

Law

The Art of Appellate Advocacy

Not another half-baked opinion

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While writing today's article, which makes a very polite suggestion to those judges who draft opinions prior to oral argument, I found myself thinking quite a bit about a case I argued, *Puddester v. Felton*, and the ominous way in which that opinion begins with the words: "There are times when tenacity is a virtue. This is not one of those times."

Just to be clear, the Maryland Court of Appeals in that case was talking about the other side, not me or my client. But, just as I remember reflecting at the time the case was decided, "There but for the grace of God go I," I couldn't help but wonder whether "there" is where I'll be after writing what constitutes yet another article that offers arguably constructive and unquestionably unsolicited advice to judges on how they should do their jobs.

In anticipation that this may not be one of those times when my tenacious efforts to improve the appellate process are fully appreciated, much less considered a virtue, and to atone for any offense that some might take by today's advice and the remote but theoretical possibility that it may not contribute in any meaningful manner to the way in which appeals are decided, I thought it would be prudent to first offer something else that is guaranteed to enrich the state of the law: a recipe for judges to make the world's best fruit cobbler.

Before proceeding any further with this shameless and hopelessly transparent attempt to ingratiate myself with sweet-toothed jurists, I feel compelled to address one reader who had the nerve to question whether I knew the first thing about the kitchen when I wrote an article a couple of years ago in which I used a baking analogy to make the point that rhythm, unlike baking powder, self-rising flour, or eggs, has no substitute and must be included in the mixing bowl to avoid the cake-making equivalent of a flat argument. It may be true, Ms. Hornig, that I once forgot to include sugar when baking what otherwise would have been the world's best cheesecake, but I personally know scores of people, starting with my just-turned 16-year-old son, who are willing to sign sworn affidavits and risk going to jail for perjuring themselves, which they would not be, in attesting to just how good this cobbler recipe is.

The peach cobbler is Sam's favorite, but you can also use blueberries (or blackberries). If making the former, boil five medium peaches for 15 seconds before immersing them in cold water, then peel, pit, and cut into bite-size pieces, and sprinkle with a quarter cup of sugar in a medium bowl. (If making a berry cobbler, sprinkle 1½ pints of the berries with the same amount of sugar.) It probably goes without saying that you should discard the pits. Unless, that is, your in-laws are visiting and have overstayed their welcome. In that case, you might consider leaving in the pits, which is not likely to endear yourself to your spouse's family but will almost certainly hasten their departure.

While your fruit is fermenting, microwave a stick of butter — this cobbler is not for the faint-hearted — in a covered two-quart round baking dish for one minute, or until it has completely melted. In a large bowl, whisk together one cup each of sugar, flour, and milk, one teaspoon of baking powder, a half teaspoon each of cinnamon and mace, a quarter teaspoon of salt — or a quarter cup of salt if you're using the unpitted version of this recipe for your spouse's family — and a half teaspoon of vanilla extract. Then whisk the entire contents into the baking dish until all of the butter has been completely mixed together with the remaining ingredients.

Lay the fruit on top with a slotted spoon, put the uncovered baking dish into a pre-heated 350 degree oven (convect bake or regular setting), do something else for 50 minutes before checking the cobbler with a toothpick every five minutes, and remove from the oven when the toothpick comes out clean. Cool for 30 minutes before serving, unless the in-laws are really getting on your nerves, in which case you should serve them immediately while the cobbler is really hot.

I strongly recommend that judges reading this article put it down at this point and try out the recipe to see how good it is before returning for the remaining portion of today's piece, which probably will not evoke the same kind of reaction that the cobbler will but makes a point that, regardless of the response it may provoke, needs to be stated: Judges who draft opinions prior to oral argument should stop doing so and should spend that time instead on other activities.

Re-read the briefs, bake a fruit cobbler, do anything else before the case is argued, but please refrain from writing anything that remotely resembles a judicial opinion until the lawyers in the case have been given an opportunity to be heard.

Argument, then analysis

I've never been a judge, so what do I know, but, in my view, the words "fair," "impartial" and "open-minded" take on an entirely new meaning once a judge begins the process of formulating a written opinion before the argument.

I have no reason to doubt the good-faith belief of judges that they continue to exhibit all of these qualities because, in their view, a draft opinion is just that, a draft, and can always be revised. But changing the mind of someone who is merely thinking about how a case should be decided is a much easier task to accomplish than convincing a person to alter course once that individual has taken the gigantic next step of transforming those thoughts into a written analysis replete with structure and maybe even citations. That analysis may not be set in stone — after all, it's just a draft, right? — but the fact that it's set in anything is precisely the point.

In my opinion, if judges are going to hear oral argument in a case, then no formal analytical undertaking of any kind should take place until after the argument. I appreciate that some judges draft opinions to stay on top of their case loads. But overloaded dockets can and should be dealt with in other ways that do not have the

making by encouraging the drafter to use the argument to confirm a point of view that has already been reduced to writing, rather than to make the argument part of the deliberative process which establishes what that point of view is.

Drafting opinions prior to oral argument is the equivalent of baking a cobbler for 40 minutes before adding the fruit. No matter how it might taste when the final product is completed, it's just not the same.