Michigan Appellate Practice Journal

An official publication of the State Bar of Michigan Appellate Practice Section

Spring 2015, Vol. 19, No. 1

In this Issue

From the Chair

By Nancy Vayda Dembinski

I hope that 2015 finds all of you well and flush with appellate business. Perhaps your business has been made a bit easier in 2015 with the True Filing system now available in the Michigan Supreme Court and the Court of Appeals.

Speaking of the Court of Appeals, this year marks its 50th anniversary! The Court of Appeals website states that, since its opening on January 12, 1965, 82 judges have served on the Court, and the Court has issued over 151,700 dispositive opinions. A photo with the names of the original nine judges who served on the Court in 1965 is also posted on the Court of Appeals website.

For more information, you can also search #MICOA50 on Twitter, or follow the Michigan Supreme Court tweets from @MISupremeCourt.

Did you know that the Michigan Supreme Court also has a Facebook page, and there is even a Michigan Courts app available to download to your Apple or Android products?

Also on the topic of technology, many of you know that our Section maintains an active Listserv. But I would also encourage you to check out our section's "SBM Connect" site on the State Bar of Michigan's webpage. It contains some member-only content where Section members can log in to participate in discussions, look up or connect with any of our 909 members, and get information about upcoming events. You will not need to login, however, to view our Section's Newsletters/Journals, Council and Committee information, and minutes and public policy positions.

While there are many ways to connect online, it is also nice to see members in person. You can find the upcoming calendar of Council meetings on our Section's webpage, and I hope to see you at one of our upcoming meetings.

Nancy Vayda Dembinski *is a partner at Landry, Mazzeo & Dembinski, PC in Farmington Hills, where she practices primarily in the area of state and federal civil appeals and litigation.*

Meet Justice Bernstein

By Anna Sherman

His chambers at the Hall of Justice are cavernous, stark, and eerily quiet; the oversized conference table seems to engulf him. But the air around Richard Bernstein is positively electric. He shows no signs of exhaustion from his 7-mile morning run on the treadmill, a daily routine he supplements when training for marathons and triathlons. His hands become animated and his face lights up as he discusses his new role as Michigan Supreme Court justice and Michigan's first blind justice. "Work days here are very intense and incredibly challenging," he says, "but I really like the people I work with—not just the other justices but the whole staff. They are *good* people. This is a collegial court and a kind place. For me, that has made all the difference."

Just 25 days into his new position at the time of this interview, Justice Bernstein talks about the initial challenges of the transition. "January is a hard month to be a new justice," he explains. "Because the term starts in September, you have to step into the middle of session." "If you can survive January, you are going to make it," he says, seemingly to reassure himself more than anyone else. He discusses the complexity of the ten cases the Court heard on the January case call. "Imagine preparing for those cases, and then imagine doing it from memory." It took two months, with preparation beginning the day after the November 4th election.

"Because I'm blind I have to work harder to be on equal footing," he openly admits. Luckily, he doesn't do it alone, nor does he pretend he does. He repeatedly mentions his "team"—his clerks, his reader, his driver—and explains why they are not just an important part of his preparation but a necessary one. "Blindness requires far more human interaction, so my team has an extraordinary degree of interaction with me."

"When the justices sit down to conference cases, I need to engage. In order for me to accomplish that, I must know the entirety of the material. Everyone else has the written material in front of them. I have to internalize it." He explains that braille and adaptive technology are not really useful in that process. Instead, he uses a reader and engages in what he calls "active reading." He describes the process as more than just being read the parties' briefs or the bench memo in a calendar case. It requires stopping, finding cases or other authorities, and assimilating those into

the argument he is hearing. Memory plays a big role. So do comprehensive and intensive discussions with his clerks.

Justice Bernstein goes through this process not just for the calendar cases, but for all the "OTEs" (Orders to Enter)—some 200 a month. (Appellate attorneys will recognize these as decisions on applications for leave to appeal). He is committed to this daunting task. "This Court is often the last chance. It is important for me to review every OTE myself." By the time the justices sit down to decide which cases they will grant leave, Justice Bernstein has internalized every case they discuss. In addition, the Court has accommodated his blindness by beginning the discussion of each case with an oral summary. He calls this his "trigger cue," which allows his preparation to fall into place.

The justice talks about other challenges of the job—the long hours (presently he is working 7 days a week, 15 hours a day), his lack of judicial experience, and the enormity of the transition from private practice to the bench. (After graduation from Northwestern Law School, Bernstein spent a number of years heading the public service division of his family's well known law firm). But surprisingly, those don't rate as his greatest struggle. "The hardest thing about this job," he states, "is that it is very isolating. I have a private garage and a private elevator. The phone doesn't ring and I have few visitors. I am a very social person and I miss the social interaction."

He stays connected in other ways, however. For example, he is excited by the prospect of the school children visiting the learning center at the Hall of Justice. He also attends numerous community functions. "It is important to be present at these events, important to connect with people," he says.

In addition to being social, Justice Bernstein describes himself as a gentle person. And he seems poised to set that tone on the bench, not just figuratively but literally. "Blind people are very sensitive to tone," he explains. Then with startling candor, he reveals a story about his first round of oral arguments in Michigan's high court. "I asked a question and it was stern. I listened to my voice and said 'That's not nice.' I told myself there was no reason for it. That wasn't the way I usually talk to someone. Why would I do it from the bench?" He promises himself, "In the future, I'll ask the same question but in a kinder way. When attorneys come before the Court I'll talk to them the way I talk to any other person."

Justice Richard Bernstein

The new justice has set other goals for himself as well. In his view, the voters sent him to the bench to apply common sense. "Law has to have a commonsensical approach. If it doesn't make sense, people won't respect the law. We must have an understanding of what is just and what is right. You don't have to be a legal scholar to understand this."

When asked what he thinks is the greatest challenge facing the legal profession today, Justice Bernstein says, "morale." He shakes his head and bemoans the fact that "there are too many lawyer jokes." "There can never be enough *good* lawyers," he proclaims—"lawyers that care, that want to make a difference, that are empathetic with real people." "And we as judges can help morale by being nicer to the attorneys who appear before us."

Justice Bernstein's parting reflections about being on the state's highest court at age 41, with no prior judicial experience, and with a profound disability, are characteristically positive. "Life experience counts for everything. It is the most important contribution a person can make. Not age. Not pedigree. It is about how those experiences are used and implemented." With no apparent discomfort, he concedes, "I am learning how to be a judge."

Upcoming APS Journal Deadlines

Volume 19, No. 2 - May 15, 2015

Volume 19, No. 3 -August 15, 2015

Volume 19, No. 4 - November 15, 2015

Volume 20, No. 1 - February 15, 2016

Nobody Wants to Hear About it (But You Do)

By Howard Yale Lederman

Nobody wants to hear about argument and issue abandonment. Why? Just hearing or seeing the word "abandoned" near "argument" or "issue" produces horrible images, like angry clients, grievances, and legal malpractice suits. At least, just hearing or seeing the word "abandoned" near "argument" or "issue" produces much embarrassment. This is true, especially if the word "abandoned" near "argument" or "issue" in your appellate brief. Nobody wants to experience these experiences, least of all you.

But you do want to hear about argument and issue abandonment. You don't want them to happen to you. Like most of you, I receive the State Bar's *E-Journal* almost every day. Like most of you, I see the Michigan Court of Appeals or the Michigan Supreme Court conclude that a party has abandoned an argument or an issue at least 2-3 times a week. So, argument and issue abandonment is a real problem. But unlike for many problems, for this problem, solutions are available for immediate use.

Let's start with the obvious. Failure to include an issue in an appellate brief's Statement of Questions Presented abandons that issue. *Eg, Lash v Traverse City,* 479 Mich 180, 2__ FN6; 735 NW2d 628 (2007) (Kelly, J, concurring in part & dissenting in part), *Ypsilanti Fire Marshal v Kircher,* 273 Mich App 496, 553; 730 NW2d 481 (2007), *vacated & remanded on other grounds* 480 Mich 910; 739 NW2d 622 (2007), *Caldwell v Chapman,* 240 Mich App 124, 132; 610 NW2d 264 (2000), *Grand Rapids v Grand Rapids Employees Association of Public Administrators,* 235 Mich App 398, 409; 597 NW2d 284 (1999).

Failure to brief an issue abandons the issue. *Eg, Mudge v Macomb County,* 458 Mich 87, 105; 580 NW2d 845 (1998), *Mitcham v Foster,* 355 Mich 182, 203; 94 NW2d 388 (1959) ("Failure to brief a question on appeal is tantamount to abandoning it."), *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: The solution is also obvious: Brief your issues. I don't need to worry. 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. *Eg, 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. I always cite supporting legal authority.

But unlike for many problems, for this problem, solutions are available for immediate use.

Yet, several times a month, Michigan appellate decisions include sections summarizing a lawyer's argument or issue abandonment for failure to cite supporting legal authority for his/her position. One cause is failing to separate arguments from one another, subissues from one another, or even issues from one another. If you don't separate them, you can't see them as separate. If you can't see them as separate, you can't check and see that all your arguments have supporting legal authority. So, this kind of abandonment does happen, even to lawyers like you.

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,* 259 Mich App 1, 14, *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), *modif 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 determining that your failure to do so is inadequate briefing, thus abandoning your argument.

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, they have not defined any safety zones in terms of numbers, kinds, 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 readily available. Therefore, citing little legal supporting legal authority is an undefined, well hidden land mine.

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. An effective response is, with a short paragraph, to explain how your chosen authority supports your argument. Also, your chosen authority might reference better authorities than itself. If so, cite a second and third authority and repeat the above process.

Likewise, failure to cite "any meaningful authority" can be inadequate briefing and thus abandon the argument or issue. *Alston Northville Regional Psychiatric Hospital,* 189 Mich App 257, 261; 472 NW2d 69 (1991), *lv den* 439 Mich 886; 478 NW2d 175 (1991). *See also, Crowe v Detroit,* 465 Mich 1, 631 NW2d 293 (2001) (citing an authority basing its issue decision on an overruled, repudiated, or distinguishable authority might be failing to cite any meaningful authority), *Ward v Frank's Nursery & Crafts, Inc,* 186 Mich App 120, 129; 463 NW2d 442 (1990), *lv den* 437 NW2d 1033 (1991) (citing only a plurality opinion is apparently failing to cite any meaningful authority).

As with citing little supporting authority, the Michigan appellate courts have not defined failing to cite any meaningful authority. The only real guides are *Crowe* and *Ward.* So, an effective response is to cite additional authorities and, in a short paragraph, explain how your cited authorities support your argument.

Furthermore, failure to present "any meaningful argument" can be inadequate briefing and thus abandon the argument or issue. *Charles A Murray Trust v Futrell,* 303 Mich App 28, 58 FN11; 840 NW2d 775 (2013), *Ewald v Ewald,* 292 Mich App 706, 726; 810 NW2d 396 (2011), *McIntosh v McIntosh,* 282 Mich App 471, 485; 768 NW2d 325 (2009), *Reed v Reed,* 265 Mich App 131, 163; 693 NW2d 825 (2005), *Eldred v Ziny,* 246 Mich App 142, 154; 631 NW2d 748 (2001). Failure to present any meaningful argument is similar to this well-known declaration:

> "`It is not sufficient for a party `simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments….'"
>
> *Wilson,* 457 Mich 243, 232, quoting *Mitcham,* 355 Mich 182, 203.

B**ut failure to present any meaningful argument is not the same as failure to brief an issue or presenting a conclusion without any analysis.** As with citing little supporting authority and citing no meaningful authority, Michigan appellate courts have not defined failing to present any meaningful argument. However, from my analysis of Michigan appellate decisions and my experience, failing to present any meaningful argument usually means presenting an argument with little or no supporting authority and little or no analysis. Any argument presented is often conclusory. *See, eg, Oil Capital Race Venture v Hunter,* Unpub Opin of the Michigan Court of Appeals, Docket No 244132, 2004 Mich App Lexis 705; 2004 WL 435402 (March 9, 2004) *15, *In Re Kazmierczak,* Unpub Opin of the Michigan Court of Appeals, Docket Nos 320920, 320922, 2014 Mich App Lexis 2373 (December 4, 2014), *3, *JP Morgan Chase Bank, NA v Jackson GR, Inc,* Unpub Opin of the Michigan Court of Appeals, Docket No 311650, 2014 Mich App Lexis 1297 (July 15, 2014) *10, *Durbrow v Township of Leelanau,* Unpub Opin of the Michigan Court of Appeals, Docket No 312818, 2013 Mich App Lexis 1912; 2013 WL 6124273 (November 21, 2013) *9 FN2, *Sherman v Sherrod,* Unpub Opin of the Michigan Court of Appeals, Docket Nos 299045, 299775, 308263, 2013 Mich App Lexis 948; 2013 WL 2360189 (May 30, 2013) *9-10.

Lastly, failing to present any meaningful argument can also mean presenting an unclear argument. *Eg, DTE Electric Co v Constant,* Unpub Opin of the Michigan Court of Appeals, Docket No 317976, 2014 Mich App Lexis 2374 (December 4, 2014) *8 FN3, *State Farm Mutual Automobile Insurance Co v Michigan Municipal Risk Management Authority,* Unpub Opin of the Michigan Court of Appeals, Docket No 306844, 2013 Mich App Lexis 1397; 2013 WL 4081110 (August 13, 2013) *16 (failure to give example), *Dohko v Joblonowski,* Unpub Opin of the Michigan Court of Appeals, Docket No 306082, 2012 Mich App Lexis 2253; 2012 WL 5853754 (November 15, 2012) *8-9 (failure to give example), *People v King,* Unpub Opin of the Michigan Court of Appeals, Docket No 294757, 2011 Mich App Lexis 688; 2011 WL 1438090 (April 14, 2011) *6, *lv den* 490 Mich 861; 801 NW2d 883 (2011), *In Re Nickerson,* Unpub Opin of the Michigan Court of Appeals, Docket No 290862, 2010 Mich App Lexis 544; 2010 WL 1052273 (March 23, 2010) *5-6 (failure to define the challenged lower court rulings and factual findings), *Bryan v Drew,* Unpub Opin of the Michigan Court of Appeals, Docket No 284361, 2009 Mich App Lexis 1808; 2009 WL 2053449 (September 3, 2009) *3 (failure to identify excluded evidence), *In Re Cayton,* Unpub Opin of the Michigan Court of Appeals, Docket No 288146, 2009 Mich App

Lexis 1495; 2009 WL 2003356 (July 9, 2009) *4 (failure to identify disabilities requiring special accommodations).

Appellate practitioners are most likely to forget to include issues in the Questions Presented, cite supporting authority, fail to cite any meaningful supporting authority, fail to present any meaningful argument, or present an unclear argument not on Issues 1, 2, or 3, but on Issues 4 and 5, the less important or "long shot" issues. Nevertheless, arguing these less important or "long shot" issues takes time, money, and effort. Doing so also takes appellate brief space. So, if you argue these issues, make sure that you don't waive them. Otherwise, don't argue them.

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 12 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.*

Contact Information: Ledermanlaw, PC, 838 West Long Lake Road, Suite 100, Bloomfield Hills, Michigan 48302, (248) 639-4696 (Office), (248) 561-0559 (Cell), hledermanlaw@gmail.com.

Outsourcing and Offshoring Legal Services

By Stephen Cooley

The law is a business. The law is also a profession and a trade, but at its heart, it is a business. Like any other business, globalization, management theory, information systems and technology, and consumer demand drive the day-to-day economic realities of a law firm.

A lot of ink has been spilled regarding the 2008 financial crisis and its effect upon law firms' bottom lines. However, often overlooked, is the tendency of large corporate firms to embrace the philosophies of supply chain management as a means to increase efficiency, lower costs, and improve client satisfaction.

In the interest of full disclosure to my readers, a significant portion of my practice is as a "law firm supplier," i.e. providing outsourced research and writing projects for attorney clients.

Supply Chain Basics

When looking to optimize a supply chain, corporations must first decide the age-old question of "make or buy." The end goal of this decision is the optimization of organizational spend.

Law firms, spurred by contracting client bases, financial strain and competition from legal service providers, have been forced to reexamine their make/buy decision.

Before we begin our analysis, however, we should note the difference between "outsourcing" and "offshoring." To "outsource" a function, it simply means that another domestic organization contracts to supply that service to the firm. To "offshore" means that the law firm contracts with a foreign organization to supply that outsourced service.

Over the last decade or so, and partly due to the global economic crisis, many individuals have been forced to tighten their belts and eliminate expense wherever possible. Unfortunately, sometimes this means being forced to represent themselves *pro per* in legal proceedings. The byproduct of this access-to-justice crisis is the packaging and sale of limited-scope representations to consumers. For instance, a client may contract with the lawyer to draft (ghostwrite) a motion or set of pleadings for the client to take into court. The underlying rationale behind "unbundling" is that, by breaking a representation down into its constituent parts, the client is able to pick and choose those portions of the representation he or she or it wishes to have the lawyer complete. For more information on unbundling, the author recommends reading the various works by Stephanie Kimbro.

This same principle, when applied to law firms and in-house corporate counsel as clients, sparked the rise in Legal Process Outsourcing (LPO). The idea, once again, is to break the representation down into projects or tasks which are easily outsourced.

To see this trend in action, simply look to virtual paralegals, receptionists, and the countless document review and e-discovery services. The demand drivers for the LPO trend tend to be large law firms and in-house corporate counsel. However, given how effective these supplier relationships have become for large firms, the trend has trickled down into the mid-size and small firm world as well. William Pfeifer, in his article[1], correctly points out the benefits to outsourcing for solo and small firms:

> "Legal outsourcing may be a great way for a busy attorney or law firm to handle complex or time-consuming projects on a more affordable budget. Solo practitioners, small firms, and boutique law practices can take on cases that would otherwise be too large for them to handle . . . [this arrangement allows] all the benefits of having associates and paralegals performing research and document review, but at a fraction of the cost and without having to bring on full time employees."

Research done on the subject of LPOs for the Financial Times Innovative Lawyers Awards found that 43% of corporations and 72% of surveyed law firms were either: 1) currently outsourcing; 2) planning on outsourcing in the future; or 3) were open to the idea of outsourcing[2].

However, it should be noted that optimizing a law firm supply chain is not as easy as chasing the low-cost supplier. As has been borne out time and again, this is not a sustainable competitive advantage for most companies and tends to favor oligarchy in the market. Below, I explain some important considerations for any lawyer or law firm to consider when deciding whether to outsource, and critically, who to outsource to. This article generally follows metrics that are used in traditional supplier scorecards. These scorecards are used globally by businesses to ensure adequate supplier performance.

Cost

Perhaps the greatest benefit of both outsourcing and offshoring is the cost-savings to the law firm. Often, savings accrue from both wages and from the overhead expense forgone by the client law firm for benefits, unemployment insurance, general office expense, etc. The wage effect can be particularly acute when the law firm is based in a high-cost location, such as New York, and outsources to a low-wage area[3].

Legal offshoring has followed the traditional sourcing trend for many multinationals by concentrating in Asia; particularly, India, Bangladesh, and the Philippines. The reason these particular countries are favored is two-fold. First, as mentioned, these countries are low-wage countries that allow the law firms to reap wage savings. The second reason is that citizens of these countries speak English and have English common-law backgrounds, which make understanding and applying American jurisprudential concepts much easier[4].

In an April 3, 2008, article for Time, Suzanne Barlyn wrote that the amendments to the Federal Rules of Civil Procedure regarding e-discovery were "boosting momentum" in legal outsourcing because document-review costs "about $1 per page in India but can range from $7 to $10 per page in the U.S[5]."

One of the concepts that is often overlooked by procuring companies is the total-cost theory. In essence, when we look to total cost, we evaluate the variable cost of those items whose cost varies with output, the fixed cost of those items whose costs do not vary with changes in output level, and the economic cost of the best alternative foregone. The true hidden cost in the LPO model is the cost of coordinating and communicating with the law firm's LPO supplier to ensure deliverables are on-time, on-budget, and high quality. In order to truly compare the economic benefit of the LPO transaction, lawyers and law firms should balance the coordination and communication costs, in addition to the contracted price, against the cost of doing the work in-house.

How are the LPOs able to offer this cost-savings? The short answer is that the LPOs realize scale economies and learning efficiencies through the sheer volume of work they perform. Strictly speaking, the more times a task is performed by a company or an individual, the more efficient that company's or individual's processes become as fixed costs are spread over more volume. Likewise, as an individual or company does a task repetitively, he becomes better at doing that task by learning shortcuts and better methods to achieve the given result.

Quality

Quality should be the ultimate concern of any professional. Our clients retain us to apply our best efforts toward their case. While this may not mean their case is ultimately won, it does mean that we have done our due diligence to investigate the case, understand the law, and render competent counsel.

Perhaps on par with confidentiality, quality is the main concern in the outsourcing or offshoring decision. In our American system, we have educational, licensure, and ethical guarantees of quality.

A potential area of concern with the LPO model utilizing offshoring is that we have none of these indirect guarantees of quality representation. Lawyers abroad subscribe to different regulations, have different educational requirements, and legal traditions. Whether or not a particular county's systems are adequate to guarantee quality representation is a question which requires careful scrutiny. To that end, many of the larger firms and in-house corporate counsel have tried to maintain offshore supplier ties with countries whose legal foundations stem from English common law.

Responsiveness

Additionally, supplier responsiveness and delivery lead times on projects are critical metrics to evaluate in the supplier selection decision. The ability to produce the legal product within the agreed upon timeline is vitally important when one considers the ramifications of missing a key litigation deadline. Certainly, effective calendaring of litigation milestones necessarily requires dependable performance by

those charged with reviewing discovery materials and drafting pleadings.

Likewise, responsiveness to changes in litigation schedules and the ability to adjust to changes in project volume is a key characteristic of a successful outsourced legal provider. Law is anything but a constant demand business, and as most lawyers intuitively know, there are ebb periods followed by the natural and inevitable flows. The ability to quickly adjust to not only increased litigation volume but the moving targets of scheduling orders requires flexibility. This type of flexibility is one of the LPO's greatest strengths - the ability to meet short term demand for legal work. If your firm, for instance, receives a large litigation file, it can compensate for this short term demand spike by contracting some of the time-intensive, low-skill work to an LPO without taking employees away from other projects.

Confidentiality, UPL, and Oversight

However, using an LPO, particularly offshore LPOs, does not come without its fair share of risks from a business standpoint. Perhaps most importantly, there is the issue of project management. These are short-term contracts to provide services for a single project or narrow band of projects. Effective management of the LPO, from a law firm perspective, depends on the law firm's project management capability. In essence, does the law firm have the ability to effectively coordinate and communicate with the LPO throughout the project to ensure the project is finished on-time, on-budget, and high quality? Additionally, bureaucratic costs associated with communication also will increase. Clearly defined project goals, with clear instructions and boundaries for the LPO, is the surest way to eliminate duplicative effort and reduce coordination and oversight costs.

From an ethical perspective, the lawyer or law firm considering the outsourcing or offshoring decision also needs to keep in mind the ethical rules of their jurisdiction. The three main issues in evaluating the outsource decision are: the unauthorized practice of law, effective oversight and supervision, and client confidentiality.

It is imperative that lawyers and law firms engaged in an outsourcing or offshoring relationship ensure the confidentiality of client information in the LPO relationship. This mandate can pose problems particularly in the offshoring context where regulation and oversight may be more relaxed than domestically. Certainly, if one draws a corollary to the recent surge of intellectual property theft in some Asian countries, serious questions arise concerning the confidentiality of say, corporate trade secrets. Particular attention needs to be paid to data transmission and communication safeguards to ensure confidentiality. While confidentiality concerns are somewhat lessened in a domestic outsourcing situation, where the providers are other licensed lawyers in the jurisdiction, best practices dictate that the issue of confidentiality be clearly addressed within the LPO engagement agreement.

Another major consideration that should be addressed in any outsourcing decision is whether to inform the client; or if informed client consent is required before such an arrangement can be undertaken. It is important at this point to consider the ramifications of relating this information to a client; particularly if one chooses an offshoring strategy. Such information may be less than palatable to some clients.

As a corollary, outsourcing, and in particular, offshoring legal work, carries with it an imminent risk of unauthorized practice of law. Law firms are certainly able to stem this risk by contracting with freelance lawyers and LPOs staffed with lawyers who are licensed in the state in which the matter is pending. However, problems of UPL can, and frequently do, arise in offshoring where those individuals working on each matter are foreign educated and licensed, or perhaps even, foreign lay people.

The work product ultimately produced by the LPO is subject to the supervision and oversight of the attorney of record. Similar to a law office, work performed by junior associates, paralegals, or office staff should be reviewed by the attorney of record to ensure accuracy. Oversight may be substantially less of an issue with licensed American lawyers, working in close proximity to the attorney of record.

However, in regard to offshoring, it is incumbent upon the attorney of record to investigate each LPO to ensure that work is being performed correctly and by the appropriate people. Traditionally, companies received inputs from foreign suppliers and pull a certain number of batches from the loading dock to test the quality of the input and to ensure the input conformed to the contract specifications. However, in a knowledge profession, such as law, random sampling is very difficult.

Ultimately, the supervising lawyer is responsible for the work product and incurs the professional liability that attaches along with it. In an offshoring context, the daily operations, as well as the individuals performing these tasks, are difficult to observe. Thankfully, the rise of information technology, project-management software, and web-conferencing has alleviated some of this concern for most domestic LPOs and some foreign LPOs.

Broader Trends in the Market.

Now let us turn our attention to broader trends in the legal marketplace. There are two trends that should be considered in conjunction with the rise of outsourcing/offshoring. These two trends are: the legal employment market and the English Legal Services Act and its counterpart in Australia.

The Legal Services Act, which has been the subject of many articles over the last several years has been a disruptive force for many in the industry. Breaking down the barriers of law firm ownership through Alternative Business Structures may have hidden implications for the LPO industry. Consider the hypothetical of an English ABS in which a law firm, owned by a holding company, establishes and maintains an LPO in India or the Philippines to exploit the low-cost of labor. This arrangement is likely to give the English firm a competitive edge over large American firms as it competes for international corporate clients. This is just one example to show the yet uncertain competitive landscape that the Legal Services Act will produce when coupled with the rise in legal process offshoring. This trend should be monitored closely.

Additionally, the rise of offshore LPOs will likely exacerbate the legal education crisis. According to Forrester Research in Boston, the LPO offshoring trend will move about 50,000 U.S. legal jobs overseas by 2015[6]. Additionally, India, for example, produces about 80,000 law school graduates each year, compared with 44,000 in the U.S[7]. Couple that statistic with the rising legal education crisis, student debt spiraling out of control, and a saturated legal market and there is serious cause for concern.

Conclusion

In conclusion, using a third party with core competencies in outsourced legal services is a growing trend among not just the large firms, but also, solos and smalls. The key to a successful LPO relationship is simply due diligence. As with any other business decision, the sourcing decision needs to evaluate a potential supplier based on both subjective and objective metrics and follow a systematic approach. The metics given in this article should serve as a good starting point in the sourcing strategy.

About the Author

Stephen Cooley *is a small business, freelance, and appellate lawyer based in Rochester, Michigan. He is a graduate of the University of Florida Warrington College of Business Administration, Michigan State University College of Law, and is currently pursuing his MBA from Oakland University.*

Endnotes

1 Pfeifer, William. "What is Legal Outsourcing?." About. 27 Jan. 2015. <http://law.about.com/od/lawpracticemanagement/a/Legal-Outsourcing.htm>.

2 Kerschberg, Ben. "Legal Services Outsourcing -- Maximizing Comparative Advantage." Forbes. 16 May. 2011. 5 Jan. 2015. <http://onforb.es/1m5yVGm>.

3 Gibson, K. William . "Outsourcing Spotlight: Outsourcing Legal Services Abroad." American Bar Association: Law Practice Magazine. 26 Jan. 2015. <http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v34_is5_pg47.html>

4 *Id.*

5 *Id.*

6 Cotts, Cynthia . "U.S. firms outsource legal services to India." The New York Times. 21 Aug. 2007. 25 Jan. 2015. <http://www.nytimes.com/2007/08/21/business/worldbusiness/21ihtlaw.4.7199252.html?_r=0>.

7 *Id.*

Revisiting Things That Go Bump in the Appellate Practitioner's Night:

Gelboim v Bank of America Corp and questions left unanswered for appeals in consolidated multi-district cases

By Michael Cook

Last Spring, I wrote about the Sixth Circuit's decision in *In re: Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586 (6th Cir. 2013), and the terrifying appellate-procedure questions that it raised. Earlier this year, the United States Supreme Court got in on the act. The decision in *Gelboim v Bank of America Corp*, __ U.S. __ (2015) (Docket No. 13-1174), gives some important clarity on appellate procedure in multi-district cases, yet it simultaneously adds to the jurisdictional nightmares terrorizing appellate practitioners.

First, a CliffsNotes version of the *Refrigerant Compressors* decision and the questions that it raises: The multi-district litigation panel consolidated the appellants' cases with similar cases. The appellants joined with the other plaintiffs to file a consolidated complaint, which merged their claims. The district court granted a motion to dismiss that resolved all of the claims in the appellants' separate complaints, but not all of the claims in the consolidated complaint. *Refrigerant Compressors* held that the district court's order wasn't a "final decision." Basically, the Court told the appellants, "You're too early," which isn't so bad. The terrifying part was that the Court left unanswered questions about what happens when the pretrial phase ends and the cases resume their separate identities:

> Generally, a party must file a notice of appeal within 30 days of the final judgment or order that it is appealing. For those plaintiffs whose claims were disposed of with an order in the consolidated proceedings, …. [f]rom what order do they claim an appeal when their case resumes its separate identity? …. Is the order transferring the case back to its original district the final order? If so, does the appeal go to the circuit for the transferor or transferee district? ….
>
> Also, what happens when a case returns to a circuit that would have treated each case as retaining its separate identity throughout the consolidated proceedings?[1]

Those questions remain unanswered.

Gelboim addressed a different, but related, issue. Like *Refrigerant Compressors*, the multi-district litigation panel consolidated the appellants' antitrust cases with several similar cases. But, unlike *Refrigerant Compressors*, the plaintiffs' didn't file a consolidated complaint that merged their claims—each case remained "independent." The district court granted the defendants' motion to dismiss all of the claims that were in the appellants' complaint. The appellants (of course) appealed. But the Second Circuit dismissed the appeal because the district court's order "did not dispose of all claims in the consolidated action."

The Supreme Court reversed. Because the appellants' complaint "retained its independent status," their "right to appeal ripened when the District Court dismissed their case …." *Gelboim*'s rationale was based on practicalities, not technicalities. The Court explained that the order dismissing the appellants' claims had "the hallmarks of a final decision" because the "petitioners are no longer participants in the consolidated proceedings." The Court reasoned that there was little reason to force the appellants to wait for all of the other claims to be resolved. And, in a passage that should sound familiar, *Gelboim* questioned how delaying an appeal could be reconciled with the 30-day deadline to file a notice of appeal:

> If plaintiffs whose actions have been dismissed with prejudice by a district court must await the termination of pretrial proceedings in all consolidated cases, what event or order would start the 30–day clock? When pretrial consolidation concludes, there may be no occasion for the entry of any judgment. Orders may issue returning cases to their originating courts, but an order of that genre would not qualify as the dispositive ruling Gelboim and Zacher seek to overturn on appeal.

So the Court concluded that, for cases retaining their independent status, the "sensible solution to the appeal-clock

trigger is evident:" They can immediately appeal when the district court grants a dispositive motion that resolves all of their claims.

Like *Refrigerant Compressors*, *Gelboim* is straightforward and logical. But *Gelboim* also left some significant questions unanswered, expressly. Citing *Refrigerant Compressors* as an example, the Court recognized that some consolidated cases don't remain "independent," but it "express[ed] no opinion on whether an order deciding one of multiple cases combined in an all-purposed consolidation qualifies under §1291 as a final decision appealable of right." In other words, the Supreme Court didn't tell us whether *Refrigerant Compressors* got it right or what should happen when cases have been consolidated for "all purposes."

Gelboim adds a layer of confusion. The Supreme Court was aware of *Refrigerant Compressors* and even seemed to approve of it. But did *Gelboim* silently overrule *Refrigerant Compressors*? The problems with the 30-day deadline persist for multi-district consolidations like *Refrigerant Compressors*. That is, even if the parties merge their claims in a consolidated complaint, the cases will still resume their separate identities when the pretrial phase ends and they return to their original courts. And that's where *Refrigerant Compressors*'s holding runs headfirst into *Gelboim*'s rationale. The problems with the 30-day deadline were the primary basis for *Gelboim*'s conclusion that the appellants had an immediate appeal of right. Why would cases that can eventually resume their independence be treated any differently?

It's difficult to see how the two decisions could be reconciled. On the one hand, *Gelboim* says that those thorny 30-day deadline issues should be avoided by allowing an immediate appeal of right for any "limited" consolidations. On the other, *Refrigerant Compressors* says that there is no immediate appeal of right, even if the consolidated cases will later resume their independence.

So the nightmare continues. In *Gelboim* and *Refrigerant Compressors*, we have two logical, straightforward decisions that seem to address and bring clarity to different appellate-procedure questions. *Gelboim* involved a consolidated action in which the cases remained independent. *Refrigerant Compressors* involved a consolidated action in which the cases merged. Yet they seem to be fighting each other and there is still no answer to when or how the plaintiffs in *Refrigerant Compressors* might appeal. And that, again, is why some appellate practitioner, somewhere, is destined to lose a night (or more) of sleep.

About the Author

Michael Cook *is an associate in the appellate practice group at Collins Einhorn Farrell PC. He focuses his practice on state and federal court appeals and dispositive motion practice in civil litigation matters, including professional liability, contractual indemnity, business torts, and general liability cases. Before joining Collins Einhorn, Mike was a law clerk for Michigan Supreme Court Chief Justice Robert P. Young, Jr.*

Endnotes

1 Michael J. Cook, *Things That Go Bump in the Appellate Practitioner's Night:* In re: Refrigerant Compressors Antitrust Litigation *and final order issues in consolidated multi-district cases*, Michigan Appellate Practice Journal, Vol. 18, No. 2, p. 10 (Spring 2014).

Appellate Practice Section Mission Statement

The Appellate Practice Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

Selected Decisions of Interest to the Appellate Practitioner

By Barbara H. Goldman

Published Opinions

Arbitration - prejudgment relief on appeal

Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc,
304 Mich App 46; 850 NW2d 498 (2014)

Panel: Saad (author), Sawyer, Jansen (dissenting).
Trial court: Oakland Circuit (Colleen O'Brien).
Appellate counsel: Barry Jensen (plaintiff-appellant); David M. Zack (defendant-appellee)

The parties agreed to binding arbitration through AAA. The arbitration agreement specified the qualifications of the arbitrators, including very detailed specifications for selecting one of the members. The parties could not agree on that member, so the selection went to AAA. The member picked by AAA did not satisfy any of the selection criteria. The plaintiff filed suit, seeking declaratory relief; an injunction; and a summary ruling that the named attorney was inadequate and any arbitration award by the panel would be void. The trial court found that the attorney satisfied the selection criteria, denied the plaintiff's motion for summary disposition and dismissed the case. The plaintiff appealed.

The majority held that "a party may petition a court for relief before an arbitral award has been made if (1) the arbitration agreement explicitly specifies detailed qualifications the arbitrator must possess, and (2) the third-party arbitration administrator fails to appoint an arbitrator that meets these specified qualifications." 304 Mich App 57-58. The panel noted that the chances of vacating an award later were slim, so effectively "this is only opportunity the objecting party has to demand an arbitration panel that conforms to the arbitration agreement." 304 Mich App 59. Judge Jansen dissented. Absent fraud, "plaintiff was required to wait until after issuance of the arbitral award and raise [the arbitrator's qualifications] in a proceeding to vacate." 304 Mich App 63.

Reversed and remanded. No application for leave to appeal filed.

Administrative agency - authority

Fellows v Michigan Comm'n for the Blind
305 Mich App 289; 854 NW2d 482 (2014)

Panel: Fitzgerald, Saad (author), Whitbeck
Trial court: Ingham Circuit Court (Paula J. Manderfield)
Appellate counsel: Mark E. Kamer (petitioner-appellee), Thomas D. Warren (respondent-appellant)

The petitioner, who was blind, ran a small concession at a state office building. MCL 393.359 mandates that a concession "in a building or on property owned or occupied" by the state "shall be operated by a blind person...." The petitioner complained about competition from sighted vendors. After a series of administrative steps, the Michigan Commission for the Blind (since renamed and reconstituted under an executive order), refused to award him money damages. The circuit court reversed the Commission. It appealed. The Court of Appeals held that MCL 393.358 did not give the Commission for the Blind power to award damages, but did note that "other remedies besides monetary damages are available to petitioners that seek redress under the Act: declaratory judgment and injunctive relief." 305 Mich App 300.

Reversed. Leave to appeal denied, 497 Mich 890; 854 NW2d 742 (2014).

Collateral attack - juvenile court jurisdiction

In re Kanjia,
(Docket No. 320055, rel'd 12/30/14)
2014 WL 7404542

Panel: Borrello, Servitto, Shapiro (author).
Trial court: Kent Circuit Court - Juvenile Division (Hillary G. Patrick).
Appellate counsel: Jennifer L. Gordon (petitioner-appellee); John P. Pyrski (respondent-appellant)

Parental rights cases proceed in two phases. In the first, the court determines whether it has jurisdiction over the child because a parent is "unfit." If the court finds jurisdiction, it obtains authority over the parent. The second ("dispositional") phase may lead to termination of the par-

ent's rights, if the parent does not comply with the court's orders. Until the Supreme Court's decision in *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014), if the court found one parent "unfit," it would also assume jurisdiction over the other parent, without an independent adjudication of the other parent's "fitness." *Sanders* held that the "one-parent rule" violated the other parent's rights to due process. In a number of unpublished cases, the Court of Appeals had not allowed collateral attacks on the jurisdictional decision in appeals after the dispositional phase.

In *Kanjia*, the mother of the respondent's son pled no contest at a hearing in the jurisdictional phase. The respondent was at the hearing, but the DHS "did not pursue any allegations against" him and he did not enter a plea. The court took jurisdiction over the child and later terminated the respondent's parental rights. *Sanders* was decided while his appeal was pending. The Court of Appeals held that he could raise *Sanders* in a collateral attack on the jurisdictional decision. The appeal was a "direct[] challeng[e to] the trial court's decision to terminate the respondent's parental rights without first having afforded [him] sufficient due process . . ." Noting that the respondent might not have had standing to challenge the jurisdictional order and also did not have an attorney, the court concluded that "it would have been exceedingly difficult, if not effectively impossible, for [him] to have challenged the trial court's exercise of jurisdiction in a direct appeal from the order of adjudication." The court also held that *Sanders* should be applied retroactively.

Vacated and remanded. Application for leave to appeal due by February 10, 2015.

Statutory interpretation - ejusdem generis

Issue preservation - waiver in lower court

In re Application of Indiana Michigan Power Company,
(Docket Nos. 314829, 314979, rel'd 10/21/14)
2014 WL 5343820

Panel: Fitzgerald, Gleicher, Ronayne Krause (per curiam).

Trial court: Public Service Commission

Appellate counsel: David R. Whitfield (plaintiff-appellee); Donald E. Erickson (Attorney General), Spencer A. Sattler (PSC), Christopher M. Bzdok (Michigan Environmental Council) (appellants)

Indiana Power operates a nuclear power plant with two reactors. The NRC extended their operating licenses for 20 years in 2005 but effectively required that the power company invest heavily in them in as a condition of the renewed licenses. The power company asked for a CON for a group of projects. The cost included a "small" increase in power-generating capacity, as well as a "management reserve" in case of unexpected events. MCL 460.6s(1) allows an electric company to get a CON (which would allow it to increase electric rates) to "make a significant investment in an existing electric generation facility," "purchase an existing . . . facility," or contract to "purchase . . . capacity." The Attorney General, the PSC and Association of Businesses Advocating Tariff Equity (ABATE) argued that the proposed expenditure did not meet the statutory criteria. The PSC approved a CON, for a lower amount. The AG and ABATE appealed.

The appellants argued that the doctrine of ejusdem generis led to the conclusion that a "significant investment" had to be an "investment" that would "increase power supply." The Court of Appeals, however, decided that ejusdem generis did not apply. Although the statute uses three terms in a series, that "does not transform 'mak[ing] a significant investment in an existing electric generation facility' into a general term." In addition, the term "does not follow the . . . [proposed] "specific" [term] . . ."

The Attorney General asked the court to remand to the PSC to "specify the costs it allowed and those it disallowed," as required by MCL 460.6s(6). The Court of Appeals held the issue was not preserved, because the AG had not argued for greater specificity below.

Affirmed in part, reversed in part. Application for leave to appeal pending.

Unpublished Opinions

Law of the case - criminal appeal

People v Poole
Docket No. 315982, issued 9/2/14
2014 WL 4347505

Panel: Murphy, Whitbeck, Talbot

Trial court: Oakland Circuit (Rae Lee Chabot)

Appellate counsel: Joshua J. Miller (plaintiff-appellee), Marla L. Mitchell-Cichon (defendant-appellant)

The defendant was tried in 1989 for the murder of a man whose body was found covered with blood. There was other inculpatory evidence, but at trial, evidence was presented that the blood was the victim's blood type and not the defendant's and that some blood of a third type was also found on the victim. The defendant was convicted of first-degree murder and conviction was affirmed on appeal. In 2005, he filed a motion for new trial and petitioned for DNA testing under MCL 770.16. The circuit court denied the motion and the petition for testing, primarily because DNA testing would not have changed the result of the trial. That ruling was affirmed and the defendant habeas petition was denied. While his petition for certiorari was pending, he filed another petition for DNA testing, arguing that the evidence tested in 1988 had been tested only for blood type, not DNA. That was denied. The Court of Appeals affirmed, holding that

the law of the case doctrine applied. The 2005 ruling was a decision on the merits; the law had not changed; and "there has been no pertinent intervening change in the facts . . ." The panel did not find applying the law of the case would work an injustice "given that the same issue was examined and rejected previously by two appellate bodies, that there was strong circumstantial evidence of defendant's guilt . . . and that the jury had been fully aware that a particular blood sample could not be linked to either defendant or the victim and that defendant's blood could in no way be connected to the crime."

Affirmed. Application for leave to appeal pending.

Right to counsel - termination of parental rights

In re Johnson
Docket No. 320222, issued 8/21/14
2014 WL 4160649

Panel: Gleicher, Servitto, Ronayne Krause

Trial court: Wayne Circuit Court, Family Division (Qiana D. Lillard)

Appellate counsel: Larry W. Lewis (petitioner-appellee), John C. Kaigler (respondent-appellant), James Ridella (guardian ad litem).

DHS petitioned to terminate the respondent's parental rights to an infant at the initial disposition. She admitted the allegations in the petition so the court proceeded immediately to the "best interests" phase. A magistrate did not recommend termination and the circuit court judge accepted the recommendation. A foster care worker developed a parent-agency agreement for the respondent.

The lawyer GAL and DHS appealed the order accepting the magistrate's recommendation. For reasons not explained in the record, the respondent was not notified of the appeal and no counsel was appointed for her; not surprisingly, she did not file a brief on appeal. The Court of Appeals reversed and directed entry of an order terminating her parental rights. In the meantime, however, she had been complying with the parent-agency agreement. When she found out about the Court of Appeals' decision, she requested appointed counsel. Her new attorney appealed from the termination order.

The second Court of Appeals panel held that the right to appointed counsel applied to a best-interests hearing and to "an L–GAL's interlocutory challenge to a referee's best-interest finding . . ." The court declined to apply the law of the case doctrine. "The law of the case doctrine . . . cannot trump the right of a parent to the assistance of appellate counsel."

Vacated and remanded, retaining jurisdiction. Post-appeal, the trial court terminated the respondent's parental rights.

Cases Pending Before the Supreme Court After Grant of Oral Argument on Application

By Linda M. Garbarino

This is an ongoing column that provides a list of cases pending before the Supreme Court by order directing oral argument on application. The descriptions are intended for informational purposes only and cannot and do not replace the need to review the cases.

***In re ARS, Minor*, SC 150142, COA 318638**

Adoption: Whether the respondent father demonstrated adequate "good cause" under section 25 of the Adoption Code, MCL 710.25(2), for the adjournment of the adoption proceedings; whether the respondent adequately demonstrated that he had "provided substantial and regular support or care in accordance with his ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of hearing was served on him," MCL 710.39(2); and whether the trial court gave adequate consideration to the legislative mandate in MCL 710.25(1) that all adoption proceedings "be considered to have the highest priority."

***Estate of Beals v State of Michigan*, SC 149901, COA 310231**

Negligence/Governmental Immunity: Whether the defendant's alleged failure to act in a swimming pool drowning incident at a residential school was *the* regular proximate cause of the decedent's death. MCL 600.1407(2)(c).

***Coalition Protecting Auto No-Fault v Michigan Catastrophic Claims Assoc*, SC 150001, COA 314310**

FOIA: Whether MCL 500.134 violates Const 1963, art 4, § 25, by creating an exemption to the Freedom of Information Act (FOIA – MCL 15.231 *et seq*.) without reenacting and republishing the sections of FOIA that are altered or amended.

***Epps v 4 QuatersRestoration, LLC*, SC 147727, COA 305731**

Contract Law: Whether the contracts and limited power of

attorney at issue are void or merely voidable, and whether the plaintiffs are required to establish actual damages to recover on their breach of contract and fraud/misrepresentation claims.

***Fraser Trebilcock Davis & Dunlap, PC v Boyce Trust 2350*, SC 148931; 148932; 148933, COA 302835; 305149; 307002**

Contract/Civil Procedure: Whether the trial court's jury instructions which did not explain that plaintiff was required to prove the legitimacy of each disputed attorney fee item billed was proper; whether the trial court abused its discretion by excluding the proposed testimony of defendant's associate regarding defendant's dissatisfaction with plaintiff's legal services; whether a law firm that represents itself is entitled to receive an award of attorney fees under MCR 2.403(O), including whether "fees" were actually incurred; whether case-evaluation sanctions are proper for post judgment activities, including time spent in obtaining case-evaluation sanctions; and whether an award of $300 was a reasonable hourly rate for attorney services in view of all the relevant factors.

***Furr v McLeod*, SC 149344, COA 310652**

Medical Malpractice: Whether *Zwiers v Growney*, 286 Mich App 38 (2009), was overruled by the Supreme Court's decision in *Driver v Naini*, 490 Mich 239 (2011).

***Latham v Barton Malow Co*, SC 148928, COA 312141**

Negligence/Construction Law: Whether a significant number of workers were exposed to the high degree of risk identified by the Supreme Court in *Latham v Barton Malow Co*, 480 Mich 105 (2008), in regard to the "danger of working at heights without fall-protection equipment."

***Michigan Assoc of Home Builders v City of Troy*, SC 149150, COA 313688**

Civil Procedure: Whether the trial court lacked jurisdiction because the plaintiffs had not exhausted their administrative remedies under the State Construction Code Act (CCA), MCL 125.1522 and the Headlee Amendment, Const 1963, Art IX, §§ 25 through 34.

***People v Ackley*, SC 149479, COA 318303**

Criminal: Whether the defendant was denied the effective assistance of counsel based on trial counsel's failure to adequately investigate the possibility of obtaining expert testimony in support of the defense.

***People v Jackson*, SC 149798, COA 310177**

Criminal: Whether the challenged testimony of the victim's aunt regarding the defendant's prior sexual relationship was admissible *res gestae* evidence. If admissible, whether the prosecutor was required to provide notice pursuant to MRE 404(b)(2), and whether, if notice was required, any failure in this regard was prejudicial error warranting reversal.

***People v Lyles*, SC 150040, COA 315323**

Criminal: Whether it is more probable than not that the failure to properly instruct the jury regarding evidence of the defendant's good character was outcome determinative.

***People v Mazur*, SC 149290, COA 317447**

Criminal: Whether the defendant is entitled to immunity under § 4 of the Michigan Medical Marijuana Act (MMMA), MCL 333.26421 *et seq*., specifically MCL 333.26424(g) and/or MCL 333.26424(i), where her spouse was a registered qualifying patient and primary care giver under the Act, but his marijuana-related activity inside the family home were not in full compliance with the act.

***People v Smith*, SC 149357, COA 312721**

Criminal: Whether the defendant was deprived of his right to the effective assistance of trial counsel.

***People v Stevens*, SC 149380, COA 309481**

Criminal: Court to address the appropriate standard of review in regard to a trial court's questioning of witnesses and whether such standard was met and/or whether a new trial is required.

***Rodriguez v FedEx Freight East, Inc*, SC 149222, COA 312187**

Civil Procedure/Judgment: Whether the decision in *Daoud v De Leau*, 455 Mich 181 (1997), which addresses whether a party has a remedy for alleged perjury in a prior action, has any relevance to this case.

***Tyra v Organ Procurement Agency of Michigan* SC 148079, COA 298444**

Medical Malpractice: Whether *Zwiers v Growney*, 286 Mich App 38 (2009), was overruled by the Supreme Court's decision in *Driver v Naini*, 490 Mich 239 (2011).

Linda M. Garbarino *is a civil practitioner who heads the appellate group at the law firm of Tanoury, Nauts, McKinney & Garbarino, PLLC.*

Recommended Reading for the Appellate Lawyer

By Mary Massaron

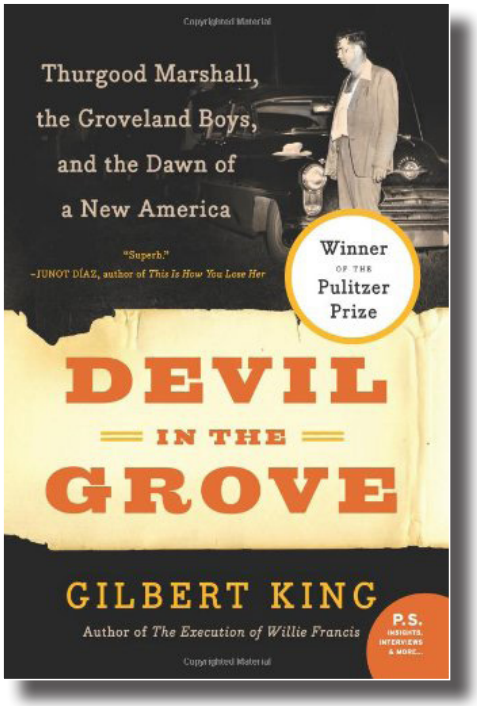
This issue discusses two inspiring biographies, one of Justice Thurgood Marshall and the other of Judge Damon J. Keith. Both offer fascinating and less well-known stories about the history of the civil rights movement in this country and the fight for equal rights at a time when "separate but equal" still ruled, and the struggle to change the justice system was often dangerous and always difficult.

Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America

Gilbert King (HarperCollins 2012)

This nonfiction account of Thurgood Marshall and the NAACP's involvement in a tragic and outrageous story of justice denied in the days of the Jim Crow South cannot fail to simultaneously horrify and inspire any lawyer who believes in the possibility of justice under law. During the late 1940s and 1950s, Thurgood Marshall repeatedly defended those charged in criminal cases brought against black men including those charged in the Columbia Race Riots trials in Tennessee and the Groveland Boys, who were falsely charged of rape by a white woman and pursued through repeated trials by a corrupt and violent sheriff who ruled Lake County in Florida in cahoots with the Ku Klux Klan.

Marshall's skill as a lawyer in pursuing a series of cases intended to eventually challenge *Plessy v. Ferguson* is well-known to most citizens and virtually all lawyers. His courage and skill in defending those being tried on trumped up criminal charges is less well- known. Gilbert had access to a wealth of new information from the NAACP files as well as those of the FBI. And he uses them to tell the story of the Groveland Boys, the NAACP involvement in efforts to defend them, and the repeated risks Marshall and others undertook in trying to safeguard and defend four young men who were beaten and tortured until they confessed to crimes they did not commit.



Images from Amazon.com

The events Gilbert describes took place only a few decades ago, and yet, the book is filled with stories about the casual discussion of violence against those incarcerated on trumped up charges, the physical violence used to extract "confessions", and the efforts to physically harm Thurgood Marshall and others who challenged the corrupt system of justice. According to Gilbert, "Marshall fought countless battles for human rights in stifling antebellum courthouses where white supremacy ruled." Gilbert also describes the horrors of that system including horrifying photographs of "shirtless black victims, their bodies bloodied, eyes bulging in their sockets." Marshall was horrified by these photographs but the worst he ever saw showed a man strung up by his neck on a Florida pine tree, which Marshall thought particularly horrible and haunting because of "the virtually angelic faces of the while children, all of them dressed in their Sunday clothes, as they posed, grinning and smiling, in a semicircle around Rubin Stacy's dangling corpse." Marshall's fear was that he would one day face the same fate. And his fear was not unreasonable, given the instances in which he barely escaped what was likely intended to end up with his own death at the hands of those fighting to retain the corrupt system of justice that existed.

Gilbert describes the economic backdrop against which the Jim Crow South existed, the cultural atmosphere, and the complete absence of anything we would today consider consistent with the rule of law. Marshall took on the representation of the Groveland Boys at a time when many, including within the NAACP, thought it was a mistake to wade into this criminal fight rather than focus on the burgeoning civil rights movement. But Marshall thought the NAACP should take on these cases if there was injustice because of race, the criminal defendant was innocent, and there was a possibility of establishing a precedent that would benefit due process or equal protection.

Marshall's legal strategies in this arena were thoughtful and farsighted. The unbelievable brutality and boldness of

white Jim Crow sheriff and others to beat and later try to kill the criminal defendants all the while inventing evidence and tampering with it, make for a tale that is almost beyond belief – except that it happened in times not that far removed from our own. Gilbert deservedly won the Pulitzer Prize for this book. It reads like a combination thriller, mystery, and legal biography. It is one of the best books I have read this year and I highly recommend that you get it, read it, and think about what it means to be a lawyer, then and now.

Crusader for Justice: Federal Judge Damon J. Keith

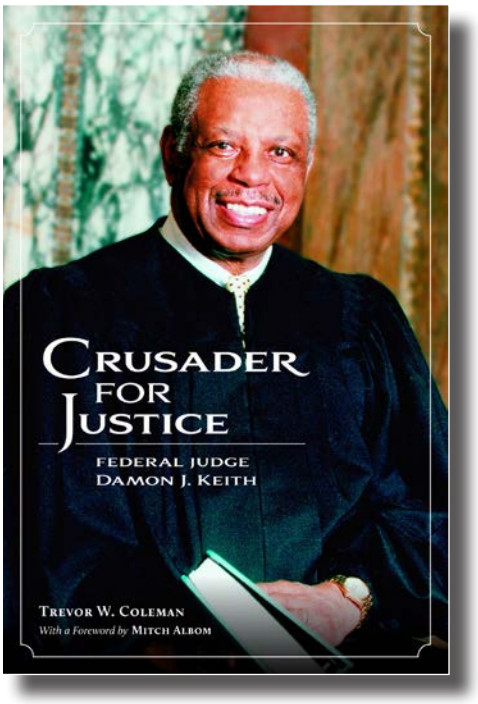
Pater J. Hammer and Trevor W. Coleman (Wayne State University Press 2014)

Appellate lawyers who have practiced in the Sixth Circuit know Judge Keith as a thoughtful jurist, and one who is always engaged, listening carefully to those who appear before him. But this biography offers a much more complete picture of Judge Keith and the forces and experiences that shaped him as well as the landmark judicial opinions that he issued during his long and distinguished career.

The biography starts with an introduction by Mitch Albom that includes references to Greek mythology and Judge Keith's Greek namesake, Damon, a loyal friend of Pythias. Albom, clearly a fan, says Keith was loyal to his causes, human rights, civil rights, and justice, and that he fought to achieve them regardless of the difficulties that created for him. The various introductory passages also quote a speech about Judge Keith lauding him as "the greatest American jurist never to have sat on the Supreme Court, and certainly the staunchest on behalf of civil rights for all and on government conducted in the open, to be seen by all."

Judge Keith's family, like many from the South, migrated to Michigan "after hearing of Henry Ford's promise of five-dollar-a-day wages for both blacks and whites." His father worked in the auto factories and ran a real-estate and loan business on the side, all to support his six children, a granddaughter, an elderly sister, and a sister-in-law. And because of his father's hard work, and that of Judge Keith, he was able to graduate from college. But just as he did, his father died and World War II began. So Keith, having joined the ROTC while on campus, finished college before reporting for duty. His experiences in the armed forces and returning to a still-segregated country were important in his developing world view. And he decided to go to law school so that he could try to achieve change.

The authors describe Keith's law school career, his time as a young lawyer trying to build a practice, his courtship and marriage to his wife, and his political activities. Keith was a supporter of William T. Patrick, Jr., the first black member of the Detroit City Council, and of Wade McCree,



Kathleen McCree Lewis's father, who was elected to the Wayne County Circuit Court. He also worked for Governor Swainson, Supreme Court Justice Voelker, and President Kennedy. These early efforts led to Judge Keith being considered for an appointment to the federal district court. But this process was intensely political, with a fight between supporters of Keith and others who thought Otis Smith should receive the appointment. The book offers fascinating public and behind-the-scenes details about the appointment decision.

The authors spend time discussing Judge Keith's efforts to achieve calm during the civil disturbances of the late 60s, another little-known and behind-the-scenes account of Detroit's history. They then focus on Judge Keith's judicial career describing the many important civil rights decisions he issued.

Any lover of Detroit and Michigan history, any follower of civil rights law and history, and anyone interested in a finely crafted biography of a man who has been at the center of key legal events of the past century will enjoy reading this book. I highly recommend it.

About the Author

Mary *currently serves as President of DRI - The Voice of the Defense Bar. She is a fellow in the American Academy of Appellate Lawyers, and has served as chair of DRI's Appellate Advocacy Committee, the Appellate Practice Section of the State Bar of Michigan, the ABA Council of Appellate Lawyers (CAL), a division of the Appellate Judges Conference, and the ABA TIPS Appellate Advocacy Committee. She serves as co-chair of the Michigan Appellate Bench Bar Conference Foundation, an organization of Michigan appellate judges and lawyers.*

Upcoming Section Council Meetings

April 17, 2015
2:00 PM
Warner Norcross, Grand Rapids

May 15, 2015
2:00 PM
Perry Hotel, Petosky

June 17, 2015
4:30 PM
Ciao Amici, Brighton

Nominations Open for Major State Bar Awards

Nominations are now open for major State Bar of Michigan awards that will be presented at the October 2015 Annual Meeting in Novi.

The Roberts P. Hudson Award goes to a person whose career has exemplified the highest ideals of the profession. This award is presented periodically to commend one or more lawyers for his or her unselfish rendering of outstanding and unique service to and on behalf of the State Bar, given generously, ungrudgingly, and in a spirit of self-sacrifice. It is awarded to that member of the State Bar of Michigan who best exemplifies that which brings honor, esteem, and respect to the legal profession. The Hudson Award is the highest award conferred by the Bar.

The Frank J. Kelley Distinguished Public Service Award recognizes extraordinary governmental service by a Michigan attorney holding elected or appointed office. Created by the Board of Commissioners in 1998, it was first awarded to Frank J. Kelley for his record-setting tenure as Michigan's chief lawyer.

The Champion of Justice Award is given for extraordinary individual accomplishments or for devotion to a cause. No more than five awards are given each year to practicing lawyers and judges who have made a significant contribution to their community, state, and/or the nation.

The Kimberly M. Cahill Bar Leadership Award was established in memory of the 2006-2007 SBM president, who passed away in January 2008. This award will be presented to a recognized local or affinity bar association, program, or leader for excellence in promoting the ideal of professionalism or equal justice for all, or in responding to a compelling legal need within the community during the past year or on an ongoing basis.

The John W. Cummiskey Pro Bono Award, named after a Grand Rapids attorney who was dedicated to making legal services available to all, recognizes a member of the State Bar who excels in commitment to pro bono issues. This award carries with it a cash stipend to be donated to the charity of the recipient's choice.

The John W. Reed Michigan Lawyer Legacy Award was introduced in 2011 and is named for a longtime and beloved University of Michigan Law School professor and Wayne State University dean. This award will be presented periodically to a professor from a Michigan law school whose influence on Michigan lawyers has elevated the quality of legal practice in the state.

All SBM award nominations are due by 5:00 p.m. Friday, April 17, 2015.

The Liberty Bell Award recipient is selected from nominations made by local and special-purpose bar associations. The award is presented to a non-lawyer who has made a significant contribution to the justice system. The deadline for this award is Monday, May 11, 2015.

An awards committee, co-chaired by former SBM President Julie Fershtman and SBM President-Elect Lori Buiteweg, reviews nominations for the Roberts P. Hudson, John W. Reed, Champion of Justice, Frank J. Kelley, Kimberly M. Cahill, and Liberty Bell awards. The SBM Pro Bono Initiative Committee reviews nominations for the Cummiskey Pro Bono award. These recommendations are then voted on by the full Board of Commissioners at its June meeting.

Last year's non-winning nominations will automatically carry over for consideration this year. Nominations should include sufficient details about the accomplishments of the nominee to allow the committees to make a judgement.

Any SBM member can nominate candidates for awards. Apply online or download application forms (*http://www.michbar.org/programs/eventsawards.cfm*). Cummiskey Award nominations can be directed to Robert Mathis at *rmathis@mail.michbar.org*; all other nominations can be submitted to Joyce Nordeen at *jnordeen@mail.michbar.org*.

SBM

State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012