

## Law

---

### **Phoenix, ashes, and one seemingly dead appeal**

June 7, 2010

By Andrew Baida

Special to The Daily Record

Winning an appeal is always a good thing, with the possible exception of that special category of criminal cases in which forensic evidence conclusively proves your client is a seriously disturbed serial killer who makes Norman Bates look normal, and the win is based on one of those “technicalities” having nothing to do with guilt or innocence.

Winning is even better when the non-serial killer client expects you to lose before you are even retained to take on what everyone apparently believes is a complete loser of a case.

And nothing is sweeter than winning such a case after you walk out of the oral argument absolutely convinced that you have lost and mumble to yourself on the way back to the car that maybe the law is not really your calling and perhaps it’s not too late to pursue your childhood dream of being a fireman.

I may still choose to chase that dream because I know there will be losses in the future. But, for now, I’m quite content to savor the moment. Because I won the appeal that no one — including my own mother, had I told her about it but didn’t because I was so sure of my defeat after the oral argument — thought I would win.

The seed which gave birth to what I am sure any objective observer would agree is one of the greatest victories of all time, surpassing even the 1980 U.S. hockey team’s Olympic gold medal win over the heavily-favored Russians, was planted when the Maryland Attorney General’s office asked if I would represent the state in *Office of the Public Defender v. State*, a case in which the Public Defender’s office appealed the Circuit Court for Cecil County’s decision to order a deputy public defender to represent a criminal defendant.

The circuit court had disagreed with the deputy public defender’s assessment of the defendant’s indigency and ordered him to represent this individual after the trial judge decided the defendant could not afford a lawyer. I was asked to serve as special counsel because the Attorney General’s office, which has the general legal obligation to represent the

state and ordinarily would have done so here, had issued an opinion some years back expressing the view that the courts lack the authority to order the Public Defender's office to represent criminal defendants in this kind of situation.

In other words, I was retained to defend a position which the client's chief lawyer, after considerable analysis, thought was absolutely wrong.

Representing the state was a role with which I was quite familiar, as I had handled a number of appeals on behalf of the state and its officers and employees during the 18 years I spent at the Attorney General's office prior to joining my firm. Since leaving government employment, I have been on the other side of the courtroom opposing my former colleagues in a few cases, including one in which the stakes were high and certain relationships were strained. So, viewing the Public Defender appeal as an opportunity to be involved in an important matter and perhaps mend fences, I agreed to represent my longtime and now former client.

But since the Attorney General's office was on record as having agreed with the position of the Public Defender in this case, I was on my own. Not only that, the author of the Attorney General opinion stating that a trial court cannot override the Public Defender's indigency determination was a former colleague for whom I have the utmost respect. In fact, I had regularly solicited this person's input and views to help me work through a number of difficult issues I encountered in various appeals when I worked for the Attorney General's office.

But in spite of my former colleague's well-written and reasoned explanation why the courts cannot order the Public Defender's office to represent a person it decides is ineligible for representation, I was a true believer in my position stating otherwise by the time I filed my brief with the Court of Appeals. And, after receiving the Public Defender's reply brief, I remained a believer.

Until, that is, the oral argument.

You know your argument is not going well when one of the judges basically tells you the other side is right. And you know it's really not going well when, after you spend several minutes unsuccessfully trying to turn the judge around, you hear yourself respond to something the judge said by saying, in restrained exasperation, "I disagree."

Telling a judge you disagree with him or her is like telling your wife, "you're wrong." You might as well call the funeral home to make arrangements for your burial. Because that's it, pal. You're done.

This was the fate I was convinced I had suffered when I left the Court of Appeals building following the oral argument last September. The young associate who helped me with the brief — the only other person I knew who thought we had a winning argument before we entered the courtroom — also was sure by the time we stood up at counsel table to leave that,

although we had fought the valiant fight, we were dead.

Not dead as in mortally-wounded-but-with-one-last-gasp-of-life dead. No, dead as in instantly-even-though-the-head-may-still-be-rolling-decapitated dead.

Well, you all know what happened.

It's been more than a month now since the Court of Appeals agreed with our argument that a trial court has the authority to order the Public Defender to represent an indigent individual upon finding that the individual cannot afford a lawyer, and that the Public Defender's previous indigency determination was erroneous. But I'm still basking in the glow.

Because how many times did the phoenix pull that hat trick?

One time is all it took to teach me the invaluable lesson that you should never give up in an argument, as I almost did, even when it appears as if all hope is lost. Your case may still take flight.