

## Legal impact

June 16, 2006

By ANDREW BAIDA,

*Special to The Daily Record*

To avoid one of those déjà vu/Groundhog Day experiences, you might want to skip today's column or, alternatively, miss the introduction to the program, "Court of Appeals at the Crossroads: Assessing the Impact of the Retirement of Judges Wilner, Cathell, and Raker," that the Maryland State Bar Association's Appellate Litigation Sub-Committee, which I co-chair, will be presenting at the MSBA annual meeting today, Friday, June 16. Today's column is also the program's introduction, and even I wouldn't listen to me twice, as entertaining as I'd like to think I can be, so, if I were you, either turn the page or go to Conference Room # 2 in the Clarion Resort Fountainebleau Hotel at 11:15 a.m. rather than 11:00.

### Special connections

The subject of this program, as you probably figured out from its title, is the impact that Judges Alan Wilner, Dale Cathell, and Irma Raker have had on the law, and the opportunity that the next governor has to change the entire Maryland judiciary when these judges retire in the next two years. Virtually all of us can claim to have been affected in some way by each of these distinguished jurists, either because we have appeared before them in court, or because our practice area has been shaped by the decisions they have authored, or because we know them personally.

I first learned of Judge Wilner as a second-year law student, when I wrote a law review article that was significantly influenced by the analysis the judge applied in a dissenting opinion he wrote in *Rusk v. State*. His analysis was brilliant, persuasive, and ultimately adopted by the Court of Appeals. In contrast, I suspect that, with the exception of my editor, very few people even read, much less were persuaded by, my article or my perceived keen insights. I have since written several law review articles as a practicing lawyer that I'm sure only my editors have read, but there will always be a special place in my heart for Judge Wilner for inspiring my repeated quixotic attempts over the course of my career to duplicate the intelligence I first saw in that dissenting opinion.

I also have a unique connection with Judge Cathell, who, I think it is safe to say, is who he is today because of me.

I had appeared before Judge Cathell when he was an associate judge with the Circuit Court for Worcester County, where I defended several cases in which the plaintiffs had sued the state of Maryland for injuries they suffered while body surfing at Ocean City. Yes, the state was sued because it didn't put warning signs on its beaches telling people that using your body to surf can be more hazardous to your health than neck bungee jumping. Engaging in hand-to-hand combat with bodysurfers, however, is not my special connection with Cathell, J.

No, that connection didn't arise until a couple of years later, after Judge Cathell dismissed these cases, when a member of the Maryland Appellate Judicial

Nominating Commission called to solicit my views about the judge, who, for reasons that still remain somewhat of a mystery, listed me as some kind of reference on his application for a position on the Court of Special Appeals. My initial thoughts, after ascertaining that this was not a crank call, were, "should I tell the truth?" Which I did, of course, and the rest is history, including my earning the nickname "kingmaker" in some legal circles.

I was not aware of my special connection with Judge Raker until I planned this program. To appreciate this connection, you need to know that I come from a family where the women guard their date of birth so fiercely that my grandmother put only my grandfather's date of death on his tombstone so that when she died 23 years later her tombstone would parallel his and would not disclose the year she was born. My mother has continued this fine tradition by refusing to reveal when she was born. Even when I confronted her as a teenager with the date of birth listed on her driver's license, she insisted that she lied about her age when she originally applied for the license.

So what's my connection with Judge Raker, you may ask? Well, you can look high and low on the Court of Appeals' Web site where you'll see lots of dates listed in the judge's bio, such as the year she graduated from Syracuse University, and when she received her law degree, served with the Montgomery County State's Attorney office, and became an Associate Judge of the District Court of Maryland and the Circuit Court for Montgomery County. There is one date, however, that you will not see. Who knew? The judge and I are practically related.

### **Collective impact**

Today's program, of course, is not about my special connections with these judges but rather about the legal imprint they have made and the opportunity that the winner of the upcoming gubernatorial election has to influence the development of the law for many years to come.

As we have seen with the voting records of David Souter, Harry Blackmun, and other Supreme Court justices, there are no guarantees about how any individual, once appointed, will decide cases as a judge. But the opportunity awaiting the next governor is huge, as evidenced by the collective impact that Judges Wilner, Cathell, and Raker have had on the law.

Between the three of them, they have served a total of 81 years on the bench: 30 on the Court of Appeals, 28 on the Court of Special Appeals, 20 as circuit court judges, and three on the District Court of Maryland.

Their years of service are quite impressive, but, hey, anyone can punch the clock. What these three individuals have actually produced while on the clock is pretty darned remarkable. One of the program speakers, professor Byron Warnken of the University of Baltimore School of Law, prepared materials detailing the number of majority and dissenting opinions they have written on the Court of Appeals. I would like to share with you the supplemental research of one of my star associates, Shannon Chilcoate, to give you a sense of all of the appellate opinions that Judges Wilner, Cathell, and Raker have cranked out in their combined 58 years as appellate judges.

As a group, these three judges have authored 626 majority opinions on behalf of the Maryland Court of Appeals; 1,219 published majority opinions for Maryland's two appellate courts; and a grand total of 1,460 published appellate opinions on behalf of the Court of Appeals and the Court of Special Appeals.

On average, for each of them, that's slightly more than 25 opinions every year. Now, let's talk about what each of them has done.

Before joining the Court of Appeals in November of 1996 where he has written 274 opinions, including 213 majority opinions, Judge Wilner was on the Court of Special Appeals for 19 years, where he scribed 446 published opinions, including 425 on behalf of the majority. Combined with what he has produced on behalf of the Court of Appeals, Judge Wilner has written 720 published opinions, and, by my rough estimate, approximately twice as many unpublished decisions while he was on the Court of Special Appeals that I just didn't have the heart to ask Shannon, my associate, to please confirm.

Judge Cathell has been a member of the Court of Appeals since January of 1998, during which time he has authored 217 opinions, 180 of which have been majority opinions. He previously served on the state's intermediate appellate court for 9 years, where he wrote 176 published opinions, including 168 majority opinions. His total numbers are 393 published opinions as an appellate judge, and, again by my ballpark calculation, several hundred more unpublished decisions while he was on the Court of Special Appeals.

Judge Raker's career as an appellate judge has been exclusively with the Court of Appeals, where she began her tenure precisely on Jan. 7, 1994 – that's another one of those Web site dates, in case you were wondering – and has written 347 opinions, 67 percent of which, or 233, were on behalf of the majority. Judge Raker also has the highest percentage of dissenting opinions among the three judges who will be retiring in the next two years. 23 percent of her published opinions were either straight dissents or concurring and dissenting opinions, in comparison with Judge Wilner, who dissented in full or in part in 14 percent of the opinions he has written as a Court of Appeals judge, and with Judge Cathell, who dissented in full or in part in 13 percent of the opinions he has written while on the Court of Appeals.

### **Behind the numbers**

I have shared these numbers with you not just because I'm a guy. Sure, guys love numbers, especially big ones, and the overall quantitative contribution that these three individuals have made to the body of case law that defines Maryland jurisprudence is at least on par with what the collective home run output of Babe Ruth, Hank Aaron, and Barry Bonds, without the asterisk, has done for baseball. So, yeah, the numbers alone are impressive in their own right.

But behind these numbers are opinions, layers upon layers of them, which have applied, created, and sometimes overruled legal principles that have affected thousands of litigants and countless more individuals, businesses, and government agencies. These numbers are the tip of the iceberg, but they should give you some sense of the qualitative impact that these judges have had in this State and that the next governor can have in filling their upcoming vacancies.

I'm way past the word-limit for this column to explore that impact any further, and, besides, this is the point in the program where I introduce the two speakers to do that. You didn't expect me to have all of the fun, did you?

***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.***

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