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EDITOR'S NOTES

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The Appellate Landmines: Issue Abandonment

By Howard Yale Lederman

Trial court-level lawyers should not handle appeals, unless they understand the appellate process. Why? Here is why:

- Because the appellate process has become more and more complicated.
- Because the skills and talents necessary to become good appellate and trial court-level lawyers differ dramatically.
- Because the appellate courts have become more and more unforgiving of any significant procedural mistakes.
- Because the negative impacts of any procedural mistakes on lawyer and client have become more and more severe.

Indeed, for all the above reasons, the case for a cadre of certified appellate lawyers and restriction of most appellate representation to these certified lawyers is stronger than ever. Therefore, if you don't understand the appellate process, refer your client to an appellate lawyer. Otherwise, work with an appellate lawyer in completing every step of the appellate process.

You might respond: He is just writing this, because as an appellate lawyer, he has an interest in getting more appellate clients. I will reply: Yes, like every other appellate lawyer, I have that interest. You can use this to justify "doing it yourself."

Save your pennies. Everything that I have said in the above paragraph is true. Indeed, the negative impacts of any procedural mistakes on the erring lawyer go far beyond mere monetary sanctions under MCR 7.216(C) and 7.316(D), which are MCR 2.114's, MCR 2.625(a)(2)'s, and MCL 600.2591's functional appellate equivalents. These severe negative impacts include disrupted client relationships, attorney grievances, and legal malpractice suits. The emotional, financial, and professional reputational costs of any of these impacts are heavy and prolonged. So, using an appellate lawyer's financial interest to justify "doing it yourself" can cost you far more than working with an appellate lawyer on the appeal or even referring the case to an appellate lawyer.

Regarding issue abandonment, let's start with the obvious. Failure to brief an issue abandons the issue. *Mudge v Macomb County,* 458 Mich 87, 105; 580 NW2d 845 (1998), *Mitcham v Foster,* 355 Mich 182, 203; 94 NW2d 388 (1959), *People v Payne,* 285 Mich App 181, 188; 774 NW2d 714 (2009), *lv den* 486 Mich App 925; 781 NW2d 839 (2010), *People v Coy,* 258 Mich App 1, 19-20; 669 NW2d 831 (2003), *lv den* 469 Mich 1029; 679 NW2d 65 (2004), *People v Kent,* 194 Mich App 206, 210; 486 NW2d 110 (1992), *lv den* 441 Mich 857; 489 NW2d 777 (1992). You might respond: I don't need to worry. Failure to brief an issue is easy to avoid. All I need to do is write about the issue. Wrong. We shall see why below.

Failure to cite any legal authority to support a position abandons the issue. *Wilson v Taylor,* 457 Mich 232, 243; 577 NW2d 100 (1998), *Mitcham,* 355 Mich 182, 203, *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 14; 672 NW2d 351 (2003), *Thomas v McGinnis,* 239 Mich App 636, 649; 609 NW2d 222 (2000), *Schellenberg v Rochester Michigan Lodge No 2225,* 228 Mich App 20, 49; 577 NW2d 163 (1998), *People v Simpson,* 207 Mich App 560, 561; 526 NW2d 33 (1994). You might react: This could never happen to me. Yet, several times a month, Michigan appellate decisions include sections summarizing a lawyer's issue abandonment from failure to cite supporting legal authority for his/her position.

If not citing supporting legal authority, a lawyer can cite and argue policy supporting the lawyer's position. But if the lawyer does not do so, failing to cite and argue supporting policy abandons the issue. *Woods v SLB Property Management, LLC,* 277 Mich App 622, 626; 750 NW2d 228 (2008), *lv den* 481 Mich 916; 750 NW2d 197 (2008), *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 14; 672 NW2d 351 (2003), *Haefel v Meijer, Inc,* 165 Mich App 485, 494; 418 NW2d 900 (1987), *People v Gallagher,* 68 Mich App 63, 74 FN1 (1976) (Bashara, J, concurring), *modified on other grounds* 404 Mich 429; 273 NW2d 440 (1979). You might reply: If I cite the policy supporting my argument that will be enough. Wrong. You have to explain how and why the policy supports your argument. Otherwise, you risk the appellate court's determining that your failure to do so is inadequate briefing, thus abandoning your position.

Now let's move to the less obvious. Citing little supporting legal authority can be inadequate briefing, thus abandoning the issue. *Peterson Novelties,* 259 Mich App 1,

14, *Goolsby v Detroit,* 419 Mich 651, 655 FN1; 358 NW2d 856 (1984). Now you are in a gray area. The Michigan appellate courts have not defined citing little supporting legal authority. Thus, the Michigan appellate courts have not defined any safety zones in terms of numbers of supporting cases or other legal authorities, kinds of supporting legal authorities, or qualities of supporting legal authorities. So, for an appellate court looking to "get rid of issues" and thus reduce its workload, citing little supporting legal authority to support its issue abandonment conclusion is a simple recipe to follow. In contrast, for a non-appellate lawyer, citing little supporting legal authority is a well-hidden land mine, ever ready to explode.

Failure to cite "any meaningful authority" can be inadequate briefing and thus abandon the issue. *Alston Northville Regional Psychiatric Hospital,* 189 Mich App 287, 261; 472 NW2d 69 (1991), *lv den* 439 Mich 886; 478 NW2d 175 (1991). As with citing little supporting authority, the Michigan appellate courts have not defined failing to cite any meaningful authority. When direct, on-point authority or authority close to it is available, this problem will not occur. But when such authority is not available, avoiding this problem can become a major operation. Appellate knowledge and experience are major pluses. Substantive law knowledge of the relevant area is another big plus. A lawyer having these advantages has a much better chance of preventing an appellate court's failing to cite any meaningful authority and resulting issue abandonment conclusion. A lawyer not having these advantages runs a much greater risk here.

Next time, we will look at some other issue abandonment land mines, mostly well hidden, ever ready to explode. ■

About the Author

Howard Yale Lederman *has been a Michigan appellate lawyer since 1984, representing civil plaintiffs and defendants and criminal defendants, and a State Bar of Michigan Appellate Practice Section charter member since 1996. He has written over 10 appellate law and practice articles and has co-written an ICLE appellate law book section. He is a Cooley Law School adjunct professor. He has just opened his new law firm, Ledermanlaw, PC, to do appeals and legal writing projects for other lawyers and the general public.*

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Evictions and Considerations

After a long and bitter dispute in the probate court to set aside a will, I was faced with the unfortunate realization that my opposition had no assets other than the decedent's home in which she was squatting. I obtained a court order for eviction but had never carried out one before. Among numerous other issues, I was uncertain as to what sort of time frame I was looking at. Beyond the wait, however was the very real matter of the investment involved. My client had almost no funds available and my compensation was going to be tied up in removing the squatter(s) and selling the house at the center of the dispute.

When dealing with any legal matters, one has to be cognizant of the "accordion effect" where one delay will cause other pendent matters to suffer delays in turn. As everyone should know, money advanced in client costs has not been a permissible business deduction for some years due to either an IRS ruling or a court decision. (I wish someone would write to establish that this has been changed.) If you have a well-heeled client and plenty of money accessible from the client trust there is no issue. For many of us this is a strategic consideration and advancing money at the end of the year is not an option.

When I heard the initial charges required by the Wayne County sheriff, I was somewhat taken aback: I would have to advance $2,250 dollars. (Plus in a separate check, the amount of about $50.) These charges were deposits toward the locksmith, the movers, and the material such as storage boxes for the junk inside the house. I had no idea of how long it would actually take to put the people out but since the order of removal was issued in December and I could expect to be running afoul of holiday vacations, I chose to wait to engage the sheriff.

I returned and put down the money during the first week in January and set about the task of waiting and more waiting. After various calls to the department over the course of weeks, I was finally given a date of March 9 and the ouster did indeed take place on that date. During the course of eviction, I learned that the city of Detroit requires that a dumpster be engaged as there was no longer any bulk trash pickup and a ticket was likely to ensue. There was some drama as the evictees were close at hand and rolled away the junk car they left on the site before a scavenger pickup service could take it. I was very glad that a deputy was on site. All was well that finally ended, however, and arrangements for sale of the house were made.

Moreover, since the movers spent less time and used less packing material than that allocated by virtue of my deposit, I was due a substantial refund. I was told to contact the main office in that regard.

The process of realizing the actual return of the unused deposit was a daunting feat and took until (drum roll please!) July 21. Returning to the possible tax repercussion issue, I could have suffered a tax liability of over $700 if I had commenced such an undertaking four or five months later than I did.

I would also ask any of the readers to provide their recent experiences in this area. Further, would any of the readership care to post or otherwise let us know what issues are of concern to you beyond whether or not to take a particular case or to recommend an attorney? What matters would you like to see covered in the *General Practitioner*? As editor, I have to let the readership know that we have in the past sought to solicit the members' preferences as to topics of interest without much response. We can do better together than alone.

—Maury Klein, Editor

Attorney Fees in First Party No-Fault Cases

By Lawrence J. Day

Having represented a courageous man who was rendered quadriplegic in a Michigan auto accident, I wanted to share our experience regarding attorney fee awards.

> An attorney is entitled to a *reasonable fee* for advising and representing a claimant in an action for personal or property protection insurance benefits which are *overdue*. The attorney's fee shall be in addition to the benefits recovered, if the court finds that the insurer *unreasonably refused* to pay the claim or *unreasonably delayed* in making proper payment. MCL 500.3148(1) (emphasis added)
>
> …benefits are *overdue* if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained…. MCL 500.3142(2) (emphasis added).

The Michigan No-Fault Act, MCL 500.3101 et. seq, is a remedial statute for victims of motor vehicle accidents. MCL 500.3107(1) states in pertinent part:

> "…personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for a person's care, recovery or rehabilitation….

The main controversy in my client's personal injury protection claim stemmed from the fact he was prescribed one-on-one, 24-7 LPN care in his home, but the insurer would only pay an inadequate per diem flat rate. This "flat rate" was arbitrarily based on the cost of care provided by med-techs covering multiple patients in an AFC facility. Not surprisingly, this man preferred to live at home with his wife and receive individualized LPN care as prescribed by his physicians. In fairness to the insurers of our state, I must say, in more than 30 years of doing auto accident work I have never seen an insurer take such an unreasonable position. It was essentially trying to "warehouse" this man.

Two years of litigation ensued. Early on an injunction was granted forcing the insurer to pay for the prescribed in-home LPN care while the matter was litigated.

Eventually, the insurer agreed to cover the cost of care as prescribed and the central dispute was put to rest. However, the issue of attorney fees under MCL 500.3148(1) was left open and required a separate hearing and briefing. In its opinion our trial court cited *Ross v. Auto Club Group*, 481 Mich. 1, 7 (2008) stating, "Once reasonable proof of the claim has been provided:

> '…if an insurer refuses or delays paying no-fault benefits, the insurer must meet the burden of showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty.'"

Our trial court determined there had been "unreasonable delay" by the insurance company and benefits were "overdue" per MCL 500.3148, making an award of attorney fees proper.

Next the court evaluated what a "reasonable" attorney fee should be by looking at the six factors discussed in *Wood v. DAIIE,* 413 Mich. 573 (1982) and *Smith v Khouri*, 481 Mich. 519 (2008).

Ultimately the court granted more than $180,000.00 in attorney fees stemming from 689 hours of work performed by co-counsel, Tom Waun, and myself.

I am as prone to "crowing" about apparent victories as the next attorney. However, the result in this case was primarily driven by very substantive and specific affidavits from treating physicians:

> "…The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference." *Olmstead v. Zimring*, 527 U.S. 581, 119 S.Ct. 2176 (1999)

We were also fortunate to have a trial judge who wrote a well-reasoned, highly detailed opinion. It was not appealed.

The stance taken by this insurer was particularly unreasonable in light of the remedial purposes, policies and

goals of Michigan's No-Fault Insurance Act as stated in 1978 by Michigan Supreme Court Justice Williams:

> The Michigan No-Fault Insurance Act, which became law on October 1, 1973, was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation…. (Supreme Court Justice Williams) *Shavers v Kelley*, 402 Mich 579 (1978).

One more thought: I hate keeping track of hourly time, but highly recommend it. You'll find yourself behind the eight-ball on a section 3148 claim for no-fault attorney fees if you don't. ■

About the Author

Larry Day *practices Michigan no-fault first- and third-party law statewide and honors referral fees to counsel. He also enjoys acting as a mediator.*

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Editor's Note: I fear that as the influence of "dark money" continues to grow that Insurers will be emboldened to continue taking these unjustified positions and that ever fewer Judges will redress these matters with an award of attorney fees or that the fees will not begin to cover the efforts needed to protect our clients.

The Year in Review

By Maury Klein

During the colonial dominion of Britain over India, tensions ran high and often boiled over. Indians felt that their ways and prerogatives were swept aside in favor of English law and violent protests followed if the conditions were right.

Around the dawn of the 20th century, a man had a child bride who was about the age of eight. Although many in India had child brides, some would simply wait for maturation to take place. The individual at the center of this matter, however, had no intention of biding his time and the girl died as a result of bleeding from sexual trauma. The British officials arrested the man and a great outcry arose.

"Again, the colonial power is putting itself above our customs and practices" came the roar of those tired of British control. "We cannot cede our ways to oversight by these outsiders," came another wave of those focusing on the injustice of foreign rule.

Some clashes took place and injuries were inflicted on both sides but it seemed the fuse was lit on a powder keg. The effect was certainly cascading and tapping ever more deeply into the groundswell of pent-up rage on which it fed.

At this time of crisis, a single voice posed questions. "Have we looked at the person for whom we risk such calamity? Is this not a man forcing himself on a child, married or not, and costing her life in the bargain?"

The man's questions were weighed and considered by all, because the one posing them was Mahatma Gandhi. Although he would later cost the Brits the "jewel" in their empire, he would do so through a non-violent struggle. In the meantime, he quelled the upheaval and saved untold lives in so doing.

Obviously, I'm not reviewing this story in a vacuum and the readers already know that it is Michael Brown to whom the parallel is to be drawn. Many have seen the video of the party store he robbed. Almost as soon as it was released, a mob tore the place apart. Presumably, they were unhappy with the portrayal it gave and the crowd was going to wreak vengeance on the one who dared provide an unacceptable depiction of 'their' victim. I later read a very recent newspaper editorial in which the author insisted that since Officer Wilson was the adult, he could have somehow imposed his will on the younger Brown. I would advise the author to review the party store tape again. Based on Mr. Brown's posture when he shoved the aggrieved owner back and towered over him, Brown was not in the frame of mind to cede control based on respect for adult authority. As for an authority figure actually in Brown's daily life, his stepfather, we can all harken back to the scene after the grand jury decision—"Burn this bitch down" is my recollection of what he shouted.

Now let us turn to Eric Garner, another man confronted by the police. Mr. Garner was clearly resistant to authority. He pulled his hands away rather than submit to being cuffed. However, he was surrounded and from what I could see, he never clenched his hands into fists or made a threatening move on the police. It was a cop who was not going to have his authority challenged who made the foray into violence by jumping on Garner's back to choke this big man into submission. This officer was going to have a great story about toppling this mountain even if it meant using an outlawed procedure. Instead a death followed and a father was lost to his family for the crime of selling illegal cigarettes. The justification given by a police spokesman later was that "people who really can't breathe, also can't utter the words 'I can't breathe.'" The evidence is now ample that Mr. Garner couldn't breathe and was being honest with the thug cop on his back.

Surrounded by multiple officers, with nowhere to go—I think that may have been an opportunity for authority figures to reason with Mr. Garner. Tell him calmly that there was no way out that didn't involve him being arrested and wait for him to calm down. That kind of patience does not juxtapose well with someone who likes being a cop for the feeling of authority it brings. And in this case read authority to mean power. I hope that at least the NYPD is going to scrutinize this officer from now on and for a long time to come.

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Turning to lighter matters, was anyone else as amused as I to see the young lady who posed herself on the course of the tour-du-France only to get hit by a cyclist as she was taking a selfie?

What is the future of our country if our people do not have the strength of will to stop texting while they are driving?

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Do the young actually believe that if they buy a particular video game that "Greatness awaits"?

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I hope someone forces the release of "The Interview" just so we get to see what Sony Pictures is trying so desperately to hide.

On the subject of movies, does anyone else recall that a film was in production about Burton Pugash? He was the lawyer who, upon being spurned by a woman, threw lye in her face, went to prison and then married the disfigured object of his affections. I can only imagine the kibosh came from the marketing department who couldn't quite figure out how to sell this as a love story. Promotions kicked around "The perfect date night movie" but nixed that notion. By the way, if you think abusers ever stop thinking solely of themselves, when Pugash's wife became unable to have sex, Pugash went outside the marriage. Of course, he did have his wife's blessing. Of course.

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Sometime this year, at a gun range and with her parents' blessing, a nine-year-old girl had an Uzi sub-machine gun placed into her hands by her shooting instructor. At some point the instructor decided it would be a great idea to switch the firing mechanism from single shot to automatic. The rifle muzzle jerked back and the instructor was shot in the head, fatally. Later, the decedent's family went on television to announce to the world that they forgave the nine-year-old. FOR WHAT! Doing what her "teacher" told her to do? Of not knowing what recoil meant? I believe this is a great opportunity for a lawsuit. This young lady had her chance to unreservedly love guns taken away. Yes, there may be some other trauma involved, but all pales beside the fervent chance to cherish weaponry. She now knows that sometimes guns do kill. Somebody should be sued over that realization alone. ■