

Law

• The Art of Appellate Advocacy: A civil appeal

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Special to The Daily Record

September 29, 2008

One of the most valuable lessons I learned about the right way to practice law occurred when I was a law student clerking for a personal injury firm. This lesson was not, however, something I was taught by any of the firm's lawyers.

I do not mean to suggest that I learned nothing valuable from the attorneys I worked for there. To the contrary, I can still remember as if it was just yesterday when I was called into the office of the managing partner, who, after introducing me to the client whose car was involved in an accident, handed me a Brownie camera and told me that the client's car was parked in front of the building and that I should take a picture of the damage. When I returned to the managing partner's office a few minutes later and explained that I found the car but was unable to locate any damage, the managing partner took me outside into the hallway, closed the door behind him, and thundered at me, "When the client says he's been involved in an accident, he's been involved in an accident, so go back outside and take a picture of his goddamned car!"

That was definitely a lesson worth remembering. But it's not the one I had in mind.

No, the lesson I was thinking of came from a rather unlikely source — a person I had just served with legal papers. I don't recall whether it was a summons and complaint naming him as a defendant, or whether the contents of the envelope I gave this individual contained a subpoena compelling his attendance at trial. What I do remember is that the cab driver thought that the East Baltimore neighborhood where this person lived was so dangerous that he wouldn't wait for me while I did my job of serving process.

This left me in somewhat of a dilemma because there wasn't a pay phone anywhere in sight and cell phones wouldn't be commercially available for another five years. Walking back to the office wasn't a particularly attractive option either — if I didn't get killed on the way, I definitely would be when my then-future wife learned about my journey after I got back.

So, I did the only thing I could think of after serving this guy: I asked him if I could use his

phone to call a cab.

Now, if someone came to your house and served you with process when you opened the door, how do you think you would respond if that person, after handing you papers that either named you as a defendant or otherwise compelled your presence in a legal proceeding, then had the chutzpah to ask, “Oh, by the way, do you mind if I use your phone so I can call a cab to get a ride back to the office?” I know how I would respond to such a request, and the reaction wouldn’t be particularly hospitable.

But not this guy. Maybe he understood that my life was in his hands. Maybe he knew that I could not have weighed more than 140 pounds, even wearing body armor, and could see that I faced an almost certain death if he just closed the door.

Or maybe he was a person who, despite being given a message that no one wants to receive, believed that all human beings should be treated with civility. Which is how he treated me when he invited me in to use his phone.

Beneath the veneer

Thanks to the contentious nature of litigation, I’ve had many opportunities over the years to think about this man and the valuable lesson he taught me. Those opportunities come up fairly often at the trial court level when interaction between opposing counsel can be a relatively common occurrence, and less frequently in an appeal when such dealings become quite limited by that stage of the case. But even at the appellate level, there is still a need for interaction, and still a need for civility.

Although I am sure that I was on the receiving end of discourteous behavior in appeals I handled when I worked in the public sector, I just cannot remember any. Since entering private practice, however, I’ve been subjected to acts of incivility a surprising number of times.

The most recent of these encounters occurred in an appeal in which I called my opposing counsel to seek his consent to a 15-day extension of time for me to file my brief. I explained that the brief’s original filing deadline fell near the end of a week in which I would be filing several briefs and motions in other cases, and that I would be on a family vacation the following week. When he responded that he would consent to a 7-day extension, I thought he must have misunderstood me and told him that such an extension wouldn’t help me at all because it would require the brief to be filed in the middle of my vacation. He replied that I would have to get any additional time from the court, which I ultimately did.

Preparation of the record extract is another area in particular where I’ve been subjected to uncivil conduct by opposing counsel. Although the rules of appellate procedure put the onus on the losing party to prepare and file the record extract, the rules encourage cooperation from lawyers for both sides by directing that they “shall agree” on the parts of the record to be included in the record extract “whenever possible.” The rules also discourage lawyers

from including extraneous materials in the extract by stating that they “shall refrain” from designating parts of the record which are “unnecessary” for resolving the issues on appeal. Nevertheless, I’ve had opposing counsel unilaterally demand that I include in the record extract transcripts of an entire trial and, on one occasion, the complete record itself, and threaten me with a motion for sanctions if I failed to do so.

Don’t get me wrong. Almost without exception, the lawyers involved in these and other cases in which I’ve had similar experiences used a pleasant tone when we spoke. I might have even characterized each of them as cordial, had it not been for the categorically disagreeable substance that lay beneath their seemingly friendly veneer. But putting on a civil demeanor should not be confused with treating others with civility, respect, and consideration.

Just ask the guy I served in East Baltimore. He’ll know what I’m talking about.

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