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Law

A little less anarchy, please

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A recent drive to work reminded me of a chaotic condition within the Maryland appellate court framework, which I meant to bring to the attention of the Maryland Rules Committee some time ago. As with other issues of a similar nature that have appeared on my radar screen sporadically, but with greater frequency than my UFO sightings, this one fell off because I misplaced the post-it note I had written to myself as a reminder to take action to try to remedy the situation. And as on more than a few of those occasions when I had completely forgotten about a matter of utmost importance due to my tendency to recycle post-it notes without reading them, a seemingly random event triggered its recall from a place where, no doubt, some will think it should have remained interred and undisturbed.

The memory-triggering event in this case occurred as I was sitting in traffic at a light that had just turned green. Years of experience driving a very small car (one unlikely to survive any serious physical encounter with another vehicle) have taught me the prudence of waiting at least two seconds after a light changes from red to green before proceeding through the intersection.

I did not time and, therefore, do not know precisely how long it actually took for the Ford Explorer, RAM pickup truck, and eight other equally large vehicles to pass through this particular intersection without braking for the red light each driver successively disobeyed. But I’m pretty sure that neither my car nor I would have fared too well if my driving habits were governed by even a minutely shortened version of the two-second rule.

Upon witnessing the complete sense of lawlessness unfolding before me as driver after driver brazenly plowed through the intersection without regard to what I had previously thought was perhaps the most basic of the rules of the road, I suddenly remembered this particular post-it note, concerning a state of anarchy in the world of appellate advocacy that is at least as disturbing. Perhaps it is worse.

Covering the chaos spectrum

In my view, controlled mayhem is far better than uncontrolled havoc. Every driver knows not to run a red light because there are clearly defined laws prohibiting that conduct. The disorder that results when these laws are disregarded is unsettling, but not nearly as alarming as the chaos that would reign in their absence.

Maryland Rule 8-605, which governs the manner in which a party may file a motion for reconsideration of a Maryland appellate decision that disposes of the appeal, covers the chaos spectrum. It operates as an unclear traffic rule for lawyers which sows confusion and invites bedlam.

The Rule offers practitioners no guidance at all concerning the contents of a motion for reconsideration. None. Its failure to do so stands in stark contrast with the comparable federal rules.

Rule 40 of the Federal Rules of Appellate Procedure, for example, provides that a petition for panel rehearing

"must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." Fed.R.App.Proc. 40(a)(2).

Local Rule 40(b) of the U.S. Court of Appeals for the Fourth Circuit supplies additional substantive guidance by requiring that a rehearing petition must state either that "[a] material factual or legal matter was overlooked in the decision," or that "[a] change in the law occurred after the case was submitted and was overlooked by the panel," or that "[t]he opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals and the conflict is not addressed in the opinion," or that "[t]he proceeding involves one or more questions of exceptional importance."

Maryland Rule 8-605 contains no such criteria. Nor does it afford any direction whatsoever for lawyers to follow when seeking in banc reconsideration of a Court of Special Appeals' decision. Although § 1-403(c) of the Maryland Courts and Judicial Proceedings Article provides that "[a] hearing or rehearing before the [Court of Special Appeals] in banc may be ordered in any case by a majority of the incumbent judges of the court," the words "in banc" are nowhere to be found in Maryland Rule 8-605.

In contrast, Rule 35 of the Federal Rules of Appellate Procedure, which governs petitions for hearing or rehearing en banc, provides that such a petition must state either that "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed … and consideration by the full court is therefore necessary to secure and maintain the uniformity of the court's decisions," or that "the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."

Maryland Rule 8-605's lack of substantive guidance is not its only shortcoming. I was recently involved in an appeal which the Court of Special Appeals decided largely in my client's favor in which the adverse party filed a 15-page Motion for Reconsideration and a separate 11-page Request for En Banc Review. This would not be allowed without court approval under the federal rules, which state that, "[e]xcept by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages" and that, for the purpose of this page limitation, "if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately." Fed.R.App.Proc. 35(b)(2) and (3).

Maryland Rule 8-605 and the federal rules do share some procedural features which are similar, if not virtually identical, including provisions describing the action that may be taken if the motion/petition is granted. Compare Md. Rule 8-605(e) with Fed.R.App.Proc. 40(a)(4). But page limits are apparently not among these shared features, as I learned when I called the Court of Special Appeals' clerk's office to ask whether it had accepted both the Motion for Reconsideration and the Request for En Banc Review, and was told that the 15-page limit imposed by Maryland Rule 8-605(b) applies only to the former.

Purposefully vague?

Perhaps Rule 8-605's lack of guidance is deliberate. Maybe it is purposefully vague so as not to encourage lawyers to waste the appellate courts' time and their clients' money. After all, it is common knowledge that motions for reconsideration are hardly ever granted. But if that is such a concern, there is no reason why Rule 8-605 cannot state, as the federal rules do, that reconsideration "is not favored," Fed.R.Civ.App. 35(a), and that seeking reconsideration "merely to reargue the case is an abuse of privilege." Local Rule 40(a).

The Maryland Rules can warn practitioners to be good. They should also establish more clear parameters, as the federal rules do, for lawyers who encounter an appellate decision which they believe was wrongly decided and should be reconsidered. A working traffic light may be occasionally abused, but that situation is far preferable to the anarchy which occurs at a busy intersection with an imprecise signal.

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