

How to be desirable (and in the public interest)

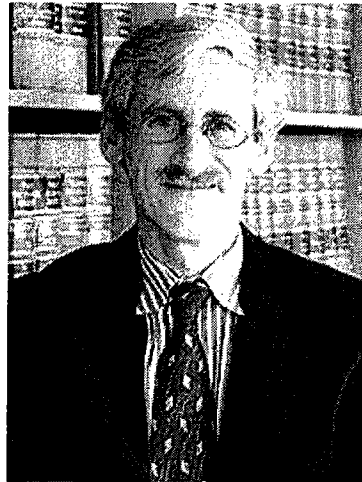
June 17, 2005

By *ANDREW H. BAIDA*,
Special to the Daily Record

The parenthetical in the title of today's article is not an afterthought but rather my subtle way of letting the reader know that, yes, this is still an appellate practice column and that while today's legal advice will talk about how to be sexy and provocative, it will be strictly in the sense of writing a certiorari petition. It should be obvious just by looking at my picture to know that I would not be offering advice about how to be desirable in any other sense, but, then again, my wife apparently saw something she liked — believe me, she didn't marry me for my money — so I thought I should clarify matters at the outset, just in case.

Unfathomable as it may seem to some of you, the mere act of losing does not make your case desirable and in the public interest for the Court of Appeals to review. Maryland's highest court is, with few exceptions, a court of discretionary jurisdiction and not an error-correcting tribunal, so to hook the big fish you'll need to use a little more bait than just the lure that a gross miscarriage of justice occurred in your case and needs to be fixed immediately.

Don't get me wrong. Profound legal errors can be a good thing. Well, they're not really "good" if you're on the losing side, but they can be a big step in the right direction of getting the Court of Appeals interested in your case. The key is how to dress up the loss in a way to make sure that you succeed in reeling in the big one.



Andrew Baida

There are a lot of ways to do this, but to give the discussion some focus I thought that I would use as a vehicle for addressing today's topic a cert petition that I filed in a case that the Court of Appeals decided last month, *Maryland Aviation Administration v. Noland*.

Clifton Noland was a paramedic employed by the Maryland Aviation Administration who had a rather stellar employment record, that is, until the early morning hours of March 30, 1999, when he was asked to transport to North Arundel Hospital a combative psychiatric patient, who was physically restrained with handcuffs and strapped to a stretcher after he was observed spitting and drinking water from the toilet in his holding cell at the BWI Airport police station. Somebody was obviously having a bad day.

Noland and another paramedic were in the process of carrying the patient, who was screaming obscenities and threatening to kill everyone in the immediate vicinity, when the patient managed to dislodge a face shield that Noland placed on him and spit at, but not on, Noland.

The response was exactly what you would expect from a health care professional with more than 10 years of exemplary service under his belt. Noland promptly struck the patient in the face with a closed fist and just as promptly reattached the face shield.

Undeterred by this response, the patient once again dislodged the face shield as they approached the ambulance and again spit at Noland, who, again, promptly hit the patient in the face with a closed fist and reattached the face shield. Sounds like somebody else was also having a bad day.

It got worse, but not for the patient, who apparently made it to the hospital without further incident. The Maryland Institute of Emergency Medical Services System suspended Noland's paramedic license for a year, while the MAA, Noland's employer, persuaded an administrative decision-maker that Noland's actions justified terminating his employment.

Noland was particularly dissatisfied with the latter action and so he turned to the courts, where he enjoyed much greater success, at least in the Circuit Court for Anne Arundel County and the Court of Special Appeals, both of which ordered the case remanded for further administrative proceedings because, as the latter court stated, "the record as it stands is insufficient to permit judicial affirmance of the agency's decision."

At this point, let me expand upon a statement I made earlier. Although the Court of Appeals is not an error-correcting court, its members are human beings whose legal training makes them particularly receptive, at least in my experience, to the idea of fixing what any fair-minded individual would agree qualifies as a colossal, bang-them-over-the-head, what-were-they-thinking error.

Successful cert petitions I've previously filed have used slightly different language in inviting the Court of Appeals to review "the unsound rule of law that the Court of Special Appeals applied in this case," or "a standard of review that finds no support in the Administrative Procedure Act and that directly contravenes this Court's cases," or "an unprecedented result that sharply departs from well-established legal principles and does so at the expense of the public," but these examples are just another way of saying that a huge mistake occurred that really should be corrected.

One of the most effective ways to get cert is to convince the Court of Appeals that the mistake that you've identified is not unique to your case but rather is an error that has been and will be repeated unless something is done about it now. It helps if the mistake occurred in the form of a reported decision because binding precedent increases the likelihood that a lower court will do the same thing that the Court of Special Appeals did in your case when faced with similar facts. The key here is to show that those facts frequently arise or that it is foreseeable that they will occur again.

Second-guessing

Your case does not need to be unreported for you to do this. Noland was not reported by the Court of Special Appeals, but the centerpiece of the cert petition was another case decided by the same court that it did report, Maryland State Retirement Agency v. Delambo, which held that a state agency must consider five factors before it can terminate an individual's employment, namely, the employee's overall employment history, attendance record, disciplinary record, work habits, and relations with fellow employees and supervisors.

Our pitch to the Court of Appeals was that in reversing the administrative decision-maker in Noland — who acknowledged that all of these factors favored Noland, but not enough to outweigh striking a psychiatric patient — the Court of Special Appeals' decision became the latest addition to a growing line of decisions from Maryland's intermediate appellate court that improperly second-guessed an agency for not conducting a "proper" Delambo review.

The strategy worked. The Court of Appeals not only granted cert It also overruled Delambo.

As suggested by this type of approach, think globally when you dress up your case. Doing so, of course, is no guarantee that your case will be deemed sufficiently desirable to get you through the door. There will always be some cases that, no matter how adroit their tailoring or dolled-up their attire, will find themselves at the end of the day to be all dressed up with nowhere to go. But try not to take it personally if one of those cases is yours. After all, it's just clothes.

Andrew H. Baida is a partner at Rosenberg|Martin|Funk|Greenberg LLP in Baltimore. He is an adjunct professor of appellate advocacy at the University of Maryland School of Law, and of Maryland administrative law at the University of Baltimore School of Law.

To hook the big fish you'll need to use a little more bait than just the lure that a gross miscarriage of justice occurred.