

Bar Briefs

August 2019



**Honorable
Jacob Michael Femminineo, Jr.
41-B District Court Judge**



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CALENDAR OF EVENTS:

- August 2 **Criminal CLE - "Evidence Boot Camp B (Hands on Training)"**
9:00am-5:00pm
Macomb Community College University Center 1
- August 26 **Family Law Lunch and Learn**
12:00pm
Hon. James Maceroni's Courtroom
- September 13 **Criminal CLE - Drug Recognition Experts**
12:30pm-4:30pm
Macomb Community College University Center 1
- September 26 **Most Interesting Installation Celebration**
5:30pm
Three Blind Mice, Mt. Clemens
- October 11 **Criminal CLE - "Crawford v Washington": Interpretation and Application"**
Part 1 - 8:00am-12:00pm
Part 2 - 1:00pm-5:00pm
Macomb Community College University Center 1

Macomb Bar Association

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A Call to Arms

*By Jonathan C. Biernat,
President of the Macomb Bar Association*

To begin, I am honored not only to be a member of the MCBA but also to be elected as its president. It is a great time to be involved in the Bar Association and to practice law in Macomb County. Macomb County is a great place to practice law and is widely recognized as having a very civil bench/bar. In addition, Macomb is currently at the forefront of the Treatment Court movement, of which I am very proud to be involved.

In my daily practice, I travel throughout the tri-county area and appear in many courts. I talk to many attorneys, and it is not uncommon to hear that they prefer to practice in Macomb and wish only that they had more work in this county. The bench/bar in Macomb is without a doubt the most accessible and the most reasonable. We are very fortunate to have such an amazing group of lawyers and judges working together to serve our community. I have had the pleasure of working with attorneys who are dedicated to our profession, providing mentoring and collegiality to

others without hesitation. I am honored to have the opportunity to do the same. Additionally, over the last few years, we have had a new, young set of judges elected and appointed. This will even further Macomb's reputation as progressive and innovative. We are a unique community of attorneys, judges, court staff, clerks, officers, deputies, and all various staff who really get it! This is a special place to work, and we need to promote these strengths.

We at the MCBA have made great strides to improve the practice of law in Macomb and to strengthen our members' position in their respective

bring free CLEs to all members, to ensure compliance with the new MIDC standards now in place. We will continue our work to ensure compliance with the MIDC and to provide our membership with the best possible access to any and all resources available to assist them in furthering their legal



MACOMB BAR ASSOCIATION

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education.

Furthermore, we, the MCBA, will address the egregious indigent defense fee structure that is currently in place and ensure that all criminal defense attorneys are adequately compensated for their time and work. The court appointed attorneys in Macomb work tirelessly for their clients, at times without being appropriately paid. We need to make sure that all monies available through the county and MIDC are accessible to



practices. Over the last year, we have partnered with CDAM to

our criminal defense attorneys. This has been and still is the biggest issue amongst the Indigent Defenders, and it is long overdue for an overhaul. This issue will be a top priority during my tenure.

Turning our attention to the practice of civil/family law, the caseload in Macomb has never been bigger or better. The volume of civil and family cases filed in this County has grown exponentially over the last ten years. My goal is to promote the civil bar here in Macomb and to increase membership with civil practitioners from



inside and outside the county. In terms of our civil division, we have without a doubt the best judges in the state. We need to work to ensure that the civil practitioners become members and that our bar association continues to grow and to serve these practitioners accordingly.

Personally, my practice focuses on bankruptcy and debt settlement, as well as criminal and civil defense. However,

my passion, and the work of which I am most proud, is my work with the Treatment Courts. I have been the defense attorney for both the Veterans' Treatment Court and the Mental Health Treatment Court in the 16th Circuit Court for the last six years. I have encountered countless people throughout my tenure as a treatment court defense attorney and have seen firsthand the amazing impact these programs have, not only on the participants, but also on the community. Treatment courts have provided immeasurable, life altering benefits to the participants, their families, and our larger community. Similarly, these programs have changed the way by which individuals are engaged by the legal community. They have allowed lawyers, judges, probation officers, and police officers to work together to reassess, restructure, and realign the criminal justice system here in Macomb. With the work of many, including the attorneys who recognize the potential of citizens and recommend them to participate in the treatment courts, we have been able to alter what it means to be a part of the system. We are at the forefront of the discussion regarding criminal justice and are helping to create a pathway in this new era of treatment versus incarceration to truly reduce recidivism. By choosing to treat members

of our community and give them assistance in fighting devastating addiction, we have demonstrated a level of understanding within the county that gives hope to those impacted by the opioid crisis and epidemic. The proliferation of these treatment courts speaks volumes to the level of dedication by Macomb County judges, coordinators, probation officers, and attorneys to work together as a single unit committed to the improvement and wellbeing of the overall community. I am very proud to say that I am a part of the Veterans Court and the Mental Health Court.

In conclusion, I will do my utmost to further the goals of our members and to strengthen this Bar Association. I will continue to strive to better the MCBA, our profession, and the way we interact with our community. As lawyers, we are a part of the community, and the impact of our work should be dedicated to improving and strengthening it.

Thank you for this opportunity to serve you as your president of the MCBA. I look forward to a productive, and fun, year.

Thank You!

Respectfully,

Jonathan C. Biernat

Volunteers: The Heartbeat of the Macomb Bar

*by Rick R. Troy, Executive Director,
Macomb Bar Association and Macomb Bar Foundation*

How many bar associations are there in the United States? A simple question, right? Yet, there is no definitive answer.

The American Bar Association recognizes more than 400 bar associations in the United States. The State Bar of Michigan recognizes 124 bar associations operating in Michigan. These are “recognized” organizations, yet it is well known that there are many, many more “unofficial” bar associations all across the nation.

Metropolitan Bars, County Bars, State Bars, Federal Bars, Judicial Bars, Special Purpose Bars, and Affinity Bars all working to provide benefits, services and advocacy for members of the profession of law. These organizations take all shapes and sizes in terms of membership, governance structures and legal entities. How bar associations function and accomplish relevance for their members also varies and seems to reflect the culture that exists within its own community. Macomb County has a unique legal culture that we should all be proud of. It’s a fact that attorneys enjoy practicing law in Macomb County. The collegiality, approachability and civility among members is unmatched. Is it perfect? Of course not! You are after all, working in an adversarial environment. Yet, the Dequindre doors are open for all to be included in the Macomb Bar. *(Join in the Membership Challenge and refer a friend (see Macombbar.org for details).*

The Macomb Bar is not a special purpose or ethnic bar. We are a County bar and as such, we work hard to provide something for all of our members. Economic value, education value, practice management value and advocacy on the local and state level are areas that we work on every day. The unique culture that is Macomb County has shaped how we deliver benefits and services to you. As we see our demographics changing we too are changing how we deliver. Bar Briefs for example, the official publication of the Macomb Bar will be available to be delivered to electronically in 2020. And you have a choice of receiving the publication

in print or electronically. Just let us know when you renew your membership how you want it.

Who is responsible for delivering services and benefits and how do we do it? The answer is found in our volunteer leadership. Events, seminars, statewide advocacy, local lobbying, vision, management and oversight of programs and services and so much more is to be credited to the many volunteers within the organization. You elect a Board of Directors to govern the organization, to set its goals, allocate resources and see to it that goals are attained. Yet there are more volunteers than the elected Board. The chairs and many active members of our law practice committees and sections are where the heart of the organization beats. They help put it all together. Allow me to introduce this year’s committee Chairs.

2019-2020 Committee Chairs

Matthew Casey, Partner, Warner Norcross & Judd
Civil Committee Chair

Dana Freers, Freer, Freers and Freers
Criminal Committee Chair

Farrah Ramdayal, Schock Solaiman Ramdayal
Elder / Probate Law Committee

Michael Gibbs, Gibbs Law Group
Juvenile Law Committee

Angela Medley, Pollizi & Medley and
Dawn Prokopec, Hass Prokopec
Family Law Committee

Golf Committee Chair: Vacant

We also have two Sections, Young Lawyers and Masters that are embedded in the Association’s Bylaws. The Young Lawyers has consistently played an active role in providing excellent networking

opportunities for new and younger attorneys to meet and experience the Macomb legal community. This year's chair is Sherman Abdo. The Master's Section has been in search of leaders to help guide its mission and provide services and events for our members who have been practicing for 30 years. If interested, give me call!

As members, I encourage you to get involved with the Association's Committees and Sections at any level that is comfortable to you. The first step is to sign up! You do that by calling the bar office and telling staff you want to be on a committee or, log in to your member profile and select the committees (and hit the save button) that you wish to be a part of, or send me an email at RTroy@Macombbar.org. This puts you on the receiving end of communication about events, seminars, job announcements, speakers and socials with other attorneys that have expressed an interest in that same area of law. In this way we help you grow your network and provide for you the opportunity to engage in bar leadership. And, if there is a committee that does not exist that you think should, well, contact me or any of our board members and let's make it happen!

Some Numbers:

- Michigan has 42,240 active attorneys.
- Macomb County has 1,857 attorneys registered with the State Bar of Michigan.
- Oakland County has 11,322 registered attorneys practicing law.

If you were wondering about the other end of the population scale, the Keweenaw Peninsula, where long time readers of Bar Briefs may recall I visit annually to recharge the batteries, has 4 attorneys.

I hope you are enjoying summer!

PS I know you are busy, but if you can think of a colleague that has a passion for the profession of law, has recently contributed to the community or has achieved a milestone, nominate them as Member of the Month. Email me at RTroy@MacombBar.org

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Circuit Court Corner

by Macomb County Circuit Court Administration

Please note that the Michigan Indigent Defense Commission (MIDC) requires court-appointed attorneys to conduct an initial client interview “as soon as practicable” after receiving an appointment. In the case of in-custody defendants, Standard 2 from the MIDC provides that “[w]hen a client is in local custody, counsel shall conduct an initial client intake interview within three business days after appointment. When a client is not in custody, counsel shall promptly deliver an introductory communication so that the client may follow-up and schedule a meeting.”



In order to track compliance with this standard, the online billing form for court-appointed attorneys at the 16th Judicial Circuit Court will now require all attorneys to self-report that they have complied with this component of Standard 2. Please keep this requirement in mind when accepting court-appointments, as this is now a requirement under the MIDC rules. For more information, the full text of Standard 2 can be found at: <https://michiganidc.gov/standards/#tab-id-2> The White Paper explaining this Standard is available at: <https://michiganidc.gov/wp-content/uploads/2017/03/White-Paper-2-Initial-Interview.pdf>

As one additional note, there have been some questions recently regarding MIDC-approved rates for extraordinary services. There are currently no “MIDC-approved rates” for extraordinary fees in effect. While the MIDC does have a proposed rate increase as part of Standard 8, Standard 8 has yet to be approved by the Department of Licensing and Regulatory Affairs, or incorporated into a compliance plan. Consequently, MIDC has clarified that no extraordinary fees in excess of Macomb’s existing fee schedule rate of \$25 per hour are presently chargeable to MIDC grant funds.



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Macomb Bar Photo Gallery

Swearing in of the 91st President Jonathan C. Biernat



1. 91st President Jonathan C. Biernat with his family, Sr., daughter Louise and son Milo.
2. Jon C. Biernat being sworn in as Macomb Bar President.
3. Hon. James Biernat, Sr., swearing in his son Jon C. Biernat, Jr. and brother Hon. James Biernat, Jr.
4. 2019-2020 Board of Directors being sworn in: Distinguished YLS Chair Sherman Abdo, WLAM Macomb Chair J..., Director Hon. Annemarie Lepore, Director Dana Fre..., and President-Elect Joseph Golden. Not Shown: Sec..., Gillain, Ryan Zemke, Chase Robl, James L Spagnuolo.

Meet the New Judge Patio Party with Hon. Jacob M. Femminineo, Jr.



wife Leah Scheible, father Hon. James Biernat,

President

C. Biernat as Macomb Bar President with his

Director Susan Chrzanowski, Treasurer Lori Smith, Jenna Bommarito, Director Angela Medley, ers, Immediate Past President Dawn M. Prokopec Secretary Francesco Briguglio, Directors: Donald lo, Jr.



5. Past President Karen Trickey Pappas, Treasurer Lori Smith and Young Lawyers Section Immediate Past Chair Katherine Krysak.

6. Past President Karen Trickey Pappas, Court Administrator Jim McGrail and Past President Peter. W. Peacock

7. New 41-B District Court Judge Hon. Jacob M. Femminineo, Jr. and Hon. Annemarie Lepore



Some Evidence

by Hon. Carl Marlinga,
Macomb County Circuit Court Judge

This month we are going to look at MRE 1008, a rather obscure rule of evidence with little case law explicating and applying it. Nevertheless, it is a good rule to remind us all that judges rule *only* on admissibility; whether or not the evidence makes a difference in the outcome of the case is a different question – and one that is totally within the province of the jury.

The rule reads as follows:

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Under MRE 104, a judge is charged with the responsibility of determining whether evidence (testimony or exhibits) should be heard or seen by the jury. In making this call the judge is not bound by the rules of evidence. The attorney proffering the evidence goes through the process of “laying a foundation.” The judge then makes a decision under MRE 901 that the evidence is probably what it appears to be and that it is relevant under MRE 401. In making these decisions a judge should be comforted to know that he or she is not, *de facto*, deciding the case. Evidence can be both admissible and flaky (i.e.

unpersuasive). The fact that a judge thinks that the testimony or exhibit should not be believed or that it should not be given much weight cannot not be a factor in the judge’s decision to admit or exclude the evidence.

MRE 1008 is a rule which expressly recognizes this separation of power, leaving it to the jury to decide contested issues of fact.

In *Halverson v Garrett*, 2006 WL 3387193, unpublished opinion of the Court of Appeals, issued Nov. 21, 2006, (Docket No. 264463) the Court of Appeals affirmed a jury’s judgment of no cause of action in a medical malpractice case, despite agreeing with the plaintiff that the trial court overstepped its bounds in excluding evidence which the jury should have been allowed to consider under MRE 1008. The plaintiff brought an action against an eye surgeon who performed a radial keratotomy (RK) on his left eye. During the surgery the plaintiff’s cornea was perforated and from that injury further complications developed. A significant evidentiary issue was whether the plaintiff was warned about the risks of the procedure. The plaintiff claimed that the defendant, prior to the surgery, had provided him with a “Dear Patient” letter which falsely stated that the defendant had performed over 8,000 RK surgeries; and that were it not for the misleading information in that letter, he never would have consented to the surgery. Unfortunately for plaintiff, he misplaced the letter. To make up for the unavailability of the original letter, plaintiff sought to introduce a later form letter which, plaintiff testified, was not identical to the letter he received but was similar in that it contained the material misstatements on which he relied. The trial court did not admit the letter into evidence, nor did it permit the plaintiff to testify about the contents of the lost original.

The Court of Appeals held that the trial court

erred in this determination. The appellate court said that the form letter by itself was not admissible because it was not a “duplicate” that would have been admissible under MRE 1003. Nevertheless, the court determined that the plaintiff should have been allowed to have the letter admitted as long as it was accompanied by plaintiff’s testimony that the material representations were the same as the ones contained in the letter that was now missing. The Court of Appeals quoted MRE 1008 which directly addresses the issue; namely: “[W]hen an issue is raised (a) *whether the asserted writing ever existed*, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) *whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine* as in the case of other issues of fact. [Emphasis added.]” The Court of Appeals further opined:

We conclude that the trial court plainly erred in determining, under MRE 104(a), that plaintiff had failed to sufficiently show that an earlier version of the letter ever existed. Under MRE 1008, the question whether the earlier letter existed, and whether the 1995 letter and plaintiff’s testimony accurately reflected the contents of that alleged earlier letter, were all questions for the jury. The trial court committed plain error in making that determination itself.

Since the plaintiff did not raise the MRE 1008 argument in the trial court, the Court of Appeals affirmed the judgment of the lower court, finding that the unreserved error did not affect plaintiff’s substantial rights.

In *People v Baker*, 2007 WL 4179404, unpublished opinion of the Court of Appeals, issued Nov. 27, 2007, (Docket No. 267241) the defendant appealed his conviction of three counts of third degree criminal sexual conduct. The Court of Appeals affirmed. The issue involving MRE 1008 was whether the victim and two other witnesses should have been allowed to testify to the contents of a lost letter allegedly written by the defendant. The Court of Appeals held that as long as the letter was not destroyed in bad faith, MRE 1008 clearly supported the trial court’s decision to let its contents be established by the testimony of the witnesses who saw the letter.

I have no doubt that the initial knee-jerk reaction of most judges would be to not permit the contents of a writing to be put into evidence by the testimony of a witness. It just seems to conjure up notions of possible violations of the “best evidence” and hearsay rules. Failure to appreciate the rule is not limited to the bench; in *Halverson*, the medical malpractice case discussed above, it is apparent that counsel for plaintiff did not even realize that MRE 1008 existed.

I love MRE 1008 for several reasons. It shows that common sense permeates and informs the rules of evidence. In the search for truth, the rules of evidence are supple enough to make up for the common human experience of misplacing or losing important documents. The rule also clearly tells judges that juries are the finders of fact, and that judges should do everything they can to get all the necessary data before the jury, and then get out of the way to let the jury decide. The basic philosophy of the rules of evidence is that they are rules of inclusion, not rules of exclusion. The parties and jurors are entitled to have as much relevant evidence as possible. MRE 1008 makes that point better than any other rule.

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CRAWFORD V WASHINGTON: INTERPRETATION AND APPLICATION

October 11, 2019

8:00-12:00pm - Part 1 • 1:00pm-5:00pm - Part 2

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