

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.

So how were we bushwacked by members of our own tribe, you may ask? I'll tell you how.

The first occasion that comes to mind is when, several years after Maryland and Virginia formed the Compact of 1785 and reached agreement about certain navigational and jurisdictional issues affecting the Chesapeake Bay and the Potomac and Pocomoke Rivers, a Marylander drew the State of Maryland's first official map. The Maryland General Assembly not only gave the map its stamp of approval, but it showered the map maker with effusive praise for his stunning detail and handiwork, which included the Potomac River and a dotted line that marked the boundary line between Maryland and Virginia.

The only problem was that this line was not along the Virginia side of the Potomac where, as we argued so forcefully to the Supreme Court, everyone had long known the boundary was ever since King Charles I gave his royal deed to Lord Baltimore. Nope, as Virginia's counsel gleefully pointed out, first to the Special Master and then to the Chief Justice and his associates, the first official Maryland map showed the boundary between the two states smack dab in the middle of the Potomac. The next opportunity for self-destruction presented itself less than a hundred years later, when Maryland and Virginia entered into binding arbitration in the 1870s for the purpose of conclusively fixing the boundary line along the entire border between the two states.

Maryland was represented by two individuals, including a former Maryland governor, who told the Black-Jenkins arbitrators that they should place the boundary line on the Virginia side of the Potomac. So what's the problem, you ask? Isn't that the right position for Maryland to take? Sure would have been, if these two Marylanders stopped there and didn't proceed to tell the arbitrators, as they did, that in placing the boundary on the opposite side of the Potomac, the arbitrators should draw the line around all of the piers and wharves built from the Virginia side so that those structures would be in Virginia and subject to Virginia's authority. Virginia's counsel had quite a field day with this stuff. I don't mean this as a slight to him — Stuart Raphael is truly one of the best litigators I've had the misfortune of crossing paths with — but honestly, is there any way that Virginia could have lost this case with these kinds of historical concessions?

Actual dispute, alternative forum

Fast forward another hundred-plus years to the scene of the most recent betrayals by more of our own. Some additional context is necessary so that you can truly appreciate the manner in which these Benedict Arnolds put the final nails in Maryland's coffin. To get the Supreme Court to review a dispute that one state has with another, the complaining state has to file a motion for leave to file its complaint, along with a copy of the complaint. But, the Supreme Court will not exercise jurisdiction over just any spat between two states. The dispute has to be based on an actual controversy, not a hypothetical one, and it has to raise significant issues. And even if there is an actual dispute over an important issue, the Supreme Court may still refrain from reviewing it if there exists an alternative forum in which the dispute can be resolved by a lower court whose decision the Supreme Court can later review if it chooses to do so.

After Virginia filed a motion for leave seeking the Supreme Court's permission to sue the Free State, Maryland filed a brief in opposition that made this alternative forum argument on the basis of a pending Maryland administrative proceeding that raised the very same issues Virginia was asking the Supreme Court to address.

The Fairfax County Water Authority, a Virginia political subdivision, initiated that proceeding against the Maryland Department of the Environment after MDE denied the Water Authority's request for a construction permit to build a waterway intake pipe 700 some feet into the Potomac River. After that proceeding dragged on for several years, Virginia finally lost patience and filed a motion for leave to file suit against Maryland in the Supreme Court, saying that neither Virginia nor its citizens needed Maryland's permission to build anything from the Virginia side of the Potomac.

In opposing Virginia's motion, Maryland told the Supreme Court that there was no need to take Virginia's case because the Water Authority made the same argument that Virginia asked the court to address and, in fact, was represented by the same lawyers in advancing that argument.

Virginia responded to Maryland's alternative forum argument by saying that the Supreme Court's direct review was necessary because Virginia would never get fair treatment in the Maryland proceeding. A few months ago, Virginia's counsel asked me whether there was anything I would have done differently in litigating this case, and I have since thought of at least one thing that I absolutely would have done differently: I should have responded to Virginia's "we'll never get any fair treatment from Maryland" argument by telling the Supreme Court, "Oh please! This is Maryland. We should be the ones arguing that the deck is stacked. Against us!" Once again, history repeated itself in the administrative proceeding, starting with Maryland Administrative Law Judge Neile Friedman, a former Maryland Assistant Attorney General, who adopted virtually every factual finding proposed by the Fairfax County Water Authority, who rejected virtually every factual finding proposed by the Maryland Department of the Environment, and who was quickly followed by Maryland Circuit Court Judge Evelyn Cannon, another former Maryland Assistant Attorney General, who dismissed Maryland's administrative appeal and ordered the State of Maryland to give Fairfax County the waterway construction permit that started this whole thing in the first place and landed us in the Supreme Court.

Staying alive

Okay, some of you may be thinking, Maryland lost the battle but why didn't it win the war? Why didn't the issuance of this permit moot out the Supreme Court case? Well, it should have, and mootness may have been Maryland's best shot at winning this case and getting Virginia's complaint dismissed, but, as we all know, that didn't happen, thanks in large part to another branch of Maryland government: the Maryland legislature, whose actions and statements removed any possible doubt that the Supreme Court might have had with respect to the question whether Maryland's exercise of authority over Virginia was a thing of the past or a live and raging issue that warranted the Supreme Court's intervention and resolution now.

So what did the Maryland General Assembly do to kill the mootness argument, you may inquire? For starters, it tried to pass legislation preventing the permit from issuing at all, but somebody in Annapolis realized that this probably would not be a good idea in light of the pending Supreme Court case. That did not stop our elected officials from passing legislation that had the effect of placing a bunch of restrictions on the waterway construction permit that the Maryland Department of the Environment issued to the Fairfax County Water Authority. Doesn't sound too moot now, does it?

It gets even better, though. I could go on and on, but my personal favorites were the many statements that appeared in newspaper articles in which the Maryland governor and various Maryland senators and delegates expressed outrage at what they perceived to be uncontrolled growth in northern Virginia and said that the only way to stop that growth would be to limit or cut off Virginia's access to the Potomac. Or how about the article in which a Maryland legislator actually declared war on Virginia? Yeah, I really liked that one.

And every time one of these statements appeared in the newspaper, Virginia's lawyer would find the article and attach it as an exhibit to yet another filing that Virginia lodged with the Supreme Court in support of its argument that Maryland would never treat Virginia fairly and that the Supreme Court had to intervene to protect the Commonwealth. Virginia didn't bother filing with the Court, however, the front-page article containing more inflammatory remarks from Maryland's legislative representatives that appeared in the Washington Post the morning of the Supreme Court argument. I guess Virginia's counsel figured that he didn't need to bring that one to the attention of the justices.

Which takes me back to a slight variation of a rhetorical question I asked earlier. I don't want to take away from Virginia's victory, which was the result of a lot of hard work and skill, but with friends like these, is there any way that Maryland could have won this case? My Maryland co-counsel and I are good lawyers — okay, I may be a little questionable, but I had really good co-counsel. Even a really good lawyer, however, can do only so much for the client.

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