

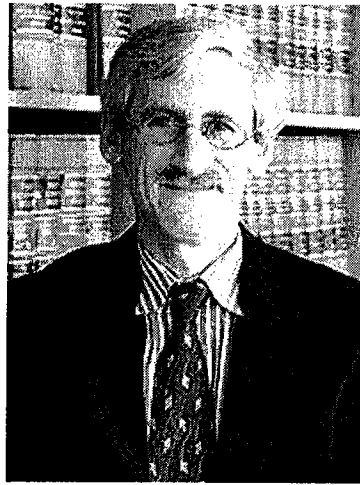
The Art of Appellate Advocacy - Desirable and in the public interest

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Several weeks ago, as I was sitting in a field behind Hopkinton High School with slightly more than 18,000 other questionably sane individuals waiting for the Boston Marathon to begin, I was suddenly struck by a distinct similarity between being a part of this running event and participating in a case on the merits before the Maryland Court of Appeals. And no, I don't mean that you have to be a masochist to engage in either of these activities, although that certainly would be a feature that they share. No, the similarity I'm talking about is that getting to do either is an action that should never be taken for granted.

For those who are unfamiliar with the Boston Marathon, it is the only marathon in the country in which runners must meet a qualifying cut-off time that corresponds to their age and gender in order to participate in the race. I was able to qualify for this year's race as a result of moving into a new age bracket, perhaps the only part of getting old that I've welcomed so far at this point in my life, with the possible exception of becoming old enough to drive and drink, respectively but not simultaneously.



Andrew Baida

Qualifying is only part of the battle, however, and just one of the obstacles to overcome to get to the finish line on Boylston Street. The debilitating heat, calf muscle spasms and stomach cramps of prior years took a back seat to this year's challenge, which came in the form of a limp-inducing foot injury I sustained just weeks before the marathon that put in doubt my ability even to get to the starting line. Hurdles like these are the reason why I never treat this marathon as a given or assume, when the race is over, that I will be back to run in it again.

The barriers that block the way to getting a case reviewed by the Court of Appeals may not be as physically challenging as those that line the road to Boston, but they present just as much reason for why no one should be cavalier about the certiorari process. The court granted only 14 percent of the cert petitions it considered in Fiscal Year 2004, 15 percent in 2003 and 17 percent in the year before that. The odds of getting cert were even lower in criminal cases: the Court of Appeals agreed to review a mere 12.8 percent of these cases in 2004, 10.5 percent in 2003 and 11.3 percent in 2002.

With numbers like these it seems that a person practically has to kill someone to get his or her case heard by the Court of Appeals, and even that's not a sure thing unless it's capital murder.

Technical, not substantive, guidance

Getting to either Boston or Annapolis is a process that should not be taken lightly, but this is where the similarity that I mentioned at the beginning of this article begins and ends. The biggest and, in my view, most profound dissimilarity is in the area of substantive guidance and assistance.

There's plenty of that for would-be marathoners looking for ideas about how to qualify for the big race. The Boston Athletic Association's Web site not only offers training tips that run the gamut from weekly mileage to tempo running to strides, drills and stretching, but it also gives a choice of two 16-week marathon training programs to choose from, one for the "rookie" runner, the other for the "veteran." There's no guarantee, of course, that you'll qualify for Boston by following these tips and programs, but it's nice to know from the folks in charge what you're supposed to do if you decide to make the effort.

The Court of Appeals, in contrast, offers no counterpart to any of these training suggestions on how to make it to the big show. Sure, the Maryland Rules contain lots of information about technical requirements that you better follow unless you want your petition denied. But, in my humble opinion, you'll have to go elsewhere if you're looking for any substantive direction on what to do to get it granted.

Okay, maybe it's me, but are you really any better off in your quest for cert after reading Rule 8-303(b)(1) and learning that the petition "shall present accurately, briefly, and clearly whatever is essential to a ready and adequate understanding of the points requiring consideration"? Or that the petition shall also contain, as set forth in Rule 8-303(b)(1)(H) and (I), "[a] concise statement of the facts material to the consideration of the questions presented," and "[a] concise argument in support of the petition"?

And then there's §12-203 of the Courts and Judicial Proceedings Article. That's the queen mother of all substantive standards governing cert petitions, which says the Court of Appeals may issue a writ of certiorari to review a case if it finds that doing so "is desirable and in the public interest." Never mind what I said earlier about there being no substantive direction on what you need to do to file a successful petition. That clears up everything, doesn't it?

Is it any wonder why the vast majority of these petitions are denied? Believe me, it's not just because these cases are simply not "cert worthy," as I know many of you are thinking. I won't disagree that some of these cases are so dead on arrival that no lawyer, no matter how skilled, could breathe life into them. But that's only true for some of these cases, not all of them. A large portion never made it to the courtroom on the fourth floor of 361 Rowe Boulevard because the lawyer for the losing side didn't know how to posture the case in a manner designed to capture the Court of Appeals' interest.

Perhaps the best proof lies in the fairly sizeable number of unreported cases that the Court of Appeals has reviewed — cases that the Court of Special Appeals found so mundane that they didn't rate a second look for inclusion in the Maryland Appellate

Reports. More often than not, these cases made the journey upstairs because the petitioners' counsel knew how to make them look desirable and in the public interest for the state's highest court to review.

Some got there, of course, through dumb luck, but I wouldn't recommend such an approach. Like qualifying for Boston, getting there is only the beginning. And it could be an extremely unpleasant trip to the finish if you're counting on luck to get you there.

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