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Law

The art of appellate advocacy: Maryland lawyers shouldn't bite or reply late

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Alex Burrows of the Vancouver Canucks may have gotten away with it unscathed when he chomped down on the gloved hand of the Boston Bruins' Patrice Bergeron in the first game of the Stanley Cup Finals, but a recent Court of Special Appeals decision makes clear that similar rule-flouting conduct will not be tolerated — at least not when it comes to filing briefs in the Maryland appellate courts.

Whether biting our adversaries is a good or bad thing is a subject for another day, but before proceeding any further, I should point out that I am not a hockey fan, nor did I even know until very recently who Alex Burrows or Patrice Bergeron are, much less that their teams were battling each other for the Stanley Cup trophy.

Until, that is, I saw a rather remarkable picture of what appeared to be a grown man in a blue-and-green Canucks jersey (Burrows) as he enjoyed a mouthful of hand belonging to yet another grown man wearing the Bruins' black, white, and gold (Bergeron), while a third grown man in a black-and-white striped shirt (an obviously beleaguered official) was sandwiched between the two.

As a citizen of the world, I was fascinated by this display, but I was even more awestruck by the National Hockey League's decision not to suspend Burrows because it could find "no conclusive evidence" that he "intentionally" bit Bergeron's finger. You can Google "finger biting hockey player" and decide for yourselves how inconclusive Burrows' intent was and whether his chew was deliberate and calculating or just an instinctive and subconscious Pavlovian response to the sight and smell of a hockey glove coming close to his mouth.

To me, this is just another example of the lawlessness to be expected from a sport which inspired the Rodney Dangerfield one-liner, "I went to a fight the other night and a hockey game broke out."

Rules such as the prohibition on players biting one another obviously do not mean that much in the NHL. But there is one rule that hockey-playing lawyers and other attorneys need to heed when preparing briefs to be filed with the Maryland appellate courts: last month the Court of Special Appeals, in Heit v. Stansbury, granted a motion to strike an appellant's reply brief for failing to comply with Maryland Rule 8-502(a)(3), which governs the time in which reply briefs must be filed to be timely.

This Rule provides that "[t]he appellant may file a reply brief within 20 days after the filing of the appellee's brief, but in any event not later than ten days before the date of scheduled argument."

I have always interpreted Rule 8-502(a)(3) to mean that the reply brief must be filed within 20 days of the date the appellee's brief is filed unless: (a) the reply brief's filing date would occur within ten days of oral argument, in which case the reply brief would be filed in less than the generally applicable 20-day period; or (b) the parties stipulated that the reply brief would be filed beyond the 20-day period, but only as long as the reply brief's filing date did not land within the 10-day timeframe.

But some lawyers have interpreted Rule 8-502(a)(3) in another way, contending that the word "may" means that the 20-day period is discretionary and that the Rule permits the filing of a reply brief at any time, as long as the filing does not occur within the 10-day period. As a result of this interpretation, reply briefs are being filed more than 20 days after the filing date of the appellees' briefs in a growing number of appeals before the Court of Special Appeals.

These cases have apparently reached the point that Maryland's intermediate appellate court in Heit v. Stansbury felt the need to take the unusual step of issuing a reported decision for the sole purpose of deciding, and granting, the appellee's motion in that case to strike the appellant's reply brief when it was filed more than five months after the appellee's brief had been filed. (The court issued another opinion two weeks later addressing the merits of the case, but that opinion was unreported).

The Court of Special Appeals rejected the appellant's argument that the reply brief was timely under Rule 8-502(a)(3) because it was filed more than 10 days before oral argument, concluding that "the '20 days' language directs the appellant that, if he is going to file a reply brief at all, the deadline for doing so is 20 days after the date on which the appellee's brief is filed.

And, anticipating that there may be cases in which the appellee's brief properly is filed not long before the scheduled argument, it further directs, in the 'but in any event not later than ten days before the scheduled argument' phrase that follows, that the

appellant will not have the benefit of the full 20-day time period if that time period encroaches upon ten days of the scheduled argument date."

The Court of Special Appeals acknowledged that "the relevant sections of Rule 8-502 — and subsection (a)(3) in particular — are not models of clarity" and that perhaps the Rule "would be most clearly worded" if it stated that the appellant may file a reply brief within the earlier of 20 days after the filing of the appellee's brief or 10 days before the date of scheduled argument. But the court concluded that the appellant's interpretation would completely eliminate the phrases "within 20 days after the filing of the appellee's brief" and "in any event."

So, beware of the reply brief deadline, especially you rules-flouting hockey player-attorneys out there. Now that there is a reported appellate decision on the subject, this is one deadline which will come back to bite you if you violate it.