THE DAILY RECORD

Law

The art of appellate advocacy: Passion play

By Andrew Baida
Special to The Daily Record
September 7, 2010

In most venues, the "f-word" is code for a word which typically provokes a range of human reaction. But in my family there are two kinds of f-words, and one of them — Frisbee — always gets the same response from the newest member of the household. And like the two pups who lived with us prior to his arrival, our now-two-year-old dog, Smokey, has taught me a valuable lesson about appellate advocacy.

Before moving to Baltimore, Smokey lived with the rest of his litter in a foster home in Richmond, Va., where my wife and daughter drove to adopt him because, after all, everyone knows there are no rescue dogs in the Baltimore metropolitan area. But I digress.

Smokey's foster mother, a University of Richmond law student, apparently took her legal education quite seriously and felt the need to make full disclosure by explaining apologetically that Smokey was learning how to play with a Frisbee-style disc but "hadn't quite gotten it completely." This may have been a deal-killer in some households, but not ours. Our then-recently departed dog, Sparky, had perfected the art of biting people, but he never understood how to otherwise play fetch. And our soon-to-be-departed other dog, Dusty, even when he was in his prime, would just look at you as if you were a complete moron if you so much as tried to play with him.

But neither Sparky nor Dusty had the genetic makeup of the border collie/Australian shepherd mix which makes Smokey very smart, extremely driven, and completely OCD. Within months of joining our family, he became Frisbee dog-extraordinaire. And I'm not talking about namby-pamby tosses either. I'm talking about manly hurls covering more than 150 feet of ground. If the Frisbee is still airborne by the time Smokey closes the gap with his cheetah-like speed, he will leap up into the sky for the ferocious kill. And if the Frisbee hits the ground first, no matter how unpredictable the bounce, he will deftly field it like a Brooks Robinson/Mark Belanger pedigree.

People actually clap when they see this crazy obsessive dog in action.

As a result of his passion for Frisbee, Smokey has ripped through at least eight rubber KONG Flyers with his fierce catches, and has forced us to limit his playing time to prevent him from stroking out, and to say “f-word” rather than “Frisbee” to avoid putting him on high alert when it’s not yet time to play.

I’m not sure why Smokey has such a Frisbee fixation, but what I do know is that the reason he now excels at Frisbee is because he loves to play the game. Which brings me to today’s topic.

Approach it with zeal

Not everything about appellate litigation is as thrilling as catching a Frisbee. Compiling the pertinent parts of the record for inclusion in a joint record extract or appendix is tedious work. Reading hundreds or even thousands of pages of trial transcripts and exhibits can be almost as deadening an experience, although perhaps slightly less so when, like watching the Orioles win a game, you see something you don’t expect which temporarily jolts you from your coma before you quickly nod off and return to the land of the undead. These types of jobs need to be done, of course, but no normal lawyer — a phrase which admittedly suggests a potentially huge exception to the general rule — pursues them with the same maniacal glee that drives my dog when he chases down his favorite toy.

One activity, however, has significantly greater potential for excitement than these other tasks and is critical to the outcome of the appellate process. And watching Smokey perfect the art of catching a Frisbee has shown me that the best way to become a better appellate lawyer is to engage in the act of writing with the same passion.

At this point some may be thinking that this column has truly gone to the dogs. But seeing this zealous canine in action has convinced me that the lawyer who loves writing as much as Smokey loves running after a Frisbee is much more likely to produce a better brief than the lawyer who views this as just another checklist chore.
I’ve seen briefs in which it was clear that the other side was dogging it and going through the motions. I’m sure you’ve seen those briefs, too, and so you know what I’m talking about when I say that they just don’t work. You are much more likely to persuade someone else if you really believe in the position you advocate. And what that position looks like directly depends on the amount of passion you use in creating it.

I have taught legal writing for a long time and have reviewed other lawyers’ briefs for even longer, so I understand that not all writers are created equally. But that doesn’t mean the playing field will always be unlevel. Writing may come more naturally to some than to others, but there is no limit, other than what each of us decides to impose, on the zeal we have for our clients and the manner in which we are articulate the reasons for ruling in their favor.

Work the record in your case by drawing on as many sources as possible to tell the most

irrefutable story you can from your client's perspective. Make sure your research is thorough and that your brief mines the cases for governing legal principles, similar facts, applicable quotes, and holdings which support rather than contradict your position. Give life to the argument by setting forth substantive reasons which also appeal to the judges' sense of right and wrong so that they want to rule in your client's favor.

Most importantly, give life to your writing by approaching it with enthusiasm instead of dread. If you love what you do, you will become better. Just ask Smokey.