

Law

A new standard

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Special to The Daily Record

February 13, 2012

A change in appellate procedure that took effect last month may not be as electrifying a piece of news as the lead story about William Hall, which I read in the Bangor Daily News on one of my recent trips to Maine. But once I tell you more, I am sure you will agree with me that the rule change which added a new feature to briefs filed in Maryland's appellate courts comes a close second on the excitement scale to the tale of a murder suspect who was seen swimming across the Penobscot River after escaping during a smoking break from a smoke-free psychiatric facility.

According to the Bangor Daily News, Mr. Hall had been undergoing a psychiatric evaluation at the Dorothea Dix Psychiatric Center after being arrested and admitting to police that he had strangled an acquaintance and had thrown the victim out of a second-story window. Mr. Hall had reportedly been granted "supervised" smoking privileges outside, but apparently there was some confusion in the psychiatric hospital about the meaning of "supervised," because Mr. Hall had enough time to scale an eight-foot wrought-iron fence and escape from the hospital without any discouragement or interference from his "supervisors" or other hospital staff.

Shortly after Mr. Hall's attempt to make good on the Live-Free-Or-Die motto of Maine's next-door neighbor, New Hampshire, someone who was fishing at the nearby Penobscot Salmon Club — a favorite hangout of Dorothea Dix hospital personnel, I'm guessing, during breaks from the rigor of their supervising responsibilities — saw a man matching Mr. Hall's description swimming across the river. Fortunately for Mainers and tourists alike, Mr. Hall was arrested shortly after escaping. Maine health officials also launched an investigation that, according to the Bangor newspaper, "could" lead to "a comprehensive review of safety policies and procedures at Dorothea Dix." Could? Seriously?

But I digress somewhat from the real topic of today's column.

To some people, a new requirement affecting the contents of Maryland appellate briefs may seem a yawner in comparison with the exploits of William Hall and the folks who were supposed to be his keeper. But the world of brief-writing, while not static, is a place where change comes slowly and ripple effects are felt when any change occurs.

Some, such as the somewhat recent rule change requiring the email address of at least one attorney on the front of the brief, are inconsequential. Others are potential game-changers, including the new requirement, set forth in Maryland Rule 8-504(a)(5), that briefs must now include "[a] concise statement of the applicable standard of review for each issue, which may appear in the discussion of the issue or under a separate heading placed before the argument."

Some of you may be thinking that a standard of review statement has always been required for Maryland briefs, but if you had such a thought, you would be incorrect. Yes, for years Maryland courts have routinely discussed in appellate cases the applicable standard of review at issue, and a standard of review section is required in briefs governed by the Federal Rules of Appellate Procedure and the rules of many state courts. But until Jan. 1, 2012, the Maryland Rules contained no such requirement.

As a result, Maryland appellate briefs which I filed in the past have not included a separate section discussing the applicable standard of review but, instead, incorporated the standard of review in the argument itself by telling the reader at the outset that the decision being reviewed should be reversed (or affirmed) because the Circuit Court clearly erred (or properly made findings supported by competent material evidence) or abused its discretion (or acted well within its range of authority) or erred as a matter of law (or was legally correct) in holding that _____ and entering judgment against (or in favor of) my client. A sentence or two would follow to expand on the applicable standard of review before plunging into a detailed discussion of the reasons why the appellate court should overturn (or uphold) the judgment.

I do not plan to change this approach, which, because I use it with respect to each issue raised in the brief, complies with a literal reading of Maryland Rule 8-504(a)(5)'s new requirement. But as long as there is no repetition in doing so, there is no reason not to supplement this approach by accepting the Rule's invitation to include a separate heading before the argument setting forth a concise statement of the standard of review which governs each issue raised in the brief. The new requirement provides lawyers with a golden opportunity to advocate for our clients which we would be remiss in passing up.

Using the William Hall case as a hypothetical, let's say that a comprehensive review of safety policies and procedures not only could take place but actually did occur, and that you had the seemingly unenviable task of seeking reversal of the Dorothea Dix hospital's administrative decision to terminate the employment of the staff person who was responsible for supervising Mr. Hall during his smoking break. Let's also say that unrefuted expert

testimony at the administrative hearing established that the staff person, Officer Goodwin Knight, had a really bad case of sleep apnea which had never been previously undiagnosed and that this was the reason why Officer Knight was found apparently snoozing in his chair in the courtyard where Mr. Hall climbed the fence and escaped.

The standard of review of an administrative agency's adjudicatory decision is extremely deferential to the agency, but the standard of review section of your brief should focus on the portion of the substantial evidence test which, in your view as the advocate for your client, controls the outcome of this case. Instead of stating that the reviewing court's role is narrow, that an agency's decision is presumptively correct, and blah blah blah, tell the judges that a reviewing court must reverse an agency's decision if no "reasoning mind reasonably could have reached the factual conclusion the agency reached," *Maine Dept. of Health v. Jones*, etc., or if the decision cannot be "reasonably supported by the evidentiary record." *Smith v. Maine Dept. of Corrections*, etc.

Other pertinent parts of the standard of review concerning fact-finding and drawing of inferences if supported by the record should also be discussed to set up the argument portion of your brief, where you will argue that reversal is required because there is no evidentiary support for the agency's decision.

So, the next time you write a Maryland appellate brief, think of Mr. Hall. Take advantage of the opportunity and run with it.