

The Art of Appellate Advocacy - Virginia v. Maryland: The real reason why Virginia won

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At the end of **my column last month**, I said that in today's article I would discuss and give suggestions with respect to the ten rules of oral advocacy that John W. Davis offers in the classic, "The Argument of an Appeal." Unfortunately, I have since found it necessary to delay that discussion temporarily due to my son's intervening Bar Mitzvah and my wife's highly motivating threats of serious bodily harm if I did not spend more time helping both of them to get ready for the event. Add to that fact that yesterday was the one-year anniversary of the oral argument in the Supreme Court in Virginia v. Maryland — and that I had given a presentation on that "Battle for the Potomac" two weeks ago at MICPEL's 15th Annual Advanced Real Property Institute — and it suddenly seemed the better part of valor to let Davis' ten commandments wait a month.

Now, I have decided not to discuss Virginia v. Maryland in the same manner that I have several times in the past, which means I will not regale you with fascinating statistics about how many original actions there have been before the Supreme Court in its 200-plus year history. One quasi-statistic perhaps worth noting, however, is that Maryland and Virginia paid the Special Master in this case \$450 an hour for his services. One would think with that kind of handsome compensation he could afford to buy, rather than charge the two states \$87 for, an atlas that he has yet to return, at least not to Maryland. Of course, he could have given it to Virginia, which wouldn't surprise me because he really seemed to like my opposing counsel. I know for a fact that Maryland didn't get any atlas after paying the Special Master's final bill.

Don't get me wrong. I've really gotten over losing this case. I no longer try to hold my breath when my family flies over Virginia on the way to visiting relatives in Florida; I spent a weekend recently in Williamsburg with my 13-year-old son, whose highlight of the trip was visiting the very colonial and historic Hooters Inn; and I can even say "Virginia" without including the words "Evil Empire" in the same sentence. So, I've learned to accept losing, but this atlas thing still really bugs me.

Undone by our own

The most substantive observation about this case that I will share today is that we, meaning Maryland, were hamstrung every step of the way by Marylanders, beginning in the 18th century, and continuing straight through the beginning of the 21st. To appreciate how badly we were undone by our own kind, I need to explain briefly our litigation position in the Supreme Court, which was relatively straightforward: Maryland owned the Potomac River ever since it was included in a charter that King Charles I gave to Lord Baltimore in 1632; Maryland never relinquished the sovereign authority that came with its ownership of the river; and Maryland's authority meant that it had the right to regulate anything that took place in the Potomac, even activity carried out from the Virginia side by Virginia citizens and entities. Our sovereignty was so established that a ship captain was actually thrown into jail in Charles County in the late 1600s when he failed to pay Maryland some kind of port or duty fee after sailing up the river and docking his vessel on the Virginia side. And I thought my dog Sparky was territorial.

