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THE ART OF APPELLATE ADVOCACY

*Checklist interruptus*

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I am sure that many of you will be deeply disappointed, but today's article will not be a continuation of the spellbinding checklist I began several months ago setting forth different considerations to think about when writing and editing your appellate brief. That spine-tingler will have to wait until next month, assuming, of course, that I am still practicing law, which, depending on the reaction to today's column, may be an assumption that not too many people, if any, would make.

I could blame the dog for the disruption in the checklist series — not Sparky, but Dusty, the most ill-tempered Cairn Terrier that has ever lived — and claim that he flew off in a jealous rage and ate the latest checklist rendition when he saw Sparky's picture in last month's Daily Record, but that would not be true.

The reason for today's detour is that, as Howard Beale implored the audience in the movie, *Network*, I want you to get up out of your chair, stick your head out the window, and start yelling.

About what, you may ask? Judges who do not read briefs. OK, that may be somewhat of an overstatement if left unexplained, and it almost certainly will end my legal career if it is not, so let me backpedal a bit to state that what I'm really complaining about are judicial opinions that appear to have been written without careful regard to the parties' briefs.

I do not mean to suggest that this is a common occurrence, nor do I have any direct, smoking-gun proof that it actually ever happens. But I've been involved in too many cases and have heard too many lawyers complain about their own experiences — including an attorney I spoke with as recently as last week — not to believe that, rare as it may be, judges sometimes decide cases without fully reading the briefs. Whether these suspicions are based on perception or reality, the fact that I and other lawyers I know even harbor them, in my opinion, merits some discussion.

**Our share of the blame**

My own view is that this is not just a perception, but I also believe that at least some of the fault, if not most of it, lies with the Bar. The complaints that lawyers make about judges in this regard are not a one-way street. I've heard just as many (if not more) complaints about lawyers who advance poorly written legal arguments that courts are asked to accept. It is hard to fault any judge for failing to spend the time necessary to understand an otherwise incomprehensible argument, or for writing an opinion which fails to address such an argument.

Nor is there much reason to complain about a judicial opinion that makes no mention of, or gives extremely short shrift to, arguments that do not have any merit and should not

have been made in the first place. A court's rejection of such an argument — or any argument, for that matter — does not mean that the author of the opinion did not spend time carefully reading the brief.

But how about when a valid and clearly articulated argument is not even mentioned in the opinion? Or when such an argument is referenced, only then to be summarily rejected, without any reasoning? And what about the argument that the opinion simply mischaracterizes, in a manner for which there is no explanation — other than, that is, that the argument appeared to have been read with less than strict scrutiny?

I mean no disrespect by asking these questions, but the fact is I am not alone in raising them. I have heard other attorneys ask these and similar questions and voice the same kind of concerns, namely, whether the judges who wrote decisions in some of the cases in which these lawyers have been involved gave the briefs, and the record and legal citations that they contained, the full attention that the parties deserved.

### **Mind-boggling numbers**

It is easy to dismiss these concerns as sour grapes since they are almost always expressed by the losing side, but the hard truth is that the appellate pipeline is so overloaded, particularly at the intermediate appellate court level, that it is a virtual impossibility for every case to receive careful judicial analysis.

Approximately 1,950 appeals have been docketed annually over the last five years with the Maryland Court of Special Appeals, which issued an average of more than 1,300 opinions in each of those years. The numbers are even more daunting for the 4th U.S. Circuit Court of Appeals, which, during the most recent 12-month period for which this type of statistical information was compiled, had 5,196 new appeals added to its docket, and disposed of 2,447 cases on the merits and another 2,089 on procedural grounds.

These numbers are mind-boggling when you consider that each of these appellate courts has only 13 judges who are responsible for this enormous workload, which is relieved only slightly by retired and trial court judges who occasionally pitch in and write some of the opinions. Even with this additional resource, the volume of opinions that the typical appellate court judge writes is huge.

I suppose that writing a hundred or so opinions every year is not such a big deal, assuming, of course, that the person responsible for this task has eliminated sleep from his or her schedule, so that the 25-30 percent of each day that most of us spend sleeping can be put to better use reviewing the parties' briefs, and reading the hundreds of pages that the joint record extract or appendix frequently contains. But unless judges are willing to make such a modest sacrifice and work 24/7, something else has to change.

As is, there are too many appeals and too few judges to decide them. No matter how hard these judges work to keep up with their crushing caseloads, it is inevitable that somewhere along the way someone's brief has been skimmed rather than read and that an important argument or record cite has been overlooked.

I suppose that this is a fact of our judicial system that we should all just accept. Until, of course, the argument or cite at issue is yours. It might make you feel better to yell, "I'm as mad as hell and I'm not going to take it anymore," but I would much prefer a more productive response. Isn't it time for more judges?

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