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## On Appeal: Courts, Lawyering, and Judging

John P. Frank

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## BOOK REVIEW

ON APPEAL: COURTS, LAWYERING, AND JUDGING

by Frank M. Coffin

(New York: W. W. Norton & Company, 1994; pp. 373, \$27.50)

*Reviewed by John P. Frank\**

Judge Coffin,<sup>1</sup> a former Chief Justice of the United States Court of Appeals for the First Circuit, a former United States Congressman, a former Executive Department administrator, is—despite those “formers”—presently a very bright and engaging writer. This compact volume<sup>2</sup> has worthwhile things to say on every aspect of appeals, briefing, argument, deciding the cases, and getting out the opinions. It crisply touches all the appeals phases in which we practitioners are interested.

There is one odd omission. Judge Coffin talks about what he wants in a brief: a good outline, a useful appendix, a table of contents which locates issues, a concise argument, a clear conclusion, and a discussion “that contains not one pejorative adjective or innuendo concerning one’s opponent or the trial judge.”<sup>3</sup> He omits from his list good prose, and what is remarkable in that omission is that Judge Coffin himself has an easy, journalistic style that makes his book a happy read. One would suppose that a writer with so uncluttered a style, such a complete absence of complex sentences or convoluted paragraphs, would ask for the same from those writing for him. If I may for a moment be vainglorious, the highest compliment I ever received was an observation from a clerk in one of our courts of appeal. The clerk said, “Yours are the only papers which come in here that we like to read.” I am sure there are others, and in any case clerks’ offices must be too busy for clerks to read many of the filings, but I turn the phrase back on this author: Judge Coffin writes a book I like to read.

I pass the directly utilitarian portions of the book—how to brief, how to argue—to reach the personal story of how this judge wants to judge. He doesn’t want bench memos. He does want his clerks to discuss the cases with him in advance so that he can be fully prepared. There are cases where his only concern is trying to be certain of what the legislature had in mind. There are others where statutes, for example the antitrust laws, express a broad policy, and here

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\* Partner, Lewis and Roca, Phoenix, Arizona. Mr. Frank and his late partner, John Flynn, prepared the petitioner’s brief in the appeal of *Miranda v. Arizona*, 384 U.S. 436 (1966).

1. Senior Circuit Judge, United States Court of Appeals for the First Circuit.
2. FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* (1994).
3. *Id.* at 119-20.

on occasion he can consider the "greatest good for the greatest number."<sup>4</sup> In other cases, Judge Coffin is simply looking for the law as it is declared in the cases or in other points of intellectual origin.<sup>5</sup>

These are only a small part of the total list of judging factors discussed by the judge. He speaks of idiosyncratic prejudices: one judge has a particular aversion to an especially foul crime, another is intellectually bound today by his practice experience of yesterday, and others decide on the basis of their "social policy likes and dislikes."<sup>6</sup> Strangely, Judge Coffin never confronts the value of doing justice, the equities, what's fair. From my distant days with Justice Black I can recall that, while he rarely fell into a temper about a case, his biggest explosions were at what he thought was injustice. I remember as Judge Black's most explosive utterance, "You can't do people that way!" A recent article by Professor Robert Martineau quotes Judge Albert Tate of the Fifth Circuit, who wants to see that individual justice is done.<sup>7</sup> Judge Coffin, by contrast, writes of the "justice nerve."<sup>8</sup> He represents his own as twitching at unfairness but not with a high vibration. He gives comprehensive discussion to the limits of judicial discretion and is renowned himself as a diligent as well as a fair judge, but he does not wear his fairness on his sleeve.

The judge constructively blasts the over-administration of federal appeals courts. As he observes, "As of March, 1992, 229 federal district and circuit judges served on some twenty-seven committees of the United States Judicial Conference."<sup>9</sup> He believes that federal judges now spend from one fourth to one third of their time on committee work and meetings. All these are at the cost of reducing the judges' time to hear and decide cases.

Let me note a few of Judge Coffin's random observations that suggest the diversity of this work. A view of his with which I enthusiastically concur is that the worst appellate court is the one-judge court, the court on which the opinion has been assigned to someone in advance and the side judges are simply among those present.<sup>10</sup> He applauds moot court practice in preparation for an oral argument;<sup>11</sup> I have argued perhaps five hundred cases over a fifty-year span and would not dream of doing the next one without a moot court first. He has very proper disdain for superfluous dissents and

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4. *Id.* at 247.

5. *Id.* at 247-48.

6. *Id.* at 256.

7. Robert Martineau, *Crafts & Techniques*, GEO. WASH. L. REV. 1, 33 (1994).

8. COFFIN, *supra* note 2, at 262.

9. *Id.* at 310.

10. *Id.* at 168.

11. *Id.* at 139-40.

concurrences: “[T]hey are ruptures in the cloak of consensus ordinarily worn by collegiality.”<sup>12</sup>

There are many fine judges of the United States Circuit Courts of Appeals who, regrettably, never made it to the high nine. As one reads Coffin on liberty<sup>13</sup> and his critique of a whole batch of Supreme Court opinions,<sup>14</sup> one’s main regret is that he never got to express those views from one notch higher on the judicial ladder. That didn’t happen. What we have instead is this worthwhile inheritance for both the work-a-day lawyer and the work-a-day judge.

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12. *Id.* at 224.

13. *Id.* at 281-82.

14. *Id.* at 295-96.

