and will assist in evidentiary rulings as well as the ultimate instructions to the jury. Do

not, however, inundate the trial judge with multiple versions of a single instruction. This has the unintended effect of annoying the trial judge, obfuscating your real point, and limiting your ability to make your point on appeal.

- *Do not file a brief you don't believe in.*

If you cannot find any merit in an appeal, refer your client to another attorney. Do not file a brief built on fog merely to appease a client. You will injure your next client's legitimate appeal.

- *Make the best of your brief time for oral argument.*

Don't hesitate to use visual aids, such as blow-ups of maps or documents, as long as they are contained in the record. Never simply restate the contents of your brief. Take the first five minutes to highlight clearly and concisely the legal path to your client's success on appeal. Consider doing so in a non-professorial manner. Sometimes a little drama or humor will catch the court's attention in a way that your brief did not. If you have one major point and you've set it forth as clearly as you can, turn the argument over to the court for questions. Never feel that you need to "fill up" that five-minute period.

- *Do not move for reconsideration unless there's something actually wrong.*

Many motions for reconsideration are just restatements of the arguments made previously. Those motions are unproductive. Because we circulate all motions for reconsideration, and the authoring justice must prepare an explanatory memo for the whole court, these motions add to the already significant workload of the court. Only if you think that the court has actually misstated the law or has fundamentally misunderstood some material fact in the record should you file a motion for reconsideration. The more motions that are filed, the more likely it is that this vehicle for correction of serious error will become an ineffective *pro forma* event.

- *Do not assume you cannot have oral argument, but don't request it unless you are certain it will help.*

Although we have a limited amount of time for oral arguments, some cases that are scheduled for on-brief treatment would be better addressed through oral argument. In the best of all worlds, every case would be argued. The Law Court simply cannot do so with its current caseload. If you request oral argument, make certain that you provide clear, thoughtful reasons for the request. I reviewed a request recently that was compelling. In it, counsel directly addressed the specific issue of law that had not recently been addressed by the court, identified sources of factual confusion in the record which could be cleared up in oral argument, and identified important public policy considerations at stake. Mere recitations of those concepts, however, will rarely be persuasive.

- *Listen to the questions during oral argument.*

This is no different from listening to the answers during trial. Very often one justice will frame a question in a way that is designed to help the arguer out of a conceptual jam. I've been surprised that, although we all know that appellate courts do that regularly, attorneys are sometimes in such a defensive or combative mode, they don't notice the lifeline that has been extended.

- *Forgive us when we act impatient or get cranky during argument.*

Those weeks of oral argument really are long. Sometimes we get impatient with seemingly frivolous arguments or inadequate records. If that happens to you during argument, the best approach is a calm and on-point response. A sharp or

defensive retort will merely compound the flow of the tide away from your position. On the other hand, if you find it happening to you regularly, consider whether you need to amend your own style or the substance of your appeals.

Now, lest you get the wrong impression, let me assure you that this is one of the best jobs any human being could ever hope for. It's demanding, exciting, and constantly changing. I feel blessed to have this opportunity. I heard this about the job from one of the professors in my class of novice state supreme court justices at N.Y.U.: "A trial judge's job is to do justice to the parties. An appellate judge's job is to do justice to justice." I hope someday to come close to that goal.

After a full year on the court, however, I still feel short for time. Although I have had to learn methods of getting more done in less time, I'm not terribly happy with the compromises that are required. And unfortunately, I still feel like the frog flapping awkwardly in the boiling water. The Chief tells me that it will stop stinging soon. I can hardly wait.

