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Law

Bad dog!

By Andrew Baida
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A few folks out there may think it insulting to compare my dog to some of the attorneys I had to deal with in recent appeals I've handled. It probably is insulting, so I'd like to apologize. To my dog. Even on his worst day, Smokey is better-behaved.

And that's saying something, because Smokey is no angel. He snores away on the living room sofa when no one's at home. He digs massive holes in the yard in a never-ending search for the meaning of life which is apparently located in a very well-hidden bone. And he has regularly feigned complete ignorance about the circumstances surrounding the dental floss, tissues, and other toiletry items strewn across the bedroom floor that were in the trash can shortly before Smokey hightailed it down the stairs.

It's a little annoying to brush large quantities of dog hair off the sofa, which is supposedly off-limits. I also have better things to do with my time than to act out the role of Sisyphus forever refilling the same holes with dirt. And, yes, it's a bit disturbing that Smokey can't seem to get enough of used Hi-Tech floss and Kleenex.

But at the end of the day, these are just shenanigans. They are nothing like the bad behavior I've had the misfortune to contend with on appeal.

Before proceeding any further, I don't mean to suggest that I'm a model of perfection. It's possible that at some point in my past I may have written a brief which viewed the evidence in the light most favorable to my client even when the governing legal standard required that it be treated otherwise. I also might have succumbed to advocate's disease on an occasion or two by assigning more significance to facts and/or cases than would be warranted by a less zealous reading of the record and applicable law.

But this is not the behavior I'm talking about. A trial lawyer I know recently complained about how much he dislikes deposition practice because, in his experience at least, there are so many lawyers who act as though depositions are the wild, wild West where they can get away with virtually anything in the sheriff's absence.

One might think that less lawlessness occurs at the appellate level because there are fewer opportunities for lawyers to behave badly. But some lawyers, no matter the forum, are shameless. The most shameful, in my view, is the lawyer who writes an appellate brief which deliberately mischaracterizes the record. This type of bad dog behavior, like that of the abusive lawyer in discovery, requires significant time and money to remedy and is not remotely what I envisioned about the practice of law when I took the LSAT.

Having said that, I've nevertheless struggled with whether I should write this article because of the possibility it could offend any number of the many lawyers I've dealt with over the years in the various appeals I've worked on. Of those attorneys, the overwhelming majority has not engaged in the conduct I'm talking about. But I've been subjected to this type of behavior too many times to remain silent.

To avoid insulting the innocent, and to ensure that those lawyers would know I wasn't talking about them, I originally intended to discuss with some specificity the most recent experience of this kind which I had suffered through. But I've since decided to try a different tack. Not because of my wife's somewhat strong reaction to the initial draft of this article, manifested by her writing "no" in the margin five times just in case I missed the first four renditions of that word. Well, at least that's not the only reason why I've basically rewritten the rest of this article.

The other reason is that I shouldn't be concerned about offending anyone in saying that lawyers should not take liberties with the record by making statements in their briefs which are just not true. Most lawyers won't be offended by this statement because they know that it's not directed at them and that this is not how they practice law. As far as other lawyers are concerned, however, they really need to change their ways.

I'm not talking about inadvertent misstatements. My complaint is about the lawyers who consciously circumvent the requirement imposed by Maryland Rule 8-504(a)(4) that "[r]eference shall be made to the pages of the record extract supporting the assertions" made in the brief's statement of facts.

I'm not sure which is worse. An "assertion" which the extract citation does not support is pretty bad. So is an "assertion" which has no extract citation and is contradicted by the record. We can debate in the abstract which infraction is the greater evil. Both are inexcusable when the assertion plays an instrumental role in the argument portion of the brief, as was the situation in the appeal which was for me the proverbial straw that broke the camel's back and prompted this article.

I suppose it should be sufficient redress that the appellate court in that case was not misled by these kinds of assertions and mischaracterizations of the record. And perhaps I would be willing to let sleeping dogs lie if this were the first time I encountered this kind of behavior on appeal. But I've seen it before and need to say something.

Lawyers shouldn't behave this way. Bad dog.

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