

You could've done better

By Andrew Baida
Special to The Daily Record

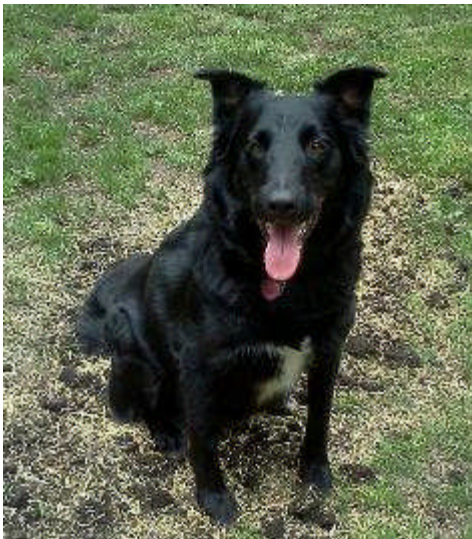
July 16, 2012

I should be basking in the after-glow of a very good program that the Maryland State Bar Association's Appellate Practice Committee, which I co-chair, presented at the recently concluded MSBA annual meeting in Ocean City. Three speakers who are truly prominent in their fields, including the Wall Street Journal's Supreme Court correspondent and a lawyer who has argued more cases before the Supreme Court than any other woman in history, regaled attendees with their thoughtful analyses, insights, and ruminations about the then-pending Obama health care cases and a number of high profile Supreme Court decisions. Even my mother would have been impressed with this striking group of standouts and the consistently sharp observations they shared throughout the two hours they were allotted.

Yes, I should be reliving the moment, but, instead, I've been consumed thinking about two others. One took place the night before the program, the other happened a few hours after the program was over, and each occurred when someone took my wife aside and, nodding in my direction, told her that she could've done better.

The first person to say this was a judge, and if he were the only one to express that view — which he did in a social setting, not a domestic relations proceeding in which I was a party — I might be inclined, in the interest of self-preservation, to turn the other cheek. But no maligned husband in my position could remain silent when, less than 24 hours later at the President's Reception, another person said those exact same words to my apparently better half.

Perhaps I opened the door to this abuse, but I don't think so. Sure, maybe I pushed a little too much on a sensitive subject when I showed the judge, who had recently written a slightly controversial decision about pit bulls, a picture of my dog Smokey and asked for an advisory opinion whether I needed to increase my homeowners' liability coverage.



Smokey (Courtesy of Andrew Baida)

And yes, as far as the second person is concerned, I may have made a similar observation about him to the woman who ultimately became his wife, but that was almost 30 years ago, well outside the statute of limitations.

So, no, having someone — or at least these two people — tell my wife that “you could’ve done better” is definitely something I did not deserve.

Not that I haven’t said those same words to myself. Just to be clear so that I’m not permanently exiled to the shed behind my house or buried beneath it, I’ve said those words about my work, not my wife. And I suspect I’m not the only attorney who has had a moment of self-reflection after filing a brief and thought, “I could have done a better job.”

Do something else

My flashes of humility occur occasionally in the classroom, where students in an appellate advocacy course I teach critique briefs I have written. I regularly select briefs which have been filed in cases I have won, thinking that these are high-quality writing samples, and my students just as regularly expose me for the delusional professor that I am by identifying uninformative topic sentences, unimaginative use of case authority, and excessive use of quotations from decisions and the record.

More frequently, the self-reflective moment takes place as I prepare for oral argument when I read briefs which I wrote and filed months before. Distance and the passage of time have a tendency to crystallize flaws which are not apparent in the heat of the writing process when it is easy to get seduced by the perceived brilliance of your own prose.

Which leads me to the appellate practice point of the day: Write it early, revise it often, then put it down and do something else for at least a week before returning to your draft. Seriously.

Briefing schedules often have three extra months in them, which the parties can use to extend the time for filing each side’s brief. Taking advantage of this opportunity means completing your legal research and factual review of the record sooner rather than later, so that you can generate as quickly as possible a draft which you can thereafter revise repeatedly, to the point of becoming delirious and overcome with nausea but not quite borderline homicidal, before affording the brief the requisite time to recover from your manic and ruthless edits so that it can breathe and take shape.

What you should not do is wait until the week before the brief is due under an extended schedule before beginning to write it. Every semester I urge my students to start working on their briefs at the earliest opportunity, and every semester only some of them heed my advice. I can tell the difference between a brief slapped together at the last minute and a brief written well before the deadline. So can judges.

I understand that we all have lots of competing demands, and I have on occasion yielded to them, so who am I to cast the first stone, but the only beneficiary when we procrastinate is the other side or a student who takes glee in shredding apart something you wrote.

So do your client a favor and give your brief the time it deserves. Believe me, the last thing you want is to be told you could’ve done better.

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