

The Art of Appellate Advocacy
Making a case for appellate advocacy
ANDREW H. BAIDA
Special to The Daily Record
March 30, 2007

For several years now, The Daily Record has not only published this column — an act that has never ceased to amuse and mystify me — but it has permitted me to do so by using the somewhat misleading title, “The Art of Appellate Advocacy.” I don’t have to explain to anyone who has previously visited this space why I use the word “misleading” to describe the title of this column, but, for those of you who had the good fortune until now of being able to say that this is something that you have not experienced, it’s because the articles that have appeared here are just as much about non-legal matters as they are about the actual topic of appellate advocacy.

As a few illustrative examples, I have written articles about my dog Sparky and his affection for my sister and brother-in-law, about encountering two police officers on the front steps of my house asking whether I knew someone whose name coincidentally was the same as my then-13-year-old son’s, and I have also written pieces about my wife threatening to hit me in the head with a two-by-four when we were dating, and, most recently, about being called a poopyhead by my daughter when she was 3.

The Daily Record is for lawyers and business people, of course, and is not a family newspaper, which is why every article eventually gets around to discussing some aspect of appellate practice. But let’s face it. Some sort of bait and switch is necessary to lure people into reading about a subject that they otherwise would likely skip over for other arguably more interesting fare. Like the food ingredient packaging notice on a box of prunes.

The bait part seems to be working, because a lot of people have sent me e-mails, called me, and even stopped me on the street to tell me about their kidney stones, how their mothers also routinely commandeer phone calls that they initiate, and, in one case, how much they love my son (who has since been placed in a witness protection program). I’ve received this kind of feedback so often that I’ve lost track of the number of times it’s occurred.

The switch part, however, is another story. As much as I’ve tried to enthrall the masses with the actual subject of appellate advocacy, I can count on the fingers of one hand — not mine, mind you, but the pitching hand of Mordecai “Three-Finger” Brown — the number of comments people have made to me about the substantive aspect of this column.

Signs of trouble

Until recently, I attributed this lack of feedback to a general sense of ennui with the subject matter. Which is completely understandable, since it’s kind of hard to fault people for not getting revved up about a discussion of the top three ideas to consider in order to write a good statement of the case. And I can’t say I was particularly surprised or even insulted by the virtually deafening silence which followed a piece I wrote about how to write an effective question presented. No matter how scintillating these and other articles I’ve written about appellate advocacy may have been, it’s still a sow’s ear, not a silk purse. Or something like that.

But the tepid response I’ve received to the nuts and bolts portion of these articles may be a sign of a deeper problem, as I discovered last month when I read about a survey conducted by the Phoenix Law School of Arizona. This survey asked each member of the Arizona bar to rank a list of professional skills according to whether they were essential or very important. And according to Arizona lawyers, who are probably not very different from Maryland lawyers, appellate advocacy is not one of those skills.

In fact, appellate advocacy was ranked at the very bottom of the list of professional skills that the Arizona bar thought lawyers needed. And when I say bottom, I mean appellate advocacy was at the bottom of all of the skills listed, far below the first runner-up for the grand prize, strategic planning.

To me, this is very unfortunate. Not just because it means that, according to most members of the Arizona bar, I have wasted my career by spending most of it developing non-essential and unimportant skills. But also because of the impact that this negative view of appellate advocacy skills seems to have had on the success that lawyers have in appeals.

As is, the statistical benchmarks of success could definitely use some improvement. In the most recent year in which information of this type is available, 79 percent of all appeals docketed in the Maryland Court of Special Appeals were either affirmed or dismissed. The numbers improve only slightly if you focus solely on appeals resulting in a written opinion: 76 percent of those appeals were completely unsuccessful.

That's a lot of money that a lot of clients have paid for nothing.

The devil's advocate might argue that these numbers would remain the same if all lawyers improved their appellate advocacy skills. Even if that were so, it's a poor reason for maintaining the status quo. As important as it is to win and not lose, appellate advocacy is not just about the judgment announced at the end of the court's opinion. It's also about being a professional and striving to do the best job that we can for our clients.

Sharpened focus

I suspect, however, that the numbers would change if lawyers placed a higher value on, and made a stronger effort to improve, their appellate advocacy skills. It is much more likely that, by doing so, we would see much greater care devoted to developing the case on appeal, many more appeals raising only one or two issues that the overworked appellate judge would be much less likely to overlook or dismiss out-of-hand, and far fewer cases in which the party taking the appeal throws multiple issues at the appellate court in the hope that one of them might stick.

The end result would be a higher likelihood of success for the appealing party, if the Court of Appeals' statistics are any indication. That court ordinarily decides only those cases it wants to review, and typically addresses a smaller number of issues per case than does the Court of Special Appeals. In the same year in which the latter court rejected nearly 80 percent of the appeals on its docket, the Court of Appeals affirmed or dismissed just 50 percent of its cases.

There are multiple reasons, of course, why the appealing party is more likely to succeed in the Court of Appeals than in Maryland's intermediate appellate court. Presenting a more focused argument that is usually confined to one or two issues is probably one of them. Paying short shrift to appellate advocacy skills is definitely not another one.

(Andrew H. Baida is a partner at Rosenberg|Martin|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.)

We hope you've enjoyed this article. For more news stories please visit us at [The Daily Record Online!](#)