

Law

• A dog's best friend
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Today's article is long overdue, but not because it's been awhile since I last made an appearance in this column. Shortly after writing a piece about my son going to college, I lost a dear friend and the first dog I ever had, Sparky, who was quickly followed into the after-life, or wherever dogs go when they die, by his good buddy, Dusty. At least that's where I think Dusty went, although I wouldn't be the least bit surprised if the gatekeeper told this snarling, ill-tempered Cairn Terrier that the kennel was full and that he would need to try again some other time. What I do know is that neither of these pups is with us today, and it's high time to mark their passing.

Anyone who thinks that eulogizing either of these canines has nothing to do with appellate advocacy obviously has never written an appellate brief or had a dog. Especially these two. Because whether your dog is your best friend, as Sparky was mine, or your mother-in-law's revenge, as the inherited Dusty was for me, there are innumerable ways in which the appellate lawyer can learn from a dog.

Like many people we know, Sparky was a complicated soul who could not be defined simply in terms of black and white, or, in his case, black, brown, and white. Some people, i.e., my father, sister, brother-in-law, cousin, and 15 or so other individuals who found themselves on the receiving end of one or more of his love bites, apparently believed that Sparky's first owner was Michael Vick; that this was a dog to be avoided at all costs, and that Sparky was not, as I had told them, a Renaissance dog who was simply trying to please his owner by acting out a line from my favorite Oscar Wilde poem, the Ballad of Reading Gaol, about how each man kills the thing he loves.

Not everyone, however, allowed Sparky's dramatic tendencies to get in the way of seeing the real Sparky. For those of us who knew him as the really good boy that he was, Sparky was the epitome of the perfect dog. And for the appellate practitioners among us, he was an excellent teacher.

One invaluable lesson which Professor Sparky taught me comes to mind virtually every time I fondly recall the way he would act like a little psychopath whenever a stranger, namely,

someone who was not a member of his nuclear family, would enter the house.

Due to our homeowner liability insurance carrier's invocation of the one-bite rule, we had to devise different ways to deal with Sparky, for example, by holding him firmly in a bear hug, or putting him outside, or, if the weather was inhospitable, locking him in a room — preferably the most remote room in the house, so that his howling, scratching and desperate body hurls against the door would not be too much of a distraction.

Regardless of the means chosen to restrain him, Sparky taught us that it was far better to deal with the issue than to ignore it and allow him to wreak havoc amongst our guests.

This, of course, is precisely the same approach that the good appellate lawyer needs to take when confronted with bad facts. Resist the temptation to pay them no heed and to hope that they will just go away. They won't. Opposing counsel can be surprisingly adept at attacking, highlighting, and otherwise exploiting the adversary's failure to acknowledge such facts. And appellate judges can be surprisingly receptive to unfavorable characterizations of this kind that paint your client, and you, in the worst light possible.

Like a dog afflicted with a case of high anxiety, bad facts will come back and bite someone if you do not take some action to contain them. So refrain from acting as if the bad facts in your case are not a problem or, worse, simply do not exist. Take the bull by the horns or, in my case, maniacal dog by the collar and do something affirmative to minimize what can potentially be a most unpleasant situation.

Good-boy behavior

My other dearly departed dog, Dusty, taught me another invaluable lesson that I saw him play out time and again whenever he met someone he did not know. Unlike his friend, Sparky, who would throw himself in front of a train to save his family, Dusty hated us, with the possible exception of my wife, and made it very clear what he would do if he saw that train coming. I know it's not polite to speak ill of the dead, but this was the only dog I ever knew who would not wag his tail or so much as lift his head to acknowledge his own family when they walked in the front door.

Which is why my jaw would drop every time Dusty encountered a complete stranger and would immediately undergo a reverse Dr. Jeckyl/Mr. Hyde personality transformation and act like the cutest dog imaginable, right down to the fervently wagging tail. I knew he was a total fraud, of course, but try telling that to the hoodwinked stranger who would be completely bowled over by Dusty's nauseating display of cuteness.

You probably know by now where I'm going with this. All of us at some point in our careers have encountered Dusty-like adversaries who would leave us aghast at the way they would successfully insinuate themselves with the judges and pretend to be the polar opposite of the lawyers who everyone else, including their own mothers, knew they were.

There is a valuable lesson, however, to be learned from these imposters — they're maddening because they win. I personally think that it is far preferable to always be the kind of attorney these attorneys act like they are only when inside the courtroom. But there is a lot of mileage to be gained from appearances.

Dressing like the consummate professional, being respectful toward the bench and opposing counsel, appearing to be reasonable by conceding inconsequential points in legal arguments, and generally behaving like a good boy or girl are just a few ways in which we can keep up with the Dusty, Esquires of our profession and improve our likelihood of success.

Here and gone

The relatively short period of time that Sparky (11 years) and Dusty (16) walked this earth has also taught me one other lesson that I'll mention. Like a dog's life when measured against the average human's life expectancy, an appeal is a virtual blip on the screen in comparison with other types of cases that frequently continue for years before the entry of final judgment. Enjoy each minute of it while it lasts, because once it's over, it's over.

Which, for me, is always a doggone shame.

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