

CAFL Appellate Panel Support Unit

Moffett Practice Tip

What if you review the findings, the transcripts, and the documentary evidence and you've got absolutely nothing of merit to argue? Can you brief a frivolous issue just because you can't find anything else? No! You aren't allowed to raise frivolous issues on appeal just to have something to write about. *Cf. Avery v. Steele*, 414 Mass. 450 (1992). An appeal is frivolous "[w]hen the law is well settled, [and] when there can be no reasonable expectation of a reversal[.]" *Glorioso v. Retirement Bd. of Wellesley*, 401 Mass. 648, 652 (1988). But "[u]npersuasive arguments do not necessarily render an appeal frivolous." *Id.* (citing *Shahzade v. C.J. Mabarby, Inc.*, 411 Mass. 788, 797 n. 8 (1992)). So you can still brief a weak argument. Call your mentor or CAFL administration – we will help you find an issue, or an angle on an issue, that is worthy of appellate argument.

But what if your *client* insists that you brief an issue that is clearly meritless? Ah, that's different. You can brief that issue under *Commonwealth v. Moffett*, 383 Mass. 201 (1981), but you must follow the *Moffett* protocols. *Moffett* is not, shall we say, a model of clarity. Luckily, the Appeals Court has some very helpful guidance. Note that *Moffett* applies to child welfare appeals through *Care and Protection of Valerie*, 403 Mass. 317, 318 (1988).

The Appeals Court's *Moffett* guidelines, available at: <https://www.mass.gov/service-details/procedures-governing-appeals-with-moffett-issues-filed-in-the-appeals-court>, are as follows:

The following procedural guidelines are to be followed by appointed counsel when a client's appeal includes issues that counsel believes to be frivolous ("*Moffett* issues"):

1. Counsel must prepare and submit a brief arguing any issues that may have some merit. *Id.* at 216.

2. If counsel determines that there is nothing to support a contention which the defendant insists on pursuing despite counsel's efforts to dissuade the defendant, counsel should present the contention succinctly in the brief in a manner that will do the least harm to his client. *Id.* at 208. Counsel should present the contentions sketchily by designating pertinent portions of the trial transcript and citing any relevant cases. *Id.* at 216-217.
3. If counsel, due to professional or ethical concerns, deems it absolutely necessary to dissociate from the purportedly frivolous contentions, counsel may do so in a preface to the brief ("*Moffett* Preface"), which is to include a statement that it is filed pursuant to the guidelines outlined in *Commonwealth v. Moffett*, 383 Mass. 201 (1981). *Moffett*, 383 Mass. at 217. The preface may apply to the entire brief, or to certain contentions found within. Examples of a *Moffett* Preface are provided below.
4. Beyond including a *Moffett* Preface, counsel must refrain from injecting disclaimers of personal belief in the merits of the case or otherwise arguing against the defendant's interests. *Id.* at 217.
5. If a *Moffett* Preface is included in the brief, the following procedures apply:
 - a. Upon the filing of the brief prepared by counsel in the Appeals Court, and service upon the Commonwealth, a copy of the brief must be sent to the defendant, and his/her attention must be directed to the *Moffett* Preface.
 - b. Counsel must inform the defendant that he/she may present additional arguments to the court within 30 days.
 - c. Counsel must include in the brief a certification stating that the defendant has been notified of the inclusion of a *Moffett* Preface in the brief with a copy of the certification sent as a separate document to the Commonwealth. **In addition, counsel must file a copy of the certification as a separate document with the Clerk's Office.** See *id.* at 208 and n. 3.
 - d. Additional arguments to be submitted by the defendant must be made in the form of a brief ("*Moffett* brief"), and must comply with [Mass.R.A.P. 16](#), [19](#) and [20](#), including containing accurate references to the transcript and record appendix. A *Moffett* brief may be accompanied by a

- supplemental record appendix containing documents that were not filed with counsel's brief and record appendix, provided that the supplemental record appendix conforms to the requirements of [Mass.R.A.P. 18](#) and [20](#) (table of contents, chronological order, consecutive pagination).
- e. The Clerk's Office requests that counsel format the defendant's *Moffett* brief to comply with court rules, and on behalf of the defendant, forward the submission to this court, and serve the Commonwealth.
 - f. Upon the filing of the defendant's *Moffett* brief with this court, and service thereof on the Commonwealth, or upon the expiration of the 30 day period allowed for the defendant to file a *Moffett* brief, whichever first occurs, the Commonwealth has 30 days to file its brief. *Id.* at 208 n. 3. The Commonwealth may file one brief in response to the brief filed by the defendant's attorney and the *Moffett* brief. If necessary, the Commonwealth may file a motion to exceed the page limit in responding to the arguments raised in both briefs. See [Mass.R.A.P. 16\(h\)](#).
6. If the court finds merit in any issue, whether raised by appointed counsel or by the defendant, the court on its own motion may appoint new counsel and order rebriefing and reargument. *Id.* at 208 n.3.
 7. The brief prepared by counsel, and any other submissions by counsel or the defendant, must comport with the requirements of the [Massachusetts Rules of Appellate Procedure](#).

(Emphasis and hyperlinks in original). The website also offers some sample *Moffett* prefaces.

Two important points. First, you *can* submit a meritless argument (when the client insists) without a *Moffett* preface; just do so sketchily. Include the *Moffett* preface – and follow the rest of the procedures – if you feel “ethically compelled” to distance yourself from an argument. *Moffett*, 383 Mass. at 216-17. For example, the client wants you to argue that the judge made an evidentiary error. You agree, but you think it’s harmless, so you wouldn’t brief the issue absent the client’s insistence. You can argue the point “sketchily” without the need for a *Moffett* preface. Now

let's assume the client wants you to argue judicial bias. You see no evidence to support the claim, and you feel "ethically compelled" to distance yourself from the argument. For something like that, you would include a *Moffett* preface.

Second, note that you can submit a *Moffett* argument within an otherwise meritorious brief. If you are not including a *Moffett* preface, put the client's meritless – and sketchily drafted – argument last. If you are using a *Moffett* preface, make sure that it states clearly that you are dissociating yourself from only Argument X pursuant to *Moffett*, not from the entire brief.

Last, can you submit a *Moffett* FAR application? The Rules don't forbid it, and our Performance Standards require that you file an FAR application unless the client instructs you not to. *See* CAFL App. Perf. St. 17. Still, it's better to try to find a colorable issue. If you can't come up with one, call us and we'll try to help.