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Law

Justice gone wild

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I have been on high alert — not to mention haunted by a profound and growing sense of apprehension, anxiety, and outright fear — ever since I learned that a Wisconsin Supreme Court justice was accused this past summer of trying to throttle one of his colleagues who had disagreed with him during a meeting in which matters apparently went south really fast.

As a regular participant in the appellate process, the possibility that there could be a Maryland version of "Justices Gone Wild" concerns me quite a bit. I'm not as bulked up as Haloti Ngata is. In fact, it would be fair to say that I'm not even half the man Ray Lewis is. Because I'm not. His neck is as thick as my waist. Okay, I lied. His neck is thicker. I may be in pretty good shape from running marathons, but I'm also pretty skinny, and if an irate jurist ever caught me and put me in a chokehold, I'd be history.

I had previously thought that there was an unspoken yet universally understood rule that appellate judges should not become homicidal when someone disagrees with them, but apparently that's not the case. So, to avoid any confusion and also to minimize the possibility that this issue may arise locally, let's just memorialize in writing the expectation overlooked in Wisconsin, but hopefully not in Maryland, that appellate judges should decide cases and not kill colleagues. Or anyone else.

Call me demanding, but there are other expectations we have of appellate judges. Several years ago I wrote an article about the need for some judges, whom I chose not to identify in the interest of self-preservation, to decide appeals more quickly. There's no need to address the point further here, particularly when The Daily Record recently explored this subject more thoroughly and critically by actually naming names. There's also no need for piling on, especially when the vast majority of judges get decisions out of their chambers with relatively satisfactory speed. It should be enough to say that it's not unreasonable to expect appeals to be decided in the months rather than years that elapse following oral argument.

At the risk of appearing to join the bandwagon of detractors who have expressed dissatisfaction with the amount of time it takes for a case to be decided following oral argument, I offer one possible solution which I believe merits consideration but also should be approached with caution: issuing shorter opinions.

Years ago, shortly after I first started this column, I wrote an article expressing the view that some appellate opinions were unnecessarily long, repetitive, and bogged down with extraneous minutiae which did not meaningfully contribute to the development of the law. I've never written a judicial opinion, but I know that a 20-page brief takes less time to write than a 35-page brief does, so perhaps shorter opinions would reduce the delays which have recently attracted the public's ire.

An appeal I recently lost, however, has driven home the point, for me at least, that shorter is not always better. Some lawyers make as many arguments as they can think of in the hope that one of them will prevail, but I have long subscribed to the view that a lawyer should minimize the number of issues raised on appeal by advancing only what he or she perceives to be winning arguments. Having said that, I would be delusional and wrong to think that every argument I advance is actually a winning one. Twenty-eight years of experience in which I've handled more than 160 appeals, some of which I've lost, have taught me otherwise.

But that same experience also made clear to me that the brief I filed raising two serious Fourth Amendment issues in this particular appeal deserved more than the three sentences of analysis which the Fourth Circuit provided in rejecting my arguments in its three-paragraph opinion.

Although shorter opinions may result in quicker decisions, a litigant's right to be heard should not be sacrificed for judicial expediency. This was also a case in which the Fourth Circuit scheduled no oral argument, which it deems unnecessary for many appeals. Summary treatment of the issues facilitates the business of deciding cases, but it does very little to advance any meaningful sense of justice.

It is not unreasonable to expect appellate judges to conduct oral argument and thereafter explain the basis of their decisions in a full and timely manner. No party has a right to win, but all litigants, particularly the ones who do not prevail, should feel that they have had their day in court.

Unless, of course, you live in Wisconsin. Just surviving after losing an argument before that state's highest court may be the most that anyone could expect.