

Maryland Bar Journal

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The Maryland Court of Special

Its Roots, History, and Future



Appeals:

By the Honorable Peter B. Krauser, Chief Judge

The history of intermediate appellate courts in Maryland does not begin, in 1966, with the creation of the Court of Special Appeals, as commonly believed. In fact, the pilgrims had disembarked from the Mayflower only 18 years earlier, when, in 1638, the semblance of an intermediate appellate court first appeared in what was then known as the “Province of Maryland.” Subsequently dubbed, in 1642, the “Provincial Court,” it was presided over by the Governor of the Province of Maryland and members of his Council (an interesting take on the separation of powers doctrine).

The Provincial Court eventually exercised both original and appellate jurisdiction, and litigants, unhappy with a ruling of the Provincial Court, could, by 1664, seek review of that decision by what was then generally referred to as the “Court of Appeals,” though, we assume, with little expectation of success, given that the Governor and his council presided over that court as well.

The Provincial Court was ultimately replaced in 1776, with what was designated as the “General Court,” by Article 56 of the Maryland Constitution of 1776. That article provided “that three persons of integrity and sound judgment in the law, be appointed judges of the court now called the provincial court, and that the same court be hereafter called and known by the name of the general court.”

The General Court sat on both the eastern and western shores of Maryland, in Easton and Annapolis, respectively. Interestingly enough, the General Court was “mentioned frequently in contemporary writings,” as noted by a prominent Maryland legal historian, “and always with an evident sense of importance in the institution. Carroll T. Bond, *The Court of Appeals of Maryland, A History* 88-89 (Baltimore: The Barton-Gillet Co., 1928). Given this description of that court, it is not surprising that four of its judges – Robert Hanson Harrison, Thomas Johnson, Samuel Chase, and Gabriel Duvall – went on to serve on the United States Supreme Court and, even more impressive, the judges, of that intermediate appellate court, received an annual salary of \$1,333.33, which was more than twice the \$533.33 salary received by the members of the Court of Appeals, a practice regrettably abandoned upon the General Court’s dissolution.

The dissolution of the General Court occurred only thirty years after its founding. Apparently, the physical and financial burden of traveling to that court, from distant counties, resulted in its dismantlement in 1806, leaving the Court of Appeals to assume exclusive jurisdiction over all appeals. But, before its short tenure concluded, the General Court rendered what, in hindsight, was a historic decision that unfortunately appears to have slipped, unnoticed, beneath the shallow waters of popular history. That decision, authored by Chief Judge Jeremiah Townley Chase of the General Court, was *Whittington v. Polk*, 1 H. & J. 235 (1802).

Issued less than a year before *Marbury v. Madison*, 5 U.S. 137 (1803), the General Court, in *Whittington*, promulgated the doctrine of judicial review, and, in so doing, laid the foundation for the *Marbury* decision. Indeed, Chief Justice John Marshall, as some legal historians

have pointed out, employed reasoning and language in *Marbury v. Madison*, quite similar to that which appears in *Whittington*. See Michael Carlton Tolley, *Maryland and its Anglo-Legal Inheritance*, 11 J. LEGAL HIST. 353, 361 (1990). What is more, the Chief Justice engaged in the same legal sleight-of-hand that was performed by the General Court in *Whittington*: That is, while seemingly acquiescing to legislative authority it boldly proclaimed, in dictum, the doctrine of judicial review.

The similarity in language, reasoning, and strategy of those two decisions is not as surprising as one would think, given the national attention that the *Whittington* decision received and that the author of *Whittington* was, as noted, Chief Judge Jeremiah Townley Chase, a cousin and close personal friend of Justice Samuel Chase, who joined Chief Justice Marshall’s opinion in *Marbury*. See Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58, 65 (2002).

After the General Court’s constitutional dissolution, Maryland was denied the benefits of an intermediate court until the creation, a little more than 160 years later, of the Court of Special Appeals. The efforts to create such a court to relieve an overburdened Court of Appeals of some of its case load began in the 1950s. Proposals for dealing with this untenable situation, from the bench and the bar, ranged from assembling an intermediate court to handle certain types of civil and criminal cases, to concocting an appellate court that would be the co-equal of the Court of Appeals, but which would only consider criminal appeals.

Those mid-century efforts to address Maryland’s rising appellate caseload were largely unavailing, though they

did result in an increase in the number of judges sitting on the Court of Appeals from five to seven. But, as expected, the palliative effect of that measure was short-lived. Decisions of the United States Supreme Court, such as *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Gideon v. Wainwright*, 372 U.S. 335 (1963), and legislative changes in the appellate process, notably, the passage of the state’s post-conviction act, sparked an exponential increase in the number of criminal appeals in Maryland. As the Court of Appeals’s workload grew with unprecedented rapidity, the Maryland State Bar Association, in the early 1960s, led renewed efforts to create an intermediate appellate court to relieve the appellate congestion.

Troubled by a 478 percent increase, from 1957 to 1964, in the number of criminal appeals, the Bar Association proposed a plan to create an intermediate court to hear all non-death penalty criminal appeals. That plan was submitted to the legislature, with the expectation that the jurisdiction of the intermediate court would ultimately be expanded to include civil appeals, an expectation shared by many legislators. It was thereafter adopted by the General Assembly and a constitutional amendment was approved by the voters authorizing the establishment of the Court of Special Appeals.

It was hoped that the Court of Special Appeals “would reduce appreciably the caseload of the Court of Appeals without complicating the jurisdictional structure;” would “provide the state a court with expertise in the complicated and ever-changing problems of criminal law and procedure”; and would “provide another vehicle for full and careful consideration of all criminal cases appealed, thereby hopefully minimizing intrusion by the federal courts through collateral proceedings into the criminal procedure

of this state." John T. Joseph, Henry R. Lord, *A Discussion of the Proposed Intermediate Appellate Court for Maryland*, 25 MD. L. REV. 300, 308 (1965).

Following the Court's creation, Robert C. Murphy was sworn in, on January 7, 1967, by Governor J. Millard Tawes, as chief judge of the newly-established Court of Special Appeals, together with Thomas M. Anderson, Charles F. Orth, James C. Morton, and C. Awdry Thompson as associate judges. The Court then "opened in a courtroom hastily improvised" with "many pieces of borrowed furnishing" in an office building on Francis Street, recently leased by the Tawes Administration. Gerald A. Fitzgerald, *New Tribunal Hears First Case*, THE BALTIMORE SUN, Feb. 21, 1967, at C6.

Notwithstanding those humble beginnings, the Court of Special Appeals quickly became a vital and essential part of the Maryland judiciary.

In fact, two years after its creation, the Court of Special Appeals, the Baltimore Sun observed, in a story entitled "The New Court Already Overworked," was flooded with cases. The Court's "workload," the Sun pointed out, "ha[d] increased 70 percent within a three-year period." George J. Hiltner, *New Court Already Overworked*, THE BALTIMORE SUN, Jul. 13, 1969, at 20. Consequently, within a year, the General Assembly stepped in and passed legislation, increasing the number of judges on the Court of Special Appeals from five to nine, and permitting "any case" before the court to be heard by a panel of not less than three judges, unless a hearing *en banc* was ordered by a majority of its nine judges. But, that increase in the number of judges was offset by a concomitant expansion of its jurisdiction to include appeals from bail, adoption, child custody, divorce, paternity, worker's com-

ensation, contempt of court, automobile accident and motion picture censor board proceedings. Inevitably, the General Assembly chose to add, in 1972, one more judge to the Court, bringing the total number of judges, sitting on the Court of Special Appeals, to 10.

Then, in 1974, the legislature, once again, extended the Court's appellate jurisdiction. It was to now include "any reviewable judgment, decree, order[s] or other action of a circuit court, and an orphan's court," except in capital cases. Md. Code Ann., Cts. & Jud. Proc. § 12-308 (1974, 1980 Repl. Vol.). This, in turn, prompted, three years later, another legislative increase in the number of judges on the Court of Special Appeals, from 10 to 13 judges.

To no one's surprise, however, the caseload of the Court continued to increase at a daunting pace, reflecting a burgeoning state population, and the

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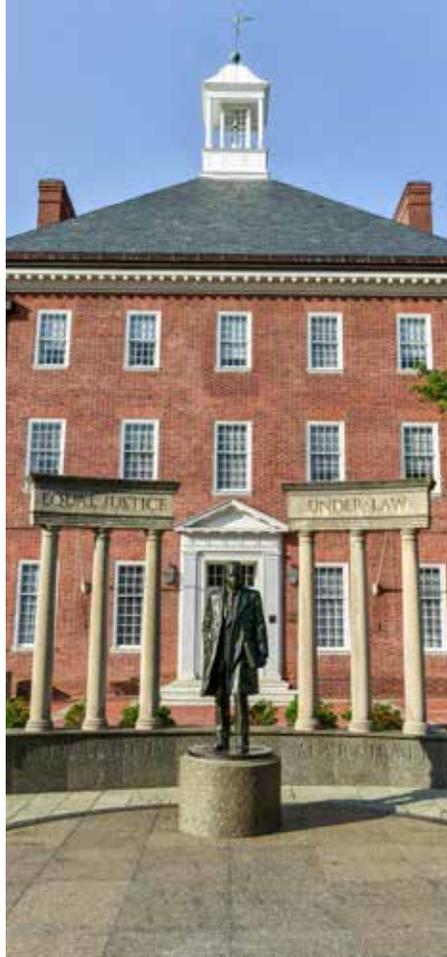
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legislature's expansion of the appellate process. Moreover, as the nature of the majority of appeals to the Court shifted from criminal to civil, the Court was frequently faced with issues of greater complexity, which, in turn, prompted a dramatic and necessary growth in the length of opinions it issued.

But the foregoing challenges have not gone unaddressed. Over the past decade, with the active support of Chief Judge Robert M. Bell, Court of Appeals of Maryland, our Court has implemented a variety of measures to meet the unrelenting press of multiplying demands, such as: an overhaul of the administrative leadership of the court with the hiring of a new Clerk of the Court, Deputy Clerk of the Court, Chief Staff Attorney, and Director of Mediation; the doubling of the number of staff attorneys serving the Court, from 8 to 16; the execution of a policy that permits one law clerk, in each chambers, to serve, at the pleasure of that judge, without any time limit on that service; and, finally, the establishment of a mediation division within the Court. That division, we are proud to say, has recently been named one of the top three appellate mediation programs in the country, which is due, in no small measure, to its Director, Mala Ortiz, and her superb staff of mediators. It now annually addresses, moreover, approximately 20 percent of all civil appeals to the Court of Special Appeals and settles between 65 and 70 percent of those appeals.

Other steps the Court has taken to meet present and future demands include the launching of a program of emailing opinions, which though that procedure is currently confined to criminal appeals, we hope to expand its scope in the near future, as well as the publication of a comprehensive appellate procedures manual, authored by our Chief Staff Attorney, Kathryn May, to assist self-represented litigants, who



now participate, as parties, in approximately 25 percent of appeals to the Court. The manual, it should be noted, has recently been expanded to cover procedures for filing and pursuing applications for leave to appeal, because of what appears to be popular and professional confusion over the differences between the two legal remedies.

Collectively, the foregoing structural, procedural, and administrative changes have enabled the court to issue opinions, last year, in 87 percent of all appeals, pending before this Court, within nine months of argument and 88 percent of all pending appeals the year before.

Finally, the most recent action taken to ensure that the Court continues to operate, in the future, at its current level of proficiency, was the creation of two new judicial positions on our Court by the General Assembly, which was signed into law by Governor Martin O'Malley.

And even more changes are in the pipeline. The judiciary, it has been said, is often "late to the harvest," at least when it comes to gathering the fruits

of technological innovation. See John G. Roberts, Jr., *2014 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of U.S. Courts, Wash. D.C.), Dec. 2014, at 3. But that has not been the case under the leadership of Chief Judge Mary Ellen Barbera. With her support and guidance, the Court of Special Appeals has adopted the Maryland Electronic Court (MDEC) program, and has begun receiving court records, briefs, and other papers electronically via MDEC.

Moreover, in addition to promoting the efficient operation of the Court, MDEC enables counsel to gain electronic access to trial and appellate records and to file papers with the Court electronically as well. While the only counties that presently enjoy the benefits of MDEC are Anne Arundel County, and the eastern shore counties, when MDEC is fully in place, lawyers, throughout the State, will be able to review appellate records and to file their motions and briefs as with the Court of Special Appeals, electronically.

In concluding, I wish to stress, however, that the high quality of work flowing from the Court of Special Appeals is ultimately the product of the exceptional judicial appointments made to our Court, by a succession of Maryland Governors; the outstanding administration of our Court by the Clerk of the Court, Gregory Hilton, and his staff; the distinguished leadership provided by Chief Judges: Robert C. Murphy, Charles E. Orth, Jr., Richard P. Gilbert, Alan M. Wilner, and Joseph F. Murphy; and the 67 judges who have served our Court over the past 50 years with a seemingly unlimited devotion to public service and an unwavering commitment to judicial excellence.

Chief Judge Krauser is Chief Judge of the Court of Special Appeals of Maryland.

My Life On the Court of Special Appeals

By the Honorable Charles E. Moylan, Jr.



As the last surviving specimen from the Jurassic Age of the Court of Special Appeals, I find it fitting that I have been asked to contribute a few memories for the Court's fiftieth birthday party.

I was not one of the five charter members. When Bob Murphy, Charlie Orth, Awdry Thompson, Jimmy Morton, and Tom Anderson were sworn in on January 6, 1967, I was still the State's Attorney for Baltimore City. I was the first of the new arrivals, however, being piped aboard on July 1, 1970.

Checking in for duty in those days was a dim echo of the quasi-coronations of more recent years. My wife, Marcia, and I, in separate cars, showed up in the waiting room outside Governor Mandel's office shortly before 10:00 a.m. My five new colleagues had walked the two blocks from the Court's temporary quarters on Francis Street to honor me with their presence. The whole ceremony lasted perhaps 10 minutes. Marcia drove home and the six of us walked back down Francis Street to go to work.



In one regard, my arrival did inaugurate a new procedure which we have been following ever since. Prior to July 1, 1970, the Court of Special Appeals had always sat en banc, with all five judges hearing and participating in the resolution of every case. I posed an overcrowding problem. Our solution was to break into two panels of three judges each. The only hitch is that we did not yet have two courtrooms. As the carpenters worked round the clock that summer to get us primed for the September term, our make-shift solution was for Jimmy Morton, Tom Anderson, and me to walk up to the Anne Arundel Circuit Court house, which graciously welcomed us with an available courtroom, while Murphy, Orth, and Thompson kept the home fires burning on Francis Street.

It was on that first trip up the street to the Anne Arundel County Court House that I learned the first secret of judicial life, a secret well hidden from the outside world. The judicial robe (black, of course, since we went into formal mourning for Queen Anne in 1714) is a strange piece of wearing apparel, at least for a male judge. It comes down well below the knees. When one is sitting, particularly if leaning forward, the bottom of the robe is actually on the floor. As the judicial rookie inches forward to catch every word of argument, the wheels of his chair are, unbeknownst to him, insidiously creeping up over the robe and clamping it fast to the floor. When the clerk suddenly booms out his command of "All rise," the unsuspecting judge, pressing down on his chair in order to rise, finds himself locked in mid-crouch at an awkward 45-degree angle. The only escape ex cathedra is to sit quietly back down and to roll the chair backward. One lesson was all it

took, but the shock of being locked in a mid-crouch before one's first judicial audience is still vivid 46 years later.

As a member of the secret society of judges, one becomes privy to all sorts of arcane secrets. Picture today the full array of 230 volumes of the Maryland Appellate Reports. They form an awe inspiring wall of green, as impressive as the Green Monster of Fenway Park. How, it might be asked, did this come to be? The law book publisher caught our first Chief Judge, Bob Murphy, completely by surprise with, "They can't be brown because the Court of Appeals is using that. What color shall your books be?" Bob had never thought about it and was totally unprepared. Quick as a cat, however, he responded, "Well, Murphy is an Irish name, so make them Kelly green." This is all the reason there ever was, but nowhere is it officially recorded.

There was another slightly darker secret, hilarious to those of us on the Court during its first decade but not to be spoken of beyond its walls. During the late '60s and early '70s, most of the middle-aged professional men, from whose ranks the judges were largely taken, were World War II veterans. During the war, every outfit had its company "scrounge." The outfit could not have survived without him. Although the phenomenon would probably be viewed today as marginally sinister, it was a practice familiar to and enthusiastically endorsed by every World War II veteran. Whether on a Pacific atoll or in the shadow of a Normandy hedgerow, if the colonel desperately needed a jeep, the scrounge could produce one overnight. If the company Christmas party needed three cases of whiskey, the scrounge would miraculously come up with them.

The early Court of Special Appeals, without every necessary piece of furniture or item of office equipment having been anticipated by the planners and with requisitioning a painfully slow process, was an outfit that desperately needed a scrounge. It had one, but he shall remain nameless here forevermore. Part of our cherished but unwritten history concerns one of our most august early judges who was chagrined that his chambers had no rug on the floor. He was too much of a gentlemen to ask the scrounge for anything, but his unhappiness at the bare floor was nonetheless well known. It was a memorable morning on Francis Street, therefore, when a beautiful rug miraculously appeared adorning the entire floor of the judge's chambers. He remained happy with it as long as he sat on the Court. Initially, no one knew whence came the miracle. It was only in the weeks and months that followed that the story started to come out of how, on the morning of our miracle on Francis Street, the Attorney General of Maryland was aghast to find the floor of his office inexplicably bare. I may be the last survivor of those who knew the story, and I'll never tell. Under the prevailing Zeitgeist, moreover, this phenomenon, among colleagues, was never looked upon as theft. It was simply the informal redeployment of assets from one unit of government to another, as every good soldier knew.

No behind-the-scenes history of the Court of Special Appeals could be written without recounting some of the exploits of Tom Lowe. Early on, after both courts had moved to Rowe Boulevard, they shared a fourth-floor kitchen and small dining room. One court might eat lunch at noon and the other at one o'clock. Food was kept on the various shelves. At one point, however, Judge Dudley Diggs

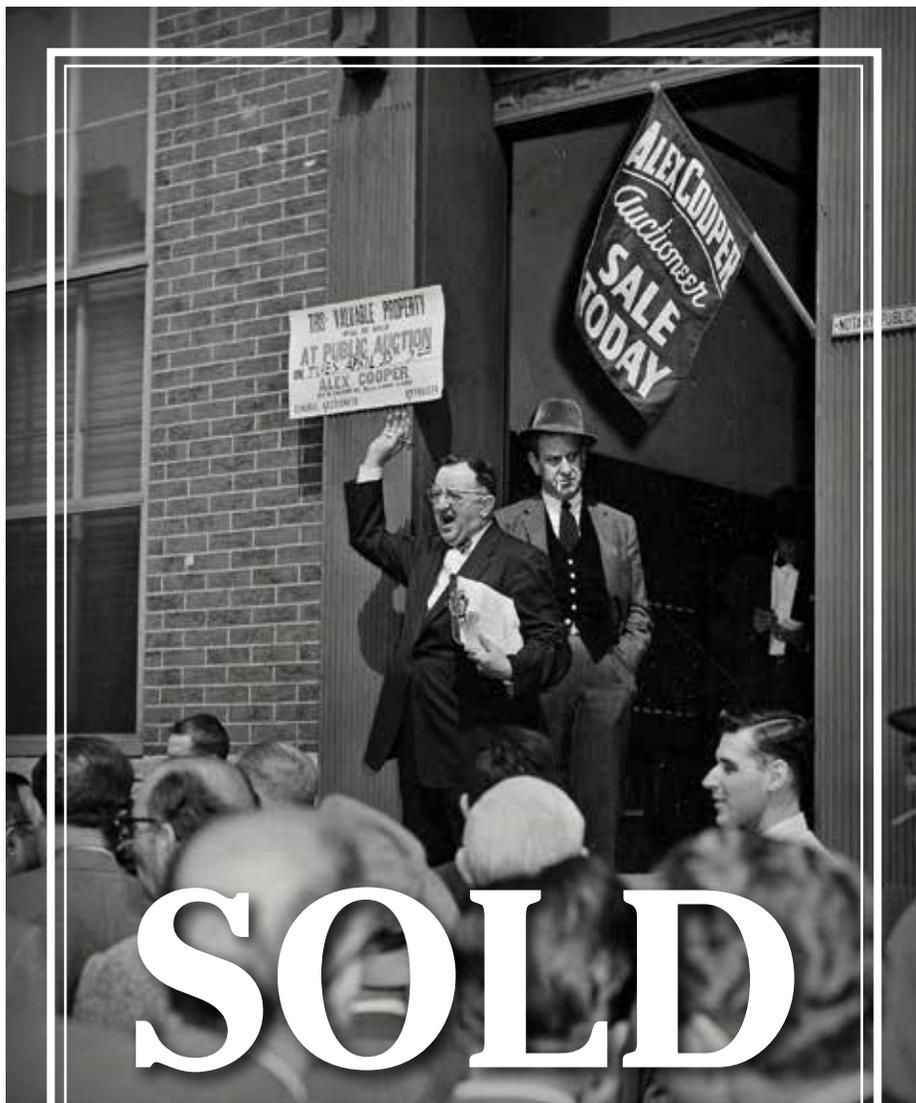
ordered a special brand of cookies that he wanted reserved for the Court of Appeals. He arranged to have a special lock put on one of the shelves housing the jealously guarded Court of Appeals's cookies. Anyone who remembers the Tom Sawyer-like impishness of Tom Lowe will know in an instant that that forbidden fruit became the Holy Grail. When the word went out that Tom Lowe had stolen the Court of Appeals' cookies, pandemonium broke loose. Our former chief, Bob Murphy, who was then Chief Judge of the Court of Appeals, was embarrassed to read the Riot Act to our then Chief Judge, Dick Gilbert. Dick himself ended up in a bit of a huff, and the joint dining experience became history.

It was, of course, Tom Lowe's disinclination to wear a collar and a tie under his robe that provoked Dick Gilbert to outflank him by directing that all members of the Court would wear a white dickey around the neck. That was our more modest attire for four to five years.

Let me get serious for a moment. I am sometimes asked what I think my most significant opinion has been. That's easy. *Evans v. State* (1975) is first and there is no second. In June of 1975, the Supreme Court decided *Mullaney v. Wilbur*. Its logical implications rendered obsolete 150 years of Maryland caselaw on homicide and many of our most fundamental evidentiary procedures.

Almost immediately the nondescript second-degree murder case of *Evans v. State* brought us face to face with the challenge of *Mullaney v. Wilbur*.

As I talked it over with Chief Judge Charlie Orth, Maryland had two choices. We could take the conservative approach and deal only with each limited question before us in a given case and thereby be dragged into the



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Twenty-First Century over the course of the next 30 years. On the other hand, we could bite the bullet and buy into the whole constitutional revolution in one fell swoop. Judge Orth agreed that we would bite the bullet, and he assigned me the mission. For a month I immersed myself in every nuance of homicide law. It became the love of a lifetime. For the next month, I started cranking out a year's supply of yellow pads. The *Evans* opinion introduced into Maryland law for the first time a recognition of the imperfect defenses and of depraved heart murder. We updated our evidentiary language, defining precisely such theretofore slack terms as presumption, inference, and burden of proof.

The whole package was ready to go for the monthly conference in October 1975. Rita Davidson, however, balked at considering a 100-page opinion dealing with a dozen major questions only several days before conference. Saddled up and in the starting gate, I was a candidate for a grand mal seizure. Judge Orth sedated me, however, with the stratagem that we could put the extra month to good use. Together we surveyed every case on the docket of the Court of Special Appeals dealing with criminal homicide and came up with 11. The collective strategy emerged that we would file each of them immediately after the filing of *Evans* and that each would base its holding on *Evans*. Six or seven of the 11 were submitted on brief and Charlie peremptorily reassigned them to me, with the proviso that I would have a publishable opinion in each ready to go within three weeks. It was a labor of love and curfew did not ring that month.

Evans v. State and all eleven others of what the Court came lovingly to call the "Dirty Dozen" were ready for

the November conference, as if lying off Omaha Beach just waiting for the word to go ashore. *Evans* was filed on Tuesday, November 25, minutes after our monthly conference concluded. On the next day, Wednesday, November 26, seven more opinions were filed, each building upon and relying on *Evans*. Thanksgiving Thursday was a day of rest. On Friday, November 28, the final four of the Dirty Dozen were filed. The net effect was that on Tuesday afternoon, *Evans* was subject to the criticism that it was 20 percent holding and 80 percent dicta. As of the close of business on Friday, however, the *Evans* package was 90 percent solid holdings and no more than 10 percent dicta. The dozen interlocking and reinforcing opinions covered the waterfront. Over the course of three working days, the Court of Special Appeals, performing as a well coordinated team in pursuit of a common strategy, revolutionized the law of criminal homicide and large parts of the law of evidence in Maryland. That law today bears little resemblance to what it was in 1974. For me, those three days in November 42 years ago are an institutional high point, and I am irrevocably proud of the institution.

Evans v. State and the entire Dirty Dozen were substantive and were there for the world to see. What, on the other hand, are some of the secret pleasures of opinion writing. I am sure that in many an appellate psyche, there lurks the DNA of a would-be poet or an aspiring novelist. In that early springtime of our Court, I shared many a conversation with Rita Davidson, the first woman to sit on our Court before going on to become the first woman to sit on the Court of Appeals. Rita and I talked of this a lot and we agreed that, inwardly at least, we had two concerns about every published opinion we sub-

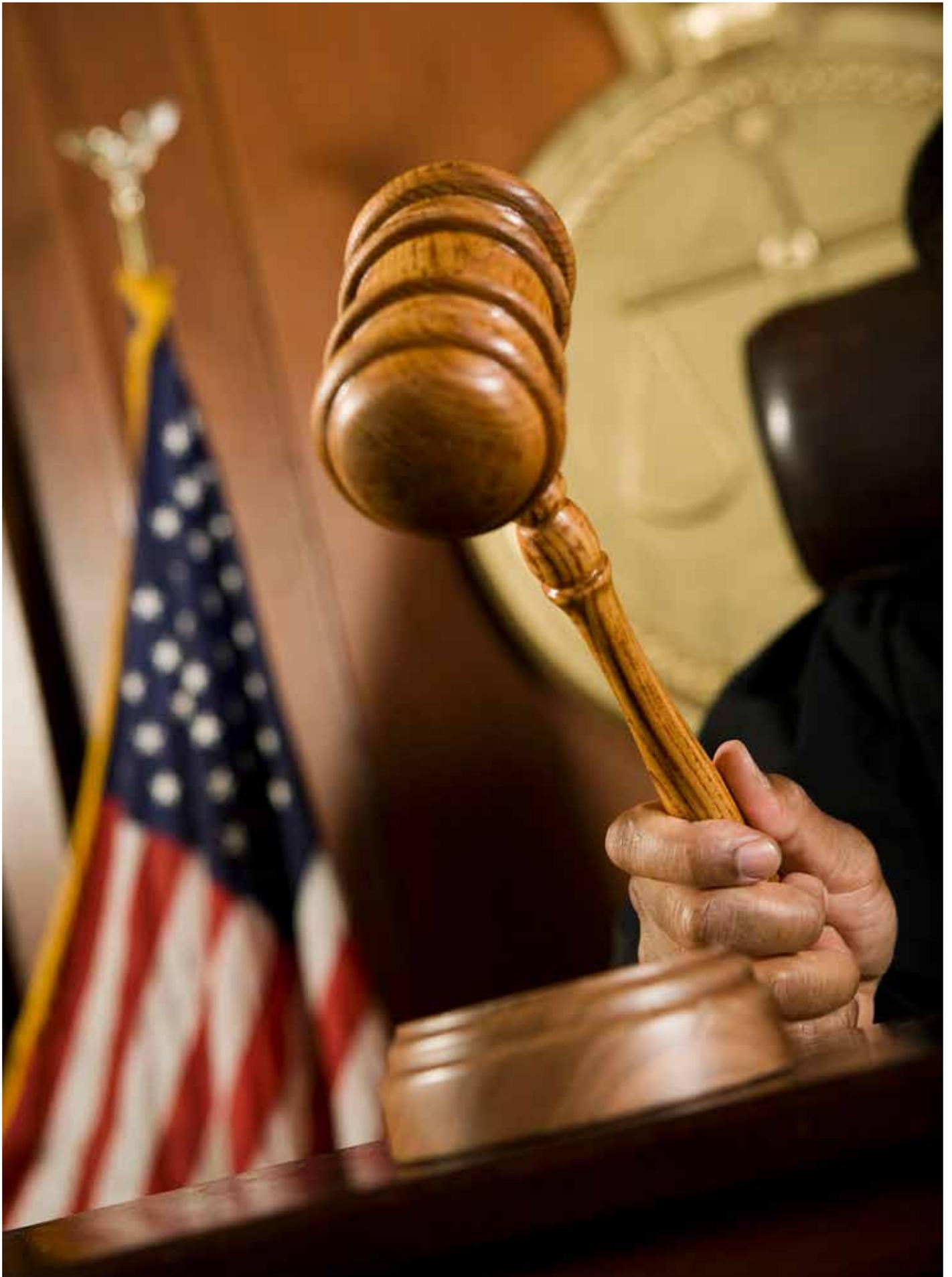
mitted. No. 1, and this was of public interest, was, "What does the opinion say?" No. 2, and this was purely private, was, "How does the opinion sing?" For anyone who picks up a pen, it is a question that cannot be blithely dismissed.

While driving a car or falling asleep at night, we may find ourselves saying over and over again, half aloud, parts of a prospective opinion, simply to judge the impact on the ear. In my early years on the Court, I remember anguishing over which of "Emerson Hotel" or "Hotel Emerson" contributed better to the rhythm of a sentence. I can't remember the case, which is now one with the Emerson Hotel itself, but I vividly know the anguish. Trivial though it may seem to the casual reader, the opinion writer can empathize poignantly with William Butler Yeats's observation on the mission of the writer to make the difficult seem ridiculously simple:

*"A line will take us hours maybe,
Yet if it does not seem a
moment's thought,
Our stitching and unstitching has
been naught."*

I have been on the Court for 47 years. Of the other 66 men and women who have graced this Court, I have been privileged to serve with each of them. It remains, moreover, a fresh and daunting challenge to pick up a set of appellate briefs that lead into some still unexplored enclave of the law. As daunting as that challenge still seems, however, I think I'm getting the hang of it.

Judge Moylan was an active member of the Court of Special Appeals for over 30 years. Following his mandatory retirement in 2000, he has remained active as a senior judge and is now in his 47th year on the Court.



Who Are We And Why Are We Here: Reflections of Two New(ish) Judges About Life, and Life on the Court of Special Appeals

By the Honorable Michael Reed and the Honorable Douglas Nazarian

DN: I'm starting this on the afternoon of my last argument day before summer. It feels a little like the last day of school, if we went to a school that never really let out.

We're about the same age and have served about the same time, and our paths to the Court have both similarities and differences. We both spent time in private practice and in state government before applying for the bench. Unlike me, though, you served on the Circuit Court for Baltimore City for a few years first. So to kick this off, I'm curious to know what made you want to be an appellate judge? For me, it was my clerkship – I came away from that year feeling like my Judge had the best job in the world, and that's what I wanted to do.

EDITOR'S NOTE: *This piece was originally intended to be two sets of personal reflections, one each by Judges Michael Reed and Doug Nazarian, on their paths to the Court of Special Appeals and lives as members of the Court. They decided instead to interview each other, virtually, over the course of the summer – each answering the other's question and asking a new one. They agreed in advance on the process, but otherwise did not discuss topics, questions, or answers before the exchange began, and they edited earlier exchanges only for grammar and clarity.*



MR: I have wanted to be an appellate judge since my first weeks of law school. That first year reading list of the appellate opinions of Learned Hand, John Marshall, Oliver Wendell Holmes, and other cases in the curriculum introduced me to the power of the written word in the law and how law had shaped our government and society. After that, my years of practice as a litigator, both as an Assistant State's Attorney and Attorney General helped me to understand the substantial impact of appellate law in a motions practice. Well-crafted language from an appellate opinion could win the day and really shape the strategy of a jury trial. As an assistant attorney general who participated in appellate arguments and writing briefs my desire to one day serve as an appellate judge grew. As a circuit judge I noticed that one of the aspects of the trial that I enjoyed the most was the oral argument of legal issues. These issues were often close calls and were eventually the subject of appellate review.

What were the first experiences as you transitioned out to your private practice and (administrative practice/government agency commission) that let you know you "weren't in Kansas anymore"? Please highlight some of those differences now? For me, it was the unique collaborative nature of serving on a three judge panel. Each judge offered a unique and diverse set of experiences. As a trial judge I often made **my** decision based on my experiences and knowledge of the law. Very often, time did not allow an opportunity to discuss a legal issue with other judges who sat on the Circuit with me. There was an abundance of time

and opportunity to work with and discuss an issue with judges on the Court of Special Appeals. I also noticed and appreciated that we had our own unique traditions on the Court of Special Appeals that allowed us to share a cup of coffee with other judges before oral argument and have lunch because of our unique argument schedules. I also have come to really appreciate the opportunity to break bread with the retired judges who sit with us from time to time.

DN: Life on the Court shares some similarities with life at the Public Service Commission. There, like here, we made decisions as a group, tried to reach consensus, and often memorialized them in written orders. In that sense, then, the move from private practice to government, from a role focused on serving clients to a role focused on making good decisions, felt more dramatic. But although the work of the PSC seemed so all-consuming, even overwhelming, the substantive range was so much narrower, and I wasn't a lawyer – I was the client. And the longer I spent in the specialized world of utility regulation, the farther removed I felt from the rest of the legal world. I wouldn't trade that experience for anything, but I am grateful I could come to the Court when I did.

Then I got here, and realized that so many of our cases involve issues I never handled in practice, and many areas I hadn't thought about since law school (at best). I thought I had had a wide-ranging litigation career when I got here, but I never tried a criminal case, never handled a divorce, auto tort, or lead paint case, and never represented a Child in Need of Assistance, to name a

few of the more common kinds of cases. That's a daunting realization. It was tempered for me, though, when I realized that nobody comes to the bench with the full range of practice or life experience, and that collectively, the experiences of our colleagues covered nearly the whole waterfront. That's where your insight about the culture of the Court and the wonderful opportunity to sit with each other and the senior judges comes in – the issue that may be new to me lies in someone's wheelhouse, and our colleagues have been incredibly helpful and gracious as I feel my way into this role. Someone told me early on that it takes about three years to start to feel comfortable, and, at year three-and-a-half, that seems about right.

What kinds of cases do you find the hardest? For me, the hardest cases involve families and children, especially the ones in which everyone is trying as hard as they can to work through their difficulties, but it still isn't working.

MR: I share your feeling that the hardest cases involve children and families. There are some cases in which the legal remedy that we will provide is not a solution to the core issue in the family. For example, in a case where a family has to relocate to accommodate a changing situation but this causes pressure or sadness for the children who are just beginning to adjust to a living arrangement. At times the attorney fees cases are also challenging because a difficult legal problem or scenario festers into a situation where attorney fees are sought but the current law has never dealt with the particular circumstances in the case. A situation emerges that coun-

the decision we did. Invariably, *any* decision we reach leaves somebody unhappy. But as in any setting – and this was true even when I busbed tables and worked on a moving truck – people will make (better) peace with a bad result or situation if they understand what happened and feel as though you’ve tried seriously and genuinely to see their side of it and solve the problems. So too here: We want the parties to our cases, not just the lawyers or the Bar, to feel that we have heard them, listened to them, taken them

seriously, and reached our decisions fairly. And I take incredibly seriously, as I know we all do, the fact that there are real human beings behind the caption of every case. I try to write opinions for them more than anyone.

And now back to your actual question. Some cases are challenging not only because the issues are challenging, but also because it’s hard to describe and analyze them in straightforward terms. My earlier legal jobs posed the same challenges, though, except in the other direc-

tion. The goal was to take a complicated set of facts or a complicated argument and make our client’s position seem simple and obvious to a court or administrative agency, and if you can do that in a complex insurance coverage case or business dispute or Telecommunications Act prosecution, you can do it here. The same was true in the world of utility regulation, especially when it came to explaining things like ratemaking and wholesale electricity markets. But it was good training for the bench to have to break those struc-



tures down for the public, for the press, for legislators, and to explain decisions in a coherent written form (that then could well be reviewed by the courts).

What do you see as your biggest challenge as a judge over the next year or two? For me, the greatest challenge comes in doing my best work on each case while keeping up with the volume. There's a delicate balance between keeping things moving (and getting the parties the prompt decision they deserve) and making sure not to miss things, that all of the bases are covered and the writing is thoughtful. The one thing that probably keeps me up at night more than anything else is the prospect – thankfully, so far unrealized, so far as I know – that I might miss something that costs someone her liberty or affect someone's life or business in a way I never intended. I do whatever I can to make sure that doesn't happen, and our colleagues and our chambers teams are great checks against that possibility. But I'd be lying if I said it doesn't scare me.

MR: I agree that our work is significant and each case has a potential critical impact on the parties who are involved in the controversies. A mistake in our work could be catastrophic. So I have a concern too, but my experience tells me that the collective mind, which includes the advocates, the judges on our court and the higher courts, eventually run down all of the "loose balls". I also agree that the volume of cases that we must decide in a reasonable amount of time does increase the risk of potential error. I also have to agree that my greatest challenge will come in doing my best work

on each case while keeping up with the volume. One of the ways that concerns me is that perhaps over time I might just focus on speedily getting the cases resolved. But my work on the court is more than just "cranking out opinions." I spend a little bit of each day working to become a better judge by improving my writing. There are many ways that I use to accomplish this goal: attending seminars or reading articles on judicial opinion writing and logic offered by the judicial colleges, studying presentations like Chief Judge Joseph Murphy's article on the contributions of Judge Charles Moylan, Jr. to the evidence law of Maryland, taking the time to critically analyze the opinions of higher courts. I also take note the impressive writing of my colleagues, which instills within me a desire to adopt and incorporate that stylistic nuance in my own writing. With our busy schedules it is hard sometimes to take time to focus on the craft of opinion writing in this way. I believe that those who take the time to read our opinions deserve this commitment.

Also I think one of the things that makes us better judges is continuing to interact with the Bar and our communities. When you combine this with our busy work schedules it can be burdensome. How do you deal with work life balance as an appellate judge? Do you have time for yourself? Do you think that is important? I find that making time for myself is important. I find my commitment to my work makes it very hard for me to take personal time. I push myself to do it and I consider it an important part of being an overall effective judge.

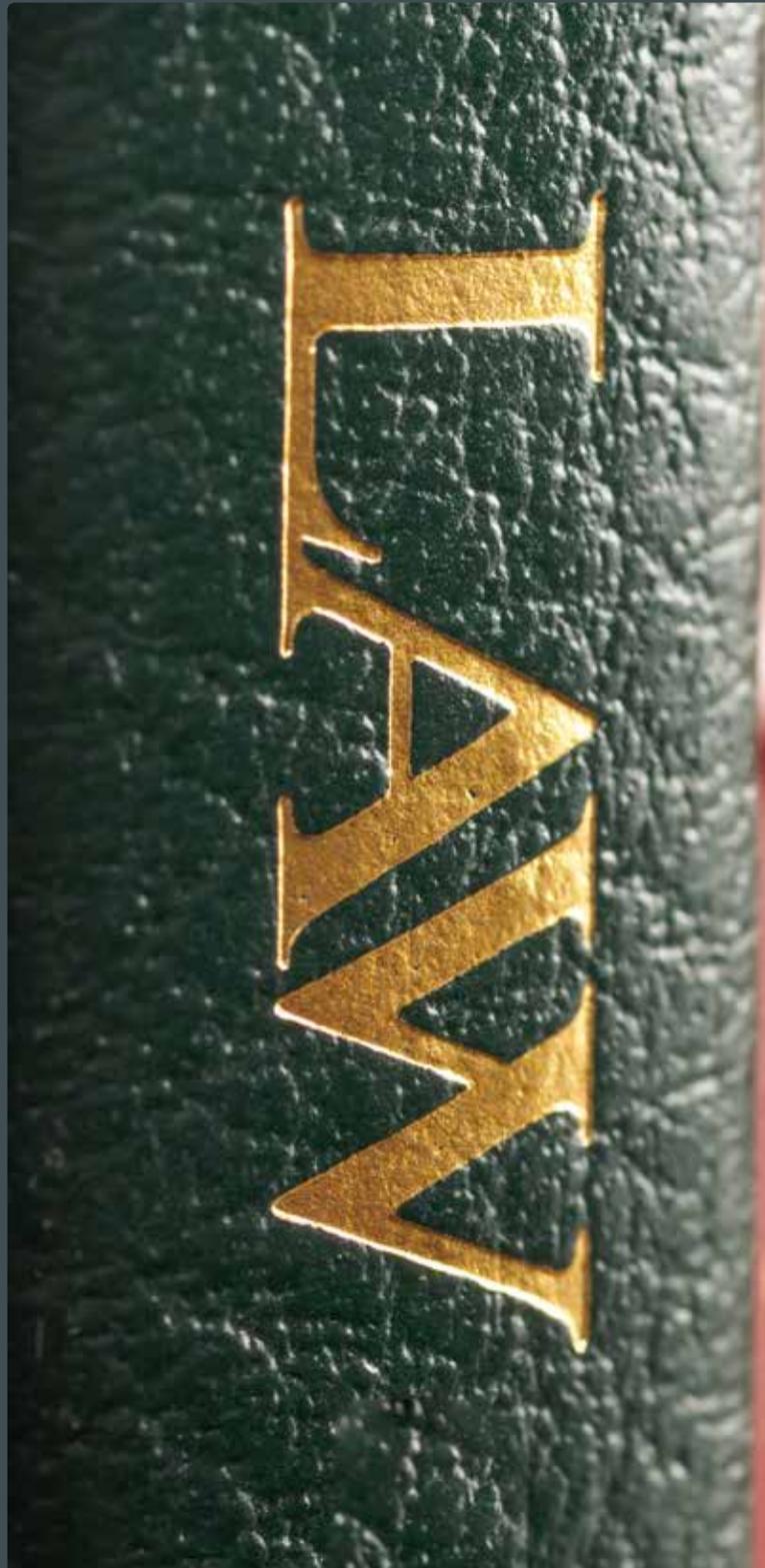
DN: I agree with you that balance is critically important, both within our professional lives and with our personal lives. A nice feature of life on our Court, though, is that we have more control over our day-to-day schedules than I have ever had since becoming a lawyer. That, combined with technology, has allowed me to exercise more consistently and have more of a family life, things I struggled to do in my last two jobs. Unlike you, I never interacted much with the Bar or broader legal community or the local law schools before coming to the Court, so those activities have been a new and wonderful bonus.

I suppose everyone's dream job is different, but once it became clear I would never play major league baseball, this is mine. I have had lawyers and judges from other courts say that they don't know how we do what we do, how we keep up with the volume of cases and do all of the thinking and research and writing that goes into each opinion. I ask the same question to trial judges, who have to make so many important and complicated decisions every day, only to have the likes of us looking back at their real-time work with the benefit of hindsight. But to answer them, I say only that this is what I have always wanted to do, and I am so grateful to have the opportunity. I know you feel the same way, and that all of us share that same sense of calling.

Judge Reed and Judge Nazarian represent the Sixth and Second Appellate Judicial Circuits, respectively, on the Court of Special Appeals of Maryland.

EFFECTIVE BRIEF WRITING IN THE COURT OF **SPECIAL**

Persuasion is the single goal in an appeal. Regardless of which party you represent, your brief is the primary (and sometimes the only) medium for convincing the panel of judges who will decide the appeal of the merit of your client's position. Consider what you want the opinion in the case to say and provide the judges with a brief that is clear and focused, engages them, and guides them to that result.



APPEALS

By the Honorable Deborah Sweet Eyer





Keep in mind that while you and your client have lived with the case, perhaps for years, the judges have not. Until they read the briefs, they do not know where or when the case originated, who the parties are, what the case is about, or how or when the circuit court disposed of the case. The judges are familiar with the law, but not with the facts, and your brief is their gateway to the record that contains the facts.

The purpose of the statement of the case portion of your brief is *not* to give a summary of your argument; it is to give the judges the most basic information about the case up front. Carefully identify the parties to the appeal. Judges frequently see briefs where the cover page gives one

first name, followed by “et al.” and “Appellants” or “Appellees” – but the statement of the case identifies only one appellant or appellee. The judges need to know who the parties to the appeal are and also whether there were parties below who are not parties to the appeal. If there are parties below that fall into that category explain, in a footnote, how the claims by or against those parties were disposed of. Ordinarily, the Court of Special Appeals will not have jurisdiction over an appeal when all claims against all parties have not been disposed of in the circuit court, because there is no final judgment. If jurisdiction is lacking, the judges have a duty to raise that issue themselves. The information about all par-

ties and all claims enables them to determine quickly whether there is a final judgment.

Choose the name you will use for a party on appeal and do not deviate from it. If you call the appellant “Appellant” on pages one through four of your brief, and “Mr. Smith” on page five, a judge reading the brief will wonder who Mr. Smith is and will be needlessly distracted from whatever you are communicating while trying to figure that out. If there are many parties to the appeal, use their names. Given names always are easier to follow than party designations. Never call a party to the appeal “Plaintiff” or “Defendant.” It is confusing and telegraphs that your brief has been

“cut and pasted.” Throughout your brief, be consistent in the names you use for people, places, and things. Consistency in writing will make your brief readable and will lessen the chance that the judges will put your brief aside to read later, after turning to other sources of information (such as your opponent’s brief) for enlightenment.

The questions presented define the subject(s) of the appeal. An appellate judge’s job is to answer the properly preserved questions raised on appeal (or cross-appeal), no more no less. A question presented should ask, succinctly, whether the circuit court erred or abused its discretion (depending upon the standard of review) in a particular ruling or disposition. It should not be worded argumentatively, nor should it contain your supporting arguments.

In selecting the questions to present, remember that the issue the question raises should be 1) preserved for appellate review; 2) substantively meritorious; and 3) material in that, if the court erred or abused its discretion, its doing so caused prejudice (in a civil case) or was not harmless (in a criminal case). An appellant who presents a laundry list of questions, many of which are not preserved for review, immediately loses connection with the judges. In preparing your appeal, you must determine whether an issue that appears to have merit has been preserved below. If it has not but you include it as a question presented, explain why the Court should address it. Remember that plain error review is rare – in the words of Judge Moylan, as frequent as Haley’s Comet – so the choice to present a question that is not preserved also should be rare. If you raise an issue that you believe is preserved for review and the oppos-

ing party argues that it is not, address that argument in your reply brief. Do not bury your strongest issue. Make it your first question presented.

Your statement of facts should give the judges the information they need for context and should recount the facts that are material to the issues they will be deciding, as those facts were presented in the circuit court and with the standard of review in mind. If the issue on appeal is whether the court erred in granting a motion to dismiss, the statement of facts should recite the facts alleged in the complaint and whatever undisputed facts may be necessary to give the judges context. If the case was decided by a jury and the issue is whether the evidence was sufficient to support the jury’s verdict on a particular claim, the statement of facts should recite the winning party’s evidence on that claim, because the standard of review requires the judges to presume that the jury credited that evidence; it should not recite the losing party’s evidence on that claim. On the other hand, if the issue on appeal is whether the court erred by not giving a requested jury instruction that was generated by the evidence, the standard of review requires the judges to consider whatever evidence was adduced at trial that generated the instruction, even if the jury’s verdict indicates it did not credit that evidence. In that situation, the statement of facts should include all the facts in evidence that could have generated the instruction.

When multiple issues are raised on appeal and some facts are material only to a particular issue (for example, whether the court abused its discretion by declining to grant a mistrial based on an improper comment of counsel in closing argument),

it is wise to reserve those facts for the argument on that issue instead of including them in the statement of facts. Otherwise, they will clutter what should be a concise statement of facts and will need to be repeated in the discussion of the issue anyway. Simply say at the conclusion of your statement of facts that additional facts will be provided in the argument, as pertinent to the particular issues raised. Likewise, when several issues are raised and each is controlled by a different standard of review, include the standard of review immediately before the argument.

Your statement of facts should flow and be easy to follow. To the extent possible, use a chronological format. If it is necessary to move back and forth in time, make clear that you are doing so. (“Meanwhile. . . .”) Do not include facts that have no bearing on the issues and are not necessary for context or completeness. That simply muddies your brief and wastes words. Conversely, do not omit facts when doing so will mislead the judges. In one of the best, and at the same time worst, examples of the latter, an appellant’s statement of facts accurately described the position of a key witness to an event as being two blocks away, strongly suggesting that he could not have seen what happened. The first sentence of the appellee’s statement of facts furnished a critical fact the appellant had omitted: the witness was looking through binoculars. Although the judges review the record and that review will be determinative, a judge is less likely to be disposed toward the merits of an argument that comes from a lawyer whose writing cannot be trusted.

Recount the facts in narrative form, accurately paraphrasing the testimo-

ny and only using quotations when absolutely necessary. One does not create a readable narrative by parroting the testimony of every witness, one by one. Although your statement of facts is not to contain argument, it should be sufficiently tailored to the issues that the judges reading the brief will not come to the end of the statement of facts without having any idea which of the myriad facts you have included matter and which do not. Present the facts objectively, without coming across as argumentative.

“[T]he appellee’s brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant’s brief.” Md. Rule 8-504(a)(4). When the appellant’s statement of facts is an incoherent jumble, however, a disconnected string of additional correcting or amplifying facts does not help. Rather than leaving the judges with no understandable statement of facts, include a complete factual narrative in the appellee’s brief.

The legal argument is the heart of your brief. Tone of voice and manner of speech are critical throughout your brief, but especially here. An argument that is snide, flippant, or belligerent, takes pot shots at the opposing party or counsel or the circuit court judge, or is an overblown appeal to emotion does nothing to advance your goal of convincing the judges that your viewpoint is correct. It has the opposite effect. It is the equivalent of yelling, and one who yells usually has little of value to say. Use a civil tone, not driven by emotion, giving the opposing side its due. Write plainly and directly, in ordinary English that is not so formal as to sound stilted or so casual as to sound like a text message. Do not flaunt vocabulary words last seen on the SATs and not used in

everyday speech. The judges will not be impressed.

Organize your legal arguments to track the questions presented, *i.e.*, question presented I should be issue I in your argument, question presented II should be issue II, and so forth. Both (all) parties should follow this format. Judges frequently read the argument sections of the briefs in tandem, issue by issue. If issue I in the legal argument section of the appellant’s brief addresses question presented I, but the appellee has organized his brief so his argument on question presented I appears in a subpart to an entirely reframed issue II, it will be a burdensome exercise for the judges to compare what the parties have to say about a given issue.

At the outset of your argument on an issue, state your basic contention, framed in terms of the standard of review (“the trial court abused its discretion by admitting evidence of a prior bad act by the appellant”), and any facts specific to that contention. If the issue is one of statutory construction or interpretation of the language of a contract, quote the critical language and explain the statutory scheme at the outset. Support any basic legal proposition that is a building block of your argument with *one* citation to the most recent Court of Appeals case on point. Avoid string cites.

Unless the law of a jurisdiction other than Maryland applies, your argument should focus on the relevant body of Maryland law, beginning with Court of Appeals cases, the most recent first, and continuing with Court of Special Appeals cases. The panel of judges assigned to your case and their law clerks will do their own independent legal research and will be familiar with the case law. It should go

without saying that making no mention of a case that is pertinent to your issue is foolish; it happens with some frequency, however. Look to cases from other jurisdictions when there are no Maryland cases that address your issue or that have a bearing on how the issue should be decided.

Although unreported Court of Special Appeals opinions are easily accessible online, you must not cite them either as precedent or as persuasive authority. Md. Rule 1-104(a). The reason for this is simple. An opinion of a three judge panel for the Court of Special Appeals only will be reported if it is approved for publication by a majority of the judges on the Court. A majority will not necessarily agree with the three judge panel’s decision. Indeed, if an opinion is submitted to the Court to be considered for publication, and a majority of the judges disagree with publication, the opinion will be filed unreported. So, an unreported opinion either has not been presented to the full Court for approval or has been presented to the full Court and has not been approved. In either situation, the opinion does not have the imprimatur of the Court that comes with reporting and therefore is neither precedential nor persuasive. Of course, unreported opinions are a treasure trove for ideas, and you are free to consider them for that purpose.

If your issue is not plainly answered by a controlling case, which is the usual situation, delve into a complete legal analysis. Citing a long list of cases for relevant legal propositions is not the same as crafting a coherent argument. Discuss the cases that you maintain support your position and explain why they do, using logic, comparison, and analogy. Do not ignore



the cases that appear unfavorable – distinguish them. Review the underlying purpose of the legal principles on which your argument rests and explain how the decision you are asking the judges to make will advance that purpose. Your analysis should be tightly organized, addressing sub-arguments one by one and tying them together, and concise, that is, straightforward and without needless repetition. It should give the judges the roadmap to follow in fashioning the opinion you hope to see. Always bear in mind that your aim is to reason the

judges into your position.

A few last points. If it will assist the judges to visualize the subject matter of the dispute – such as in a property boundary case – insert a map or other visual guide from the record in your brief. Include the text of all pertinent statutes in the brief, as Rule 8-504(a)(8) requires, so the judges can digest any statutory argument no matter where they may be when reading your brief. Familiarize yourself with the appellate rules and adhere to them strictly. Only file a reply brief to address arguments raised by your opponent, not

to rehash arguments already made. If you represent a cross-appellant, let the judges know whether the cross-appeal is conditional. Do not rely on spell check and grammar check – proof-read. Finally, Rule 8-112(c)(1)(2) now requires that briefs be double-spaced; one-and-a-half spacing is no longer permitted. The judges cherish their eyesight and will appreciate your heeding that rule.

Judge Eyer is Senior Associate Judge of the Court of Special Appeals of Maryland. She has been a member of the Court since 1997.



EFFECTIVE ORAL ARGUMENT BEFORE THE COURT OF SPECIAL APPEALS



Appellate judges, like trial judges, want to make the right decision in a case. Oral argument is an opportunity for an appellate judge to reach the right decision by clearing up any ambiguities in the record, probing the parties' arguments for strengths and weaknesses, testing his or her own analysis of the issues, and exploring the consequences of a particular holding. Similarly, oral argument affords the advocate the opportunity to enter into a dialogue with each member of the panel and in that dialogue to persuade the panel of the correctness of his or her argument. The initial views of a panel member can be changed or modified by effective oral advocacy. Accordingly, the purpose of this article is to explore the ways in which you, as an appellate attorney, can develop an effective oral argument.

Preparation

"Appellate argument is an art form different from argument in the trial courts." Hon. Lynne Battaglia. Unlike trial practice, lawyers have no control over oral argument. Trial lawyers determine the parties, the claims and defenses, the witnesses, the exhibits, the opening statement, and the closing argument. At oral argument, lawyers have no idea what is going to happen. Will there be a lot of questions? Will there be few or no questions? What matters will the questions address? Indeed, in the Court of Special Appeals the lawyers do not know what judges are on their panel until the day of the argument. Therefore, the first step for you to become an effective appellate advocate is complete and thorough preparation.

Your preparation must include a full knowledge of the record, the law, the arguments of *both* sides, and the hearing procedure.

The Record

You are expected to know the record thoroughly and be able to cite to a specific page in the record extract or transcript when requested. Although the briefs are supposed to contain citations to the record to support every assertion based on the record, that does not always happen. A judge may want to know the specific record reference for a key fact, exhibit, or assertion.

The Law

You should be fully familiar with all of the law relevant to the appeal, including key cases, statutes, regulations, and secondary authority. For the key cases, be prepared to discuss the facts, holding, and rationale of the cases supporting your position as well as the position of your opponent.

Many advocates overlook the fact that one of the panel members may be the author of a key case in the appeal. That panel member will have a full understanding of the particular case. Don't forget that some Senior Court of Appeals judges sit by special assignment on the Court of Special Appeals. Currently, Judges Lawrence Rodowsky, Irma Raker, Alan Wilner, Glenn Harrell, and Lynne Battaglia hear cases on the Court of Special Appeals. Together, these judges have authored literally thousands of cases for the Maryland appellate courts, the vast majority of which are still controlling law in Maryland.

Finally, don't forget to shepardize the key cases up to the date of oral argument. A new case may be issued that affects your argument.

The Arguments

"Do not read to the court your argument notes; prepare adequately and work from a 'bullet point' outline." Judge Glenn Harrell. One of the biggest mistakes that an advocate can make during

**By the Honorable
Patrick L. Woodward**

oral argument is to read the argument from a prepared text. You should write out your important points in an outline form, along with an overall theme. In preparing the outline, the strengths and weaknesses of your argument and those of your opponent must be objectively assessed. With almost mathematical certainty, the panel's questions to you will focus on the weaknesses of your argument. You must be prepared to address those weaknesses and show how they do not preclude winning on the issue. Finally, a "moot court" of your argument with a knowledgeable colleague is an effective way to assess how well you are prepared for oral argument.

The Hearing Procedure

This last step in your preparation for oral argument is learning the procedure employed by the Court of Special Appeals for the conduct of the hearings. You are required to check in with the Clerk's Office between 8:30 a.m. and 9:00 a.m. on the day of the hearing. At that time the clerk will want to know who will be arguing for each side and how the time will be allocated. Each side has 20 minutes, regardless of the number of parties. The appellant may divide the time in any way between opening and rebuttal. The appellee may use the full twenty minutes, but is not required to do so. ("I occasionally remind counsel that there is no penalty for using less than the afforded time." Judge J. Frederick Sharer). If there is more than one appellee, counsel for the appellees will decide among themselves the division of the 20 minutes and so advise the clerk.

The hearings start promptly at 9:30 a.m. A panel usually hears between four and seven cases on a particular day. If your appeal is not the first one on the docket, it is a good idea to remain in the courtroom to observe the cases that are being heard before you. As will be dis-



cussed *infra*, knowledge of the reasons why a judge asks a question is an integral part of an effective oral argument. There is no better way to learn why and how the members of your panel ask questions than to observe them in action before your argument.

Your time is controlled by warning lights on the podium or on the bench. They mean:

- White – five minutes left
- Red – one minute left
- White and Red together – your time is up

The Goal

In sum, your goal in preparing for oral argument is to be the best-prepared person in the courtroom (and that includes the judges).

Oral Argument

Your objective in oral argument is, of course, to convince the panel that your side should win. To achieve this objective, you must have an understanding of the dynamics of the colloquy between the members of the panel and the advocate.

Beginning

You can expect that the panel members will have read the briefs, read or reviewed the record extract, and be fully familiar with the facts and law on the issues raised in the appeal. As appellant's

counsel, therefore, you do not have to use any of your time recounting the facts or procedural history of the case. Instead, you should begin with a summary of your argument, focusing on the key facts or law that show why you should prevail. As appellee's attorney, you should be prepared to do the same thing, but with one major caveat. You have had the benefit of hearing the questions from the panel and the responses by appellant's counsel. Sometimes appellant's counsel will not answer a question, or not answer a question completely, or will answer a question incorrectly. Beginning your argument by answering a question missed or avoided by your opponent can be very helpful to the panel and yourself. The same technique should also be used by appellant's counsel during rebuttal argument.

Court's Questions

"Judges do ask questions for a number of reasons. But believe it or not, they usually ask questions because they want to better understand the case – the facts, the legal issues, the arguments." Douglas S. Lavine, *Salad, a Glass of Red Wine, and a Discussion about How to Effectively Answer Questions in Appellate Argument*, 14 J. APP. PRAC. & PROCESS 25, Spring 2013, at 30-31. The top five reasons for asking questions are as follows:

First, judges ask questions frequently to probe the weaknesses of your argument. They have a concern about some aspect of your argument that needs to

be resolved in order for you to prevail. Second, a question may be a neutral request for information. There may be some ambiguity in the record or in your position that simply needs to be clarified. Third, a judge may give you a friendly or helpful question – a “soft-ball.” Such a question is not designed to trick you. Indeed, because the members of the panel usually do not discuss the case before oral argument, the questioning judge may be using the “soft-ball” question to advise the other panel members of his or her position. Fourth, a question may be phrased as a hypothetical in order to explore the boundaries of the holding that is being proposed by you or your opponent. This type of question is often involved in cases of first impression. Finally, a question sometimes seeks to obtain a lawyer’s commitment to a particular position. The question can be in the form of restating your position and asking you to agree to that statement.

Persuasive Answers

“Oral argument is a chance for a lawyer to get inside a judge’s head and persuade [him or] her. Every time a judge asks a question, the lawyer is presented with a chance to persuade.” *Id.* at 35. “Questions from the panel should be considered the advocate’s best friend because they reflect the thinking and concerns of the panel.” Judge James Kenney, III.

In order to be persuasive with your answer, you must answer the question asked – directly, promptly, and accurately. *See* Lavine, at 35-36. Every judge knows when you are not responding to the question asked. It is instinctive. “Please do not say you will get to a judge’s question – answer it now.” Judge Stuart Berger. “Putting the judge off by delaying an answer is throwing away a valuable opportunity.” Lavine, at 35.

If you do not understand the question,

you should seek clarification. “If you do not know the answer to a question, say so; never misrepresent the facts or the law.” Judge Kathryn Graeff. “I don’t mind – in fact, I very much appreciate – counsel helping me understand why a question misses something, or if the answer wouldn’t change the outcome. That is an answer, and often a good one.” Judge Douglas Nazarian. If a factual or legal point must be conceded, you should do so; but then show how the concession does not mean that you lose on the issue. “When you make a mistake, admit it. . . . [D]on’t try to hide it or give fatuous excuses. . . . Just tell the court you made a mistake.” Lavine, at 42.

When answering a question, you should always be conscious of the standard of review governing the issue that you are arguing. Oral argument is *not* closing argument. Appellate judges do not reweigh the evidence in the record. The job of an appellate panel is to review the rulings of the trial court – factual findings for clear error, questions of law *de novo*, and discretionary decisions for abuse of that discretion. Do not fall into the trap of giving the panel a “jury” argument.

Finally, after answering the question asked, transition back to your argument.

Style

There are many style pointers for effective oral argument. Here are some of the best:

1. When you are addressing the panel, make sure that you direct your attention to each member of the panel. Each one has a vote.
2. If you refer to a judge by name, make sure that you know how to pronounce his or her name.
3. Don’t interrupt a judge.
4. Don’t talk over or argue with a judge.
5. Don’t congratulate a judge for

asking a question.

6. Don’t make any *ad hominem* attacks on the opposing party or his or her counsel.
7. Speak slowly, clearly, and with sufficient volume to be heard by auditorily challenged judges.
8. *Always* be “civil, courteous, and professional.” *See Id.*, at 36.

Credibility

“A lawyer should never misrepresent what the record says. This should not have to be said, but it is amazing how often it happens. And when it does, the lawyer’s credibility is gone.” Judge Deborah Eyler.

Above all, you must be honest about the law, the facts, and the record. Failure to do so will destroy your credibility with the Court. When your credibility is gone, so too is your effectiveness as an advocate.

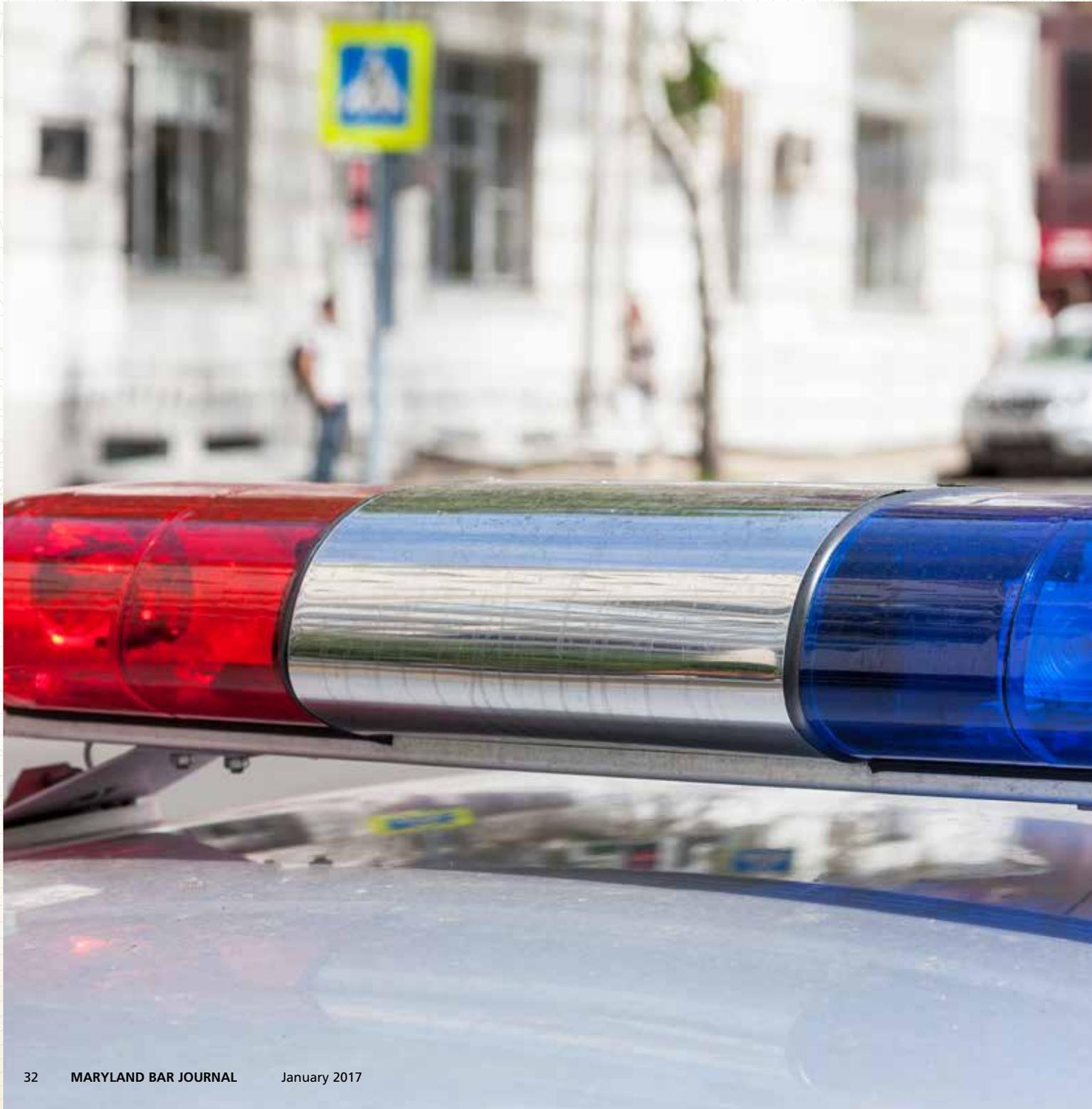
Conclusion

“[T]he ultimate goal of any good appellate argument . . . [is to] [i]nitiate a conversation – and by that I mean a real exchange – with human beings sitting on the bench. Don’t talk at them, talk with them. Engage them. Relish the give and take.” Lavine, at 44. Oral argument thus is an opportunity to engage in a colloquy with the members of the panel during which you employ your knowledge of the law and the record, along with your analytical skill, to persuade the panel that your side should prevail.

Judge Woodward is an Associate Judge of the Court of Special Appeals and has been a member of the Maryland Judiciary for over 25 years, having served on the District Court, Circuit Court, and for the past 11 years on the Court of Special Appeals. The author would like to acknowledge the invaluable contribution to this article by Thomas D. Murphy, Esq., Past President, Maryland State Bar Association, and Fellow of the American College of Trial Lawyers.

From Binoculars to Cell Site Simulators:

The Evolution of Criminal Cases in the Court of Special Appeals and the Impact of Advanced Technology on Fourth Amendment Claims





By the Honorable Kathryn Graeff

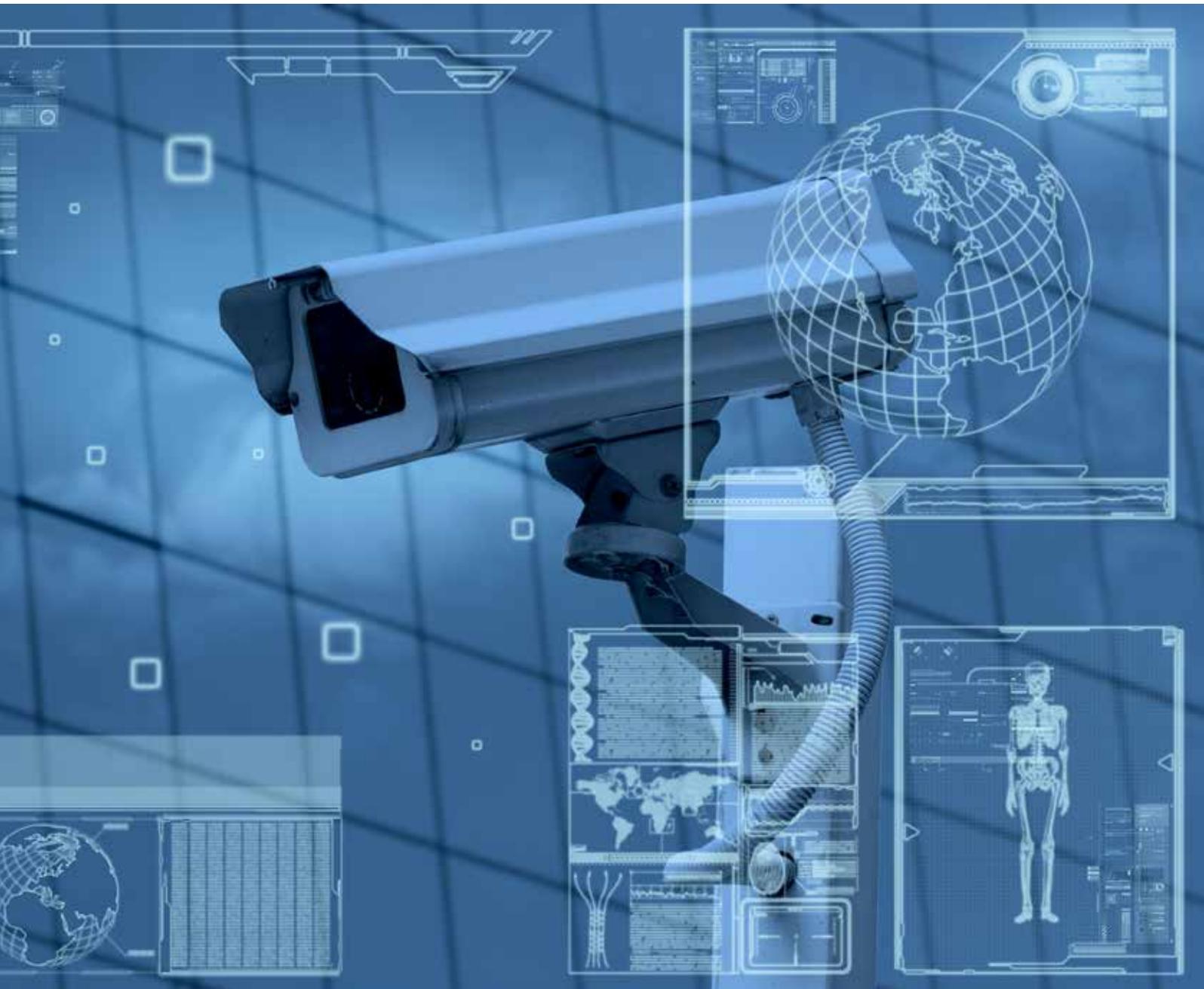
When the Court of Special Appeals came into existence in 1967, it heard appeals only in criminal cases, leading to the designation Court of “Special” Appeals. There were five judges on the Court at that time, and in the first full term (September 1967), there were fewer than 400 appeals filed. Much has changed in the last 50 years, including the number of appeals heard, the percentage of those cases that are criminal, and the nature of the issues presented to the Court.

In 1970, four new judgeships were created, and the jurisdiction of the Court was broadened to include certain civil cases. By the September 1970 term, the Court's caseload had nearly doubled to 760 appeals, of which approximately 77 percent were criminal in nature. Criminal cases continued to be the majority of filings until 1984, after the adoption of Section 12-302 of the Courts and Judicial Proceedings Article,

which removed the right of direct appeal in criminal cases where a guilty plea was entered. Under the new requirements, a defendant was required to file an application for leave to appeal, which does not guarantee that the Court will hear the appeal.

Today, 50 years after the creation of the Court of Special Appeals, the number of appeals filed, and the nature of the cases heard, are much

different. Statistics from fiscal year 2015 show that the Court, which now has 15 incumbent judges, disposed of more than 2,000 cases. The majority of cases now are civil cases, with only 40 percent of the direct appeal filings being criminal in nature. The breadth of the issues presented in these criminal cases is extremely broad. Criminal appeals presented to the Court of Special Appeals address a wide spectrum



of crimes prohibited by statute or common law, from murder and rape to theft and trespassing. The issues presented involve constitutional claims, evidentiary claims, the substantive law required to convict of multiple criminal offenses, and a myriad of other issues, too many to discuss in the course of this Article.

This Article will focus on changes in technology in the last 50 years and how those changes have affected the analysis of the Court of Special Appeals and other courts in addressing challenges based on the Fourth Amendment to the United States Constitution. The Fourth Amendment provides for the right of the people to be secure against “unreasonable searches and seizures.” Changes in technology present new challenges to courts, particularly in the context of “searches” under the Fourth Amendment, which occur when the State invades a reasonable expectation of privacy.

In *Johnson v. State*, 2 Md. App. 300, 302 (1967), a case decided in the first year of the Court of Special Appeals’ existence, the Court noted that the Fourth Amendment protected a person’s privacy against arbitrary intrusion by the police. The Court stated that the “development and refinement of means of communication” was raising questions involving the individual’s right to privacy. The legislature had made it a crime to use an electronic device to “eavesdrop” on conversations, but the Court noted that, with respect to a violation of privacy by visual means, the legislature had made it illegal to look into a window of a building only if the person entered “upon the land

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CAITLYN E. YUSCHAK
LICENSED IN DC AND MD

Kuder, Smollar, Friedman & Mihalik, P.C. is pleased to announce that Caitlyn E. Yuschak has joined the firm.

Prior to joining the firm, Ms. Yuschak served as a law clerk to the Honorable Anthony C. Epstein, of the Superior Court of the District of Columbia. While attending law school, Ms. Yuschak was an active member of the Catholic University Law Review, Students for Public Interest Law, and Street Law organizations. At KSFM, Ms. Yuschak will focus on family law, including divorce, alimony, custody, child support, paternity and property distribution cases.

Kuder, Smollar, Friedman & Mihalik, P.C. has been committed to helping clients in Washington D.C., Maryland and Virginia with family matters for more than 40 years. Our attorneys are experienced litigators, skilled negotiators, and trained mediators. We are active in the legal community and have been repeatedly acknowledged as some of the region’s best lawyers.

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or premises of another for the purpose of invading the privacy or the occupants” of a building. *Id.* at 303. In addressing whether a police officer, who used binoculars to observe activities occurring in a house 150 feet away, violated the Fourth Amendment, the Court focused on whether there was a physical trespass on the premises under observation. *Id.* at 306. Because there was no trespass or “unauthorized physical penetration into the premises or actual intrusion into a constitutionally protected area,” the Court held that there was no constitutional violation. *Id.*

In 1967, the year that *Johnson* was decided, the United States Supreme Court revisited the issue of what constitutes an unconstitutional invasion of privacy. In *Katz v. United States*, 389 U.S. 347 (1967), a case involving FBI agents placing a

recording device on the outside of a telephone booth, the Court shifted away from a constitutional analysis focusing solely on whether there was a trespass. Rather, because “the Fourth Amendment protects people, not places,” the Court determined that, when addressing whether a Fourth Amendment “search” occurs, courts should look to whether a person had a reasonable expectation of privacy. *Id.* at 351, 353. Because Katz had a reasonable expectation of privacy in the telephone booth, recording his conversation was a search under the Fourth Amendment, even though there was no trespass. *Id.* at 353.

Approximately 50 years after *Johnson* and *Katz* were decided, the Court of Special Appeals was confronted with the use of technology much more advanced than binoculars or a recording device. In

State v. Andrews, 227 Md. App. 350 (2016), the Court addressed whether the police violated the Fourth Amendment in using a cell site simulator (referred to as “Hailstorm” or “StingRay”), without a warrant, to locate Andrews, who was wanted on charges of attempted murder, inside a home. A cell site simulator is a mobile “electronic device that mimics the signal from a cell-phone tower, which causes the cell phone to send a responding signal” and permits the police to determine the location of the phone. *Id.* at 380 (quoting *State v. Tate*, 849 N.W.2d 798, 826 n. 8 (Wis. 2014), *cert. denied*, 135 S.Ct. 1166 (2015)). In holding that there was an unconstitutional search, Judge Andrea Leahy, writing for the Court, noted that “rapid advancements in technology make ascertaining what constitutes a search under the Fourth Amendment ever more challenging.” *Id.* at 381. The Court’s discussion in this case provides a good history of how courts have grappled with analyzing Fourth Amendment privacy rights in light of rapidly changing technology.

In two cases subsequent to *Katz*, the Supreme Court addressed whether the use of technology to gain information in a home amounted to a search. In *United States v. Karo*, 468 U.S. 705, 715 (1984), the Supreme Court held that the use of a radio transmitter to track the movements of a container into a home without a warrant was unconstitutional because it revealed information about the inside of the home that the government “could not have otherwise obtained without a warrant.” In *Kyllo v. United States*, 533 U.S. 27 (2001), the Court addressed whether a search occurred when the

government used a thermal imaging device to detect areas of heat inside a home (due in that case to high intensity lamps used to grow marijuana plants inside the home). In addressing the question of “what limits there are upon this power of technology to shrink the realm of guaranteed privacy,” the Court held that, where “the Government uses a device that is not in general public use, to explore the details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” *Id.* at 34, 40.

Relying on these cases, as well as *United States v. Jones*, 132 S.Ct. 945 (2012), which held that the use of a Global-Positioning-System (“GPS”) tracking device placed on the underside of a vehicle to track the movements of a suspect over a period of time was a search, the Court in *Andrews* determined that the use of the Hailstorm device, without a warrant, violated the Fourth Amendment. It held that “cell phone users have an objectively reasonable expectation that their cell phones will not be used as real-time tracking devices through the direct and active interference of law enforcement,” and therefore, “the use of a cell site simulator, such as Hailstorm, by the government, requires a search warrant based on probable cause . . . unless an established exception to the warrant requirement applies.” 227 Md. App. at 394-95.

The technological advances discussed in *Andrews* could not have been envisioned when the Court of Special Appeals decided *Johnson* and the Fourth Amendment impli-

cations of the use of binoculars to see into a home. In the ensuing years, courts continuously have had to determine whether Fourth Amendment values are protected when changes in technology change the nature and scope of searches. For example, courts have had to reconsider precedents in light of the nature of cell phones, and “smart” phones, which are “based on technology nearly inconceivable just a few decades ago.” *Riley v. California*, 134 S. Ct. 2473, 2484 (2014). In *Riley*, Chief Justice John Roberts noted that, before cell phones, “a search of a person [incident to arrest] was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy.” *Id.* at 2489. Because many cell phones, however, are “mini-computers,” with “immense storage capacity,” the Court held that the police could not search the digital contents of a cell phone under the search incident to arrest exception to the warrant requirement. *Id.* at 2489-91. The Court of Appeals characterized this decision as creating “a sea-change in this area of Fourth Amendment jurisprudence.” *Spence v. State*, 444 Md. 1, 8-9 (2015).

Other technological advances, such as DNA analysis, similarly have generated significant litigation. For example, in *Raynor v. State*, 201 Md. App. 209 (2011), *aff’d*, 440 Md. 71 (2014), the Court of Special Appeals addressed whether the defendant, who was at the police station for an interview concerning a rape allegation, had a reasonable expectation of privacy in DNA that he shed by rubbing his arms on a chair at the station. In addressing this issue, Chief Judge Peter Krauser, writing for the Court,



agreed with the State's argument that the DNA evidence in that case was akin to the recovery of fingerprint evidence, which had never been deemed to be a search under the Fourth Amendment. The Court held that, although a DNA sample had the potential to provide more personal information than a fingerprint, where DNA evidence is "used for identification purposes only, it is akin to fingerprint evidence." *Id.* at 221. Because the DNA analysis was used only for identification purposes, appellant had no objectively reasonable expectation of privacy in "biological residue he left behind." *Id.* at 225.

New technology will continue to present Fourth Amendment questions that must be resolved by

courts. For example, does surveillance through the use of drones, unmanned aircraft that can be guided remotely and may carry high powered cameras, constitute a "search" under the Fourth Amendment? The Supreme Court previously held in *California v. Ciraolo*, 476 U.S. 207, 215 (1986), that law enforcement's observations of marijuana plants in a backyard, made from a plane with a human pilot 1,000 feet above the ground, did not constitute a search because the respondent did not have a reasonable expectation of privacy in objects that could be seen by the naked eye from this airspace. Does this same analysis apply to drones, which, because of their size, technology, and ability

to operate unmanned, may make surveillance cheaper, easier, and less obvious? That is a question that likely will be presented to courts in the near future.

There is no doubt that technology will continue to advance in ways that we cannot, at this time, anticipate. These changes, along with the many other new issues presented in criminal cases, will continue to present interesting and challenging issues for the Court of Special Appeals in the next 50 years.

Judge Graeff has served as an Associate Judge of the Court of Special Appeals since 2008. Prior to that, she was Chief of Criminal Appeals in the Maryland Office of the Attorney General.

NAVIGATING YOUR APPEAL

By Gregory Hilton

I intend this article to be, primarily, a discussion of best practices for you, the appellate litigant, but, in recognition of the 50th anniversary of the creation of the Court of Special Appeals, I would also like to take the opportunity to honor the outstanding work of my predecessors Julius A. Romano (1967 – 1978), the first clerk of the Court of Special Appeals, Howard E. Friedman (1978 – 1988), and Leslie D. Gradet (1988 – 2013), my immediate predecessor. I would also like to take this opportunity to thank the staff of the Clerk's Office, without whom, the work of the office could not get done.

Here, then, is a discussion of best practices based on the Maryland Rules.



IN THE COURT OF SPECIAL APPEALS



Prepare for the Appeal

While appeal preparation actually commences at trial and the proceedings leading up to trial as you take measures to ensure the preservation of issues, Maryland Rule 8-131, the practical part of preparing to present an appeal begins at the moment an appeal is noted. At this point the record is readily available to the attorney for review and you can determine whether the record is complete, and, more importantly, that the courtroom clerk has retained all exhibits in the file.

Next, you should review the appellate timeline discussed below. In cases in which the trial was lengthy or there will be a large number of documents in the record extract, it will expedite the preparation of your record extract if you initially consider which documents from the record will be necessary to include. A review of Rule 8-501, which I will discuss later, would be helpful at this point.

Appearance of Counsel

If your appearance has been entered in the circuit court and you do not affirmatively strike your appearance in the circuit court or notify the Clerk of the Court of Special Appeals in writing not to enter your appearance, your appearance will carry over to the appeal by Rule 8-402.

If you do not wish your appearance to be entered in the Court of Special Appeals, you should send the Clerk of the Court of Special Appeals a line instructing the clerk not to enter your appearance. Rule 8-402(a). If you do not send this notice to the Clerk, your appearance will be entered and you will be required to file a motion to strike your appearance in accordance with Rules 8-402(f) and 2-132. In crim-

inal cases, if a Public Defender enters his or her appearance, your appearance is stricken by rule. Rule 8-402(g). Merely indicating to the circuit court that a Public Defender will enter his or her appearance is not sufficient. Be mindful of filing deadlines for briefs when you are striking your appearance.

The Appellate Timeline

The notice of appeal must be filed within 30 days after the entry of an appealable judgment on the circuit court's docket. There is no mechanism to extend the filing deadline except when a motion for a new trial, a motion for judgment notwithstanding the verdict, or a motion to alter or amend the judgment are filed within ten days of the entry of the judgment. Filing such a motion will toll the time for filing the notice of appeal until thirty days after resolution of the motion. Rule 8-202(c).

In most civil cases, a Civil Appeal Information Report must be filed with the Court of Special Appeals within 10 days of noting an appeal. Rule 8-205. Within 30 days of the filing of the information report, you will either receive an order directing the preparation of the transcript and transmission of the record (called an Order to Proceed) or an order to a prehearing conference or alternative dispute resolution (ADR).

Unless your case is a child access case, you must order transcripts within 10 days of the date of the Order to Proceed and file a copy of the transcript order with the clerk of the trial court. Rule 8-411. For child access cases, the time to order transcripts is shortened to five days. Rule 8-207(a)

Sixty days after the Order to Proceed, the circuit court clerk will

send the record to the Court of Special Appeals. Upon receipt of the record, the Court will send you a notice of the receipt of the record, the date Appellant's brief is due (roughly 40 days after the date of the notice), and the projected dates of argument. Rule 8-502. This notice is known as a Session Brief Notice.

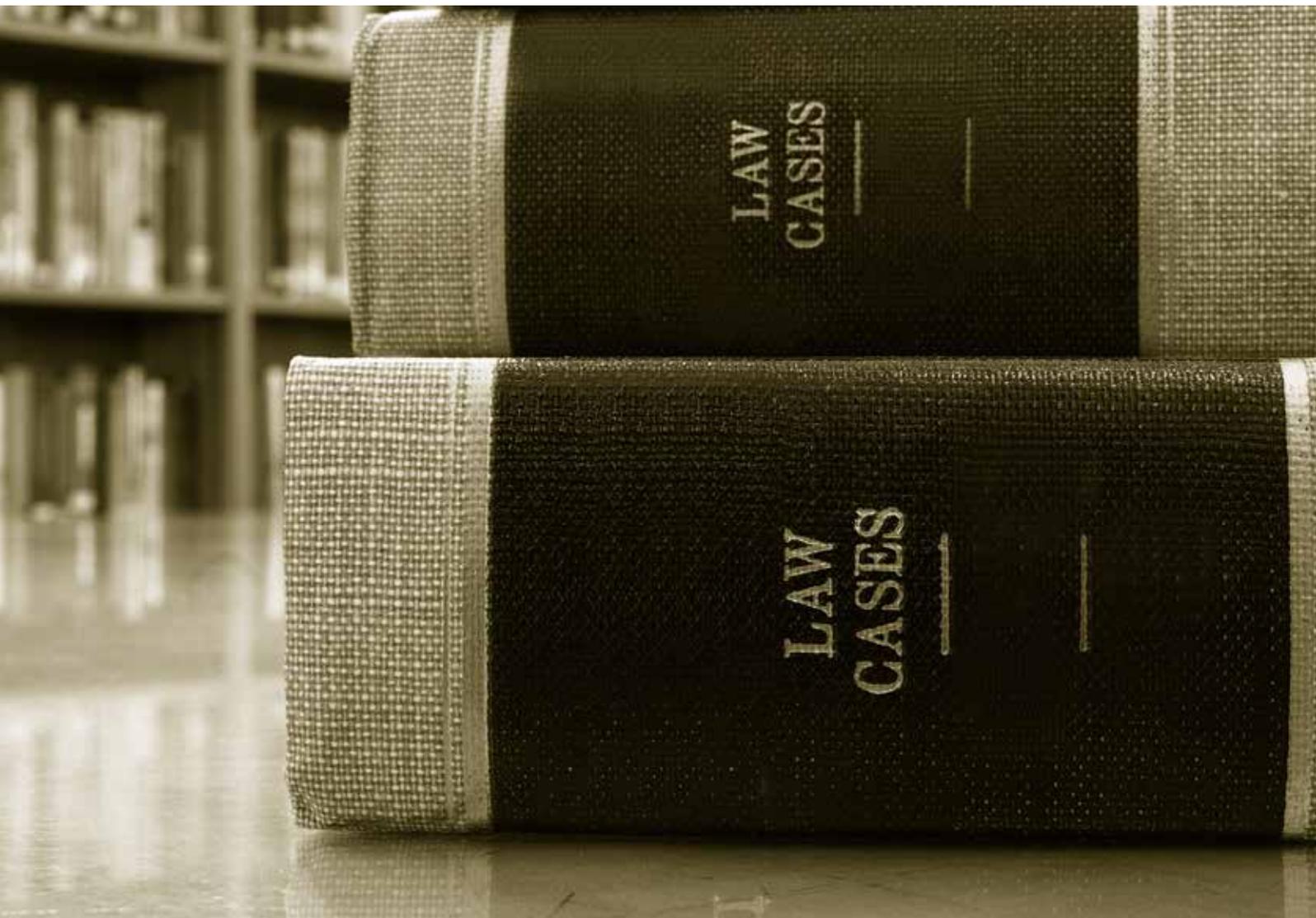
Appellee's brief is due 30 days after appellant's brief is filed. Rule 8-502(a)(2). Appellant's reply brief is due 20 days after Appellee's brief is filed, but, in any event, no later than 10 days prior to argument. Rule 8-502(a)(3).

Arguments are ordinarily scheduled on the first eight business days of every month. When you receive this notice, check your calendar and inform the Clerk immediately of any scheduling conflicts.

Based upon the Court's current capacity, oral arguments are currently being scheduled for eight to nine months following the filing of the record. Argument is not ordinarily scheduled in the months of July and August except for child access cases and appeals by the State of Maryland from the granting of a pre-trial motion to suppress evidence. Approximately four to five weeks prior to argument, you will receive notice of the date of your argument, and the Clerk will publish on the Court's webpage the expected order of argument.

Each side is afforded twenty minutes to present its argument regardless of the number of attorneys on either side and regardless of whether there is a cross-appeal. Rule 8-522(a). Appellants may reserve a portion of their argument for rebuttal. Rule 8-522(b). Also, only two attorneys may argue per side, regardless of the number of appellants or appellees. Rule 8-522(c).

Following argument, the panel will



conference and the opinion will be prepared. When the opinion is complete, it will be filed by the Clerk, and the opinion will be posted to the Court's webpage and mailed to the parties. If the Court intends to report the opinion, Rule 8-605.1, it will not be filed until after the Court's regular conference at the end of the month.

Stipulations and Extensions of Time

Counsel may stipulate to an extension of time so long as the stipulation is filed prior to the date the brief is due and does not affect the date argument is scheduled or require that appellee's brief be filed fewer than 30 days prior to argument. Rule 8-502. If a stipulation is not possible, counsel may

file a motion to extend time to file a brief. Rule 8-502(b)(2) and Rule 1-204. The motion should provide the Court with an appropriate reason for the extension of time, and, when possible, the position of the opposing party. The filing of the motion to extend time does not guarantee that it will be granted. Accordingly, you should file the motion early enough that the Court has the opportunity to rule on the motion after the opposing party has an opportunity to respond.

Motions Practice

Any request for relief of the Court must be made by a motion. Maryland Rule 8-431. The clerk will hold the motion for the period of time required by Rule 8-431 and the timing require-

ments of Rule 1-203, unless the opposing party has authorized you to represent its position in your paper, or unless you seek *ex parte* relief pursuant to Rule 1-351. Any motion or response that asserts facts not contained in the record or the papers on file with the appellate court must be supported by an affidavit. Rules 8-431(c) and 8-603(d)).

The lower court judgment may be stayed by posting a supersedeas bond in the trial court. Rule 8-422 and Rule 8-423. Alternatively, a party seeking a stay of the lower court judgment can make a motion to stay that judgment pursuant to Rule 8-425. Ordinarily, a party seeking a stay or injunction in the appellate court must first seek that relief in the trial court. Rule 8-425(b).

Orders of the Court, with respect to



motions, will generally be filed on the date of the order. Generally, the order resolving a motion will be placed in the mail on the date that it is filed.

The Style and Formatting of Briefs

The requirements of the record extract are covered in detail in Rule 8-501. The style and formatting of briefs is covered in Rules 8-503 and Rule 8-504. The most frequent problems we find with briefs are:

1. Failure to double space the lines of text. Rule 8-112(c)(2).

2. Failure to use the proper type size (minimum size is 13 points). Rule 8-112(c)(1).
3. Failure to include a statement of the font and type size used. Rule 8-504(a)(9).
4. Failure to include all of the elements of a brief: table of contents, table of citations, a brief statement of the case, questions presented, statement of the facts, standard of review, argument, conclusion, and the verbatim text of constitutional provisions, statutes, ordinances, rules, and regulations. Rule 8-504(a).

5. Failure to include references to the record extract in civil briefs. Rule 8-504(a)(4).
6. Failure to include all the required elements of a record extract. Rule 8-501.
7. Failure to reference the first page of the initial examination, cross-examination, and redirect examination of each witness in the record extract index when transcripts are included in the record extract. Rule 8-501(h).
8. Failure to explain why additional documents are necessary as an appendix to a brief. Rule 8-501(e) & (f) and Rule 8-504(b).
9. Failure to include a certificate of service. Rule 1-323.
10. Failure to include the certification of word count. Rule 8-503(g).

While Rule 8-501(d) places the obligation of producing the record extract on the appellant, it also imposes a duty on all parties to cooperate in determining the content of the record extract. Rule 8-501(d) provides a process for resolving any conflicts between the parties as to the content of the record extract. It bears noting that the record extract is an extract of the record. As this implies, the entire record need not be reproduced in the record extract. The record extract is most useful as an aid to the Court in reviewing the briefs of the parties – that is, as a ready reference to documents mentioned in the brief.

When the Clerk's office identifies a problem with a brief or record extract, it will send notice to counsel to correct. Failure to make the corrections to the brief may result in the striking of the brief, and, as to appellant the dismissal of the appeal, or, as to appellee, the denial of argument.

Applicable Statutes and Rules

In addition to statutes or rules governing particular causes of action, counsel should familiarize themselves with the statutes and rules governing the jurisdiction of the Court and its procedures. Court's and Judicial Proceedings Article of the Maryland Code: § 12-301 provides the general rule of appealable judgments; § 12-302 covers some exceptions to the general rule of appealability; and § 12-303 covers the limited bases for an interlocutory appeal. The Court of Special Appeals does not have jurisdiction to review judgments from the circuit court in the exercise of its appellate jurisdiction. § 12-302(a).

It is not an overstatement to say that nearly every title of the Maryland Rules has some impact on the appellate process. Counsel should carefully review Title 1 of the Rules, Rule 2-601, Rule 2-602, and Title 8 of the rules whenever an appeal is noted. If you are filing an appeal from a judgment in a county where MDEC has been implemented you must review Title 20 of the Rules.

Lest there be any confusion, there are no secret rules or undisclosed internal practices, only business practices necessary to implement the published rules.

Court Records and MDEC

While the Court of Special Appeals has a "database" that it uses for case management, it is not available through Judiciary Case Search and is not viewable remotely. You can come into the office and request copies of our dockets and review any file that is not sealed. Generally, we will not email or fax these to you.

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The deficiencies in access to the Court of Special Appeals' records are rapidly being corrected through MDEC. Currently the Court of Special Appeals processes appeals in MDEC in appeals arising from Anne Arundel County and the Eastern Shore Counties. This means that attorneys of record in cases appealed from these counties will be able to see, review, and electronically file into the Court of Special Appeals. The current roll out of MDEC does not, however, show appellate cases in Judiciary Case Search.

Contact with the Clerk's Office

The Clerk's office welcomes your questions and will attempt to provide the appropriate answers to them. However, it has been my experience that the answers to most of the ques-

tions we receive are readily available in the Rules. The Clerk's office cannot provide you with legal advice or suggestions on what may accommodate your particular scenario.

Conclusion

While the Court of Special Appeals has come a long way since its first sitting in 1967 and continues to evolve with new systems and updated business practices, one thing that remains constant for the Court and litigants before it is a grounding in the Maryland Rules. Learning and applying the Rules eases the process of an appeal and ensures the fairness of that process for all.

Mr. Hilton is Clerk of the Court of Special Appeals of Maryland.