

## Some friendly advice

October 14, 2005

By *ANDREW BAIDA*,

*Special to The Daily Record*

Next to losing an appeal, I can think of few things that are more painfully disappointing in the world of appellate litigation than spending hours researching and writing a brief in a case that, after all of the hard work is done and the final product has been filed, is dismissed on the basis that the case has become moot. Just thinking of all that wasted scholarship and legal prose is enough to keep my psychotherapist busy for weeks.

Even when the case has been argued and it's pretty clear from the way some of the judges acted at oral argument that they're doing you a big favor by dismissing the case on mootness grounds, I'd almost rather lose than not get any decision at all. But that's not the worst kind of moot case. At least in that situation you know that the brief has been read. The worst is when the case doesn't even make it as far as the argument but is dismissed shortly after the briefs are filed.

This is the fate that befell a case that I recently worked on, but, unlike prior cases that met the same unfortunate demise after my brief was filed, this time I have found a way to turn lemons into lemonade to make sure that the legal community will not again be deprived of the fruit of my labor. This time I get to write all about it in this column.

Before turning the page to read something more interesting, please allow me to offer some friendly advice. Don't. Not because I desperately want somebody, anybody, to read about what I wrote in a brief that never made its way out of the clerk's office. That's not why you should keep reading. It's because what you don't know can hurt you. Maybe even kill you.

Okay, so I got a little carried away with that last part, but moot cases tend to make me a little hysterical.

### **First Amendment concerns**

I alluded to the subject of today's article in last month's column when I briefly discussed my involvement in an attorney grievance case that presented the question whether statements that a lawyer made in a motion to recuse violated Rule 8.2(a) of the Maryland Rules of Professional Conduct. This rule provides that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

Some disgruntled clients may think that any reason is a good idea to sanction a lawyer — or to take even more extreme action, as suggested by that famous Shakespeare line — but disciplinary action based on statements an attorney makes about a judge triggers First Amendment concerns, regardless of whether the statements are true or false.

The Court of Appeals was sufficiently interested in Rule 8.2(a)'s constitutionality that it not only asked the parties in that case, but also invited the Maryland State Bar Association, to address several questions about the rule, including whether it is

consistent with the First Amendment and whether an objective or subjective standard should be used in determining whether a lawyer has made a false statement with reckless disregard as to its falsity.

In light of the mootness problem I mentioned, we will have to wait for another case to get the court's answers to these questions, but, in the meantime, please consider the following advice.

Think twice and then a third time before you say anything about a judge that can be construed in any negative way, and don't say it at all if that is the only way in which the statement can be interpreted.

The last piece of advice may seem obvious, but you would be amazed by some of the statements that lawyers have actually made about judges that subjected them to disciplinary action. Maybe it's just me, but referring to a judge as "a midget among giants" does not seem to be an especially smart tactic to take unless you're looking for trouble, which is what one lawyer got by including this statement in a motion that the same judge had been asked to decide. Nor would I advise publicly stating that a judge was "drunk on the bench." Or that another one was a "lying incompetent asshole."

Remarkable as it may seem, not all of these impulse control-challenged lawyers were disciplined.

The first of the three statements quoted above was found to not run afoul of the equivalent of Rule 8.2(a) because, according to the court that was asked to impose discipline, calling a judge a midget among giants does not constitute a false statement about a judge's qualifications but rather is an opinion. The First Amendment does not protect a known false statement of fact, but it shields from disciplinary action an opinion that is not capable of being proven as factually false.

At this point, let me offer some more advice to those of you who like to play Russian roulette, talk on your cell phone while in the merge lane, or otherwise live on the edge. Couching a statement about a judge with the words "in my opinion" will not give you automatic immunity from disciplinary action. The Constitution prohibits disciplinary action against a lawyer for expressing an opinion about a judge — even one that is disrespectful — when the opinion is either not capable of being proven true or false or is based on disclosed or implied facts that are not false. But the First Amendment provides no shelter for a statement of opinion that insinuates a false assertion of fact.

### **Subjective or objective?**

Although the law from other jurisdictions is fairly uniform about this last point, the cases are not so easily harmonized on whether an attorney can be disciplined for making a false statement about a judge that the attorney did not know was false. Rule 8.2(a) makes such a statement subject to discipline if it was made with reckless disregard as to the statement's truth or falsity, but whether reckless disregard exists depends on whether a subjective or objective standard applies.

A few courts have adopted the former standard and held that the First Amendment applies unless the lawyer had a high degree of awareness of the statement's falsity. Other courts have used an objective standard, largely because, in their view, a subjective standard would immunize reckless statements as long as the attorney making them did not have serious doubts about whether the statements were true.

The problem with the objective standard is that, as one court concluded, using language illustrative of how other courts have treated the issue, a lawyer is deemed "objectively reckless" and can be sanctioned when "a reasonable attorney ... would

not have made the statement in question." Idaho State Bar v. Topp, 925 P.2d 1113, 1117 (Idaho 1996).

To me, the words "reckless disregard" in Rule 8.2(a) cannot mean that a lawyer can get dinged for making a statement about a judge if the statement was believed to be true, but was not, and a reasonable lawyer would not have made the statement. Reckless disregard means something more than mere negligence.

The Maryland Attorney Grievance Commission probably disagrees with this interpretation, but, if the vehicle for testing the AGC's disagreement happens to be some errant comment that you made about a judge's qualifications or integrity, please don't worry. Because have I got a brief for 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.**

Copyright 2005 © The Daily Record. All Rights Reserved.