

## Law

The Art of Appellate Advocacy: To report or not to report?

ANDREW H. BAIDA

Special to The Daily Record

August 3, 2009

In yet another one of her endless and mostly futile efforts to steer me away from discussing our family and toward the direction of addressing a topic more suited, at least in her view, for this type of column, my wife forwarded me a somewhat spirited exchange on the subject of unreported appellate opinions that she had read on one of her listservs, and suggested that maybe I could write an article on the topic.

I had a rather lukewarm reaction to her suggestion at the time it was offered this past Spring when the discussion appeared in the MSBA's Real Property and Solo and Small Firm Practice Sections' listservs, and told her I would write such an article when I felt the right inspiration for doing so.

I got just the spark I needed when I read an obituary a few weeks ago. In the interest of self-preservation, I'd like to make clear, before proceeding any further, that this is not meant as either an editorial commentary about my marriage or a not-so-subtle suggestion that it suffers from a comparative lack of fireworks. That raging inferno of a relationship generates so many sparks on a daily basis that it would take several lifetimes to write the articles they inspire.

But one sentence in this obituary triggered the sudden realization that my views on unreported opinions have been manifestly wrong since day one and are in dire need of being corrected for the record.

The epiphany I experienced, the likes of which have not been seen since the conversion of St. Paul, occurred when I read that it was the wish of the person who had died that her age not be disclosed.

Most, if not all, of us know someone who does not want other people to know his or her age. I learned the identity of one such person when I was preparing introductory remarks about the speakers in a program sponsored by the Appellate Litigation Committee at last year's

annual MSBA meeting and saw, after reading the bio posted on the Maryland Court of Appeals' Web site, that no birth date was included for this particular individual. Curious George that I am, I've since learned that the bios of a few other members of Maryland's appellate courts omit this type of information.

The phenomenon is of particular interest to me because I was raised in a house in which each of the family matriarchs guarded the secrecy of her age with such zeal and cunning that Coca-Cola had sought their collective advice on protecting its secret formula.

OK, I made up the part about the advice, but not the rest. My grandmother was so vigilantly obsessive about not revealing her age that she had the tombstone for my grandfather bear only the date of his death so that hers, naturally, would include the matching biographical information when she died.

She also tried to take the secret with her to the grave by lying about her age to two of her great-grandchildren when she told them several months prior to her death that she was 94 years old. She almost got away with it, too, until we learned soon after the funeral that her older sister was born two years before my grandmother was and would have been 98 if she were still alive. Good try, Grandma.

My mother, while equally fanatical in her efforts to hide her birth date, was not as careful as my grandmother was and made the mistake of leaving her purse in plain view, thus enabling her then-pre-adolescent son to and read her driver's license. But she had prepared herself for the occasion and insisted, as she does to the present day, that she lied about her age when she applied for her license so she could get into clubs where alcohol was served. Which raises the question, Mom, did you really commit fraud, or are you really 80?

### **The zombie wakes**

You would think with such a family history that I would have immediately jumped into action when my wife suggested writing an article about the same practice of keeping us in the dark that the Maryland Court of Special Appeals uses by not reporting the vast majority of its decisions. (Maryland's highest court, the Court of Appeals, decides far fewer cases than the Court of Special Appeals does and reports virtually all of its decisions.) But apparently either or both of the age-crazed women I grew up with put me into some kind of hypnotic trance to leave alone any scheme remotely resembling the one my grandmother passed down to her daughter.

Well, call it irony, fate, or anything you want, but that obituary broke the evil spell I was under and put an end to my zombie-like acquiescence in the current Maryland situation of not disclosing unreported decisions to basically anyone other than the parties in the cases in which those decisions are issued.

I may no longer be a zombie about the subject of unreported decisions, but I haven't turned full cycle either into one of those demonic advocates, a few of whom participated in the

listserv exchanges I mentioned earlier, who say that every one of the 1,200+ decisions that the Maryland Court of Special Appeals issues each year should be “reported” in the Maryland and Atlantic Reporters. Most Court of Special Appeals decisions do not involve issues of “substantial interest” that qualify them for reporting under Md. Rule 8-605.1(a), and enough trees have been sacrificed for truth, justice, and the American way of reporting decisions that frequently, in the scheme of things, add little to the existing case law.

Some listserv contributors suggested that an appellate decision may be unreported for reasons having nothing to do with whether the case involves matters of substantial interest. According to these individuals, unreported opinions do not have to be as carefully researched and written as reported decisions do, and a judge may choose not to report a decision if it involves controversial issues which run counter to the judge’s personal beliefs and/or might adversely affect the judge’s future political aspirations.

I share the view of other listserv participants who expressed the belief that the reasons why judges choose not to report decisions are based on appropriate considerations.

But regardless of what those reasons are, there is another, more fundamental point to be made: Just because a decision isn’t stamped with the word “Reported” on the cover page does not mean that it should be kept out of the public domain. I could try to wax eloquent about access to the courts and open government, but why overtax an already challenged brain? For me, it’s simply a matter of inquiring minds having the right to know what Maryland’s intermediate appellate court is doing.

Whatever reasons motivate people, such as some of the women in my family, to not disclose their age, there is no valid basis for enshrouding unreported decisions in a cloak of secrecy. Even if you subscribe to the view that some cases may warrant special treatment because they involve unique matters of privacy or confidentiality, that’s what initials, pseudonyms, and Rules such as Md. Rules 8-121, 8-122, and 8-123 are for.

### **Good enough for the 4th**

Making unreported decisions available to only a select few is a relic of the past that, in light of the current state of technology, deserves a quick funeral and should be buried forthwith, preferably in an unmarked grave so as not to disclose any embarrassing information about a practice whose death has been long overdue. Westlaw, Lexis, and other public databases abound with “unpublished” opinions of the federal appellate courts, many of which, including the U.S. Court of Appeals for the Fourth Circuit, have erected more demanding requirements that must be met for publishing an opinion than the amorphous substantial interest standard used by the Court of Special Appeals.

If it’s good enough for the federal counterparts of our intermediate appellate court to make these opinions accessible to the public, it should be good enough for Maryland.

I know it’s good enough for me, which is why I want to thank my wife for keeping me on

topic. As I'm sure her mother-in-law will, too.

*Andrew H. Baida is a partner at Rosenberg|Martin|Greenberg LLP in Baltimore. He is an adjunct professor of appellate advocacy at the University of Maryland School of Law, and of Maryland administrative law at the University of Baltimore School of Law.*