Bar Briefs

October 2019

Volume 38 Official Publication of the Macomb Bar Association Number 04

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Bar Briefs

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IN THIS ISSUE:

CALENDAR OF EVENTS:

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
November 13	The Foundation Gala Da Francesco More Details to Come
December 5	Annual Holiday Party 5:01pm More Details to Come

Macomb Bar Association
Macomb County Circuit Court Building
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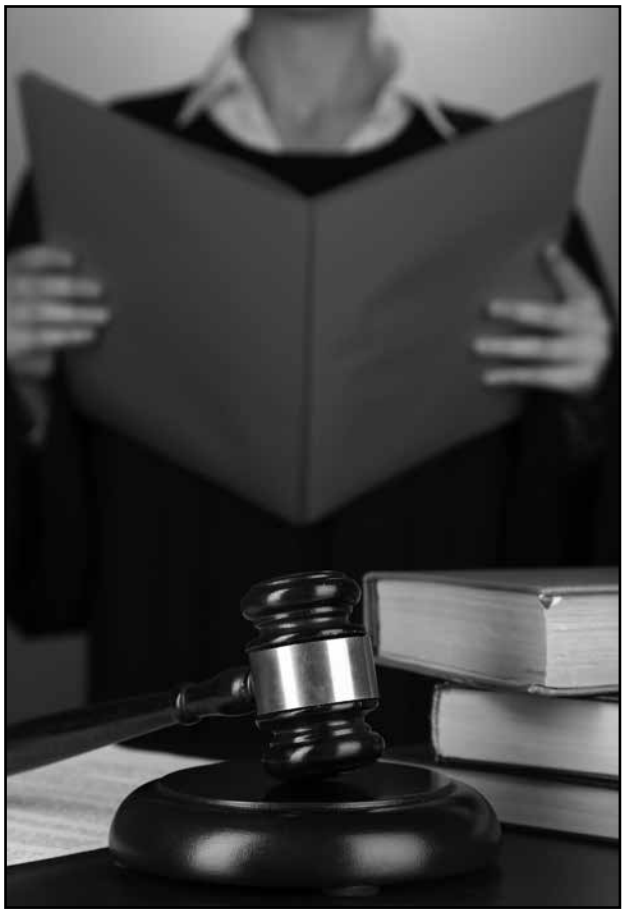
Editor's Note: The opinions expressed in Bar Briefs do not reflect the official position of the MCBA, nor does this publication constitute an endorsement of the views expressed. Bar Briefs (ISSN0886-506X) is published monthly by the Macomb County Bar Association.

Periodical class postage paid at Royal Oak MI 48043. POSTMASTER: Send address correction to MCBA Bar Briefs, 40 North Main St., Suite 435, Mt. Clemens, MI 48043-1037.

Incorporating Treatment Courts into Daily Practice

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

When sworn in as attorneys we all took an oath that states in part, "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any cause for lucre or malice." It is difficult to imagine these words being more pertinent than in our current struggles with the opioid crisis and the apparent rise in mental health disorders. As a defense attorney for the 16th Circuit Court Veterans Treatment Court and Mental Health Treatment Court, I believe that Problem-Solving Courts (PSCs), commonly known as treatment courts, attempt to put the cause of the afflicted in perspective and attempt to serve the community to the best of their abilities. As one of the many defense attorneys working in the treatment courts, I believe these courts have become an integral component of a criminal defender's practice. These programs give us, the attorneys, additional tools with which we can assist clients. Instead of routinely appearing in court to seek a lesser charge or sentence to improve a client's immediate situation, we have the power to pursue diversion, treatment, and productivity for our clients that will bring his/her quality of life to a new level. In my opinion, the opportunity afforded our clients through Drug Courts and other PSCs are immeasurable.



Problem-Solving Courts are powerful because they empower the individual participant by providing a structure that assists in achieving success. Through testing, therapy, supervision, and regular court appearances, participants become connected to a supportive community that monitors, facilitates, and invests in their making positive progress. Participants begin with frequent and regular contacts with the program to improve their chances for longevity within it, a factor that directly correlates with program graduation. These points of contact are used to administer monitoring, incentives, and sanctions that promote pro-social behaviors. With this structure, the participants' court appearances are by and large constructive, rather than punitive. These positive court interactions in turn foster a bond amongst the participants and their families as they see progress. This is not to suggest that these programs are easy for the participants; they are not. Program completion typically requires more than a year of hard work, and arguably about half of those admitted into PSCs fail to make it to program completion. Therefore, I have had the honor to witness a lot of success stories as well as the opportunity to observe tragedy in my more than seven years of involvement in Macomb County's Treatment Courts.

Addiction and mental health disorders are difficult to address and even more difficult to

overcome. Treatment court participants have an uphill battle to fight each day of their enrollment and every day of their lives. Participants are required to drug and alcohol test frequently, engage in regular therapy, and report regularly to a treatment court coordinator and a probation agent. The treatment court community has grown exponentially, extending into community organizations, such as Family Against Narcotics and Hope not Handcuffs. The opportunity to assist those in need and to give support to the larger community should be central to our practice. These courts allow participants an opportunity to be treated for both mental health issues as well as addiction issues, but they also assists the defendants' families and in turn the greater community. The treatment courts have allowed us, attorneys, an opportunity to counsel our clients with real substantial resolutions. They grant us the chance to give a client an opportunity for sobriety treatment, the prospect of employment, and a renewed interest in life. We are impacting not only our client, but also their spouses, children, family, and society as a whole.

Drug Courts are clearly defined and have clear objectives. According to the MI Association of Treatment Court Professionals (MATCP):

> "Drug court is an umbrella term that refers to voluntary judicial programs that offer an alternative to imprisonment for nonviolent criminal offenders with substance use disorders (SUD). To combat offenders cycling in and out of the criminal justice system, problem-solving courts use a specialized therapeutic jurisprudence model designed to treat the SUD underlying the criminal behavior and, therefore, reduce recidivism."

Additionally, Michigan Compiled Law 600.1060(c) defines a drug treatment court as ". . . a court-supervised treatment program for individuals who abuse or are dependent upon any controlled substance or alcohol." Drug courts have evolved since their inception and now include several models to serve specific offender populations. Although they share the same therapeutic jurisprudence model, each drug court model has specific program guidelines that frame its operations. We are fortunate to work in an area that has so vehemently embraced the treatment approach for addicted and mentally ill offenders.

According to the MATCP, based on the statistical data from 2018, the success rate amongst participants in the treatment court across Michigan ranges from 48% to 78%. Additionally, The National Center for State Courts published the *Michigan's Adult Drug Courts Recidivism Analysis* in 2018 and reported, "Twenty-six percent of participants who went on to graduate from the drug court program were employed at entry and 87 percent were employed at program completion." These are great indicators that treatment courts work. When one considers the option of incarceration and the cycle of criminal offense, the recidivism rates amongst graduates of drug courts, 10%, is astonishing low. For the benefit of all, we must utilize them and expand their presence.

As of January 2018, Michigan had 188 Problem-Solving Courts comprised of 127 Drug/Sobriety Courts, 25 Veterans Courts, and 33 Mental Health Treatment Courts. In fact, Michigan is a national leader with 25 Veterans Treatment Courts within the state. The proliferation of Treatment Courts in Macomb County has been remarkable. The county currently has twelve PSCs. The 37th District Court in Warren alone currently serves approximately 155 participants.

Please note, if you are representing an individual in a jurisdiction that does not currently have a Problem-Solving Court, you may still be able to apply to have the matter transferred to a treatment court that will assist your client. I have had clients charged in 37th District Court and sentenced to 41-B District Court's Mental Health Treatment Court. These programs are here to serve the needs of your clients. These courts have a remarkable process that will only grow broader and have a much further reaching impact on our communities.

If you have a client or know of someone who you think would benefit from placement in a Problem-Solving Court program, please use the following information to seek eligibility for that individual. I have compiled a list of PSCs, those who preside over the courts, coordinators for the programs, and the baseline placement criteria for programs for your convenience. Feel free to reach out to me or anyone involved in the process in order to learn more.

16th Circuit Problem Solving Courts

40 N. Main St., Mt. Clemens, MI 48043

Adult Drug Court

Presiding Judge
Hon. Jennifer Faunce
Hon. Joseph Toia

Program Coordinator
Christina Wohlfield
(586) 469-5229

Mental Health Treatment Court

Presiding Judge
Hon. Carl Marlinga

Program Coordinator
Jennifer Prill
(586) 463-2542

Veterans Treatment Court

Presiding Judge
Hon. Michael Servitto

Program Coordinator
Lori Menzie
(586) 469-6164

Macomb County District Court Drug and/or Sobriety Courts

37th District Court
Hon. Matthew Sabaugh

Program Coordinator
Lana Harrison
(586) 574-4974

39A District Court
Hon. Joseph Boedeker
Hon. Kathy Tocco

Program Coordinator
Frank Valenti
(586) 447-4438

39B District Court
Hon. Joseph Boedeker
Hon. Kathy Tocco

Program Coordinator
Frank Valenti
(586) 447-4438

40th District Court
Hon. Mark Fratarcangeli

Program Coordinator:
(586) 445-5280

41B District Court
Hon. Carrie Lynn Fuca

Program Coordinator
Cara Hartman
(586) 569-7833

42-1 District Court and 42-2 District Court
Hon. Denis LeDuc

Program Coordinator
Kelly Morris
(586) 469-4258

Macomb County District Court Mental Health Treatment Courts

41B District Court
Hon. Jacob Femminineo, Jr.

Program Coordinator
Cara Hartman
(586) 569-7833

Macomb County District Court Veterans Treatment Courts

41B District Court
Hon. Carrie Lynn Fuca

Program Coordinator
Cara Hartman
(586) 569-7833

The Foundation

By Rick R. Troy, Executive Director,
Macomb Bar Association and Macomb County Bar Foundation

November 13, 2019 The Foundation Gala at De Francesco's

The Gala is the Foundation's annual event that raises funds for several of its law related and civic education programs such as Law Day, Mock Trial Tournament and the *Legally Speaking* television show. Last year was standing room only as owner and Chef, Jeff Baldwin of Testa Barra took everyone on a culinary adventure. This year the venue has changed but we look forward to a similar turnout and culinary creations.

Programming for the Gala includes an introduction of the Foundation's 2019 Law School Scholarship winners:

> Joseph Zannetti, Trustee Law School Scholarship. May 2020, Wayne State University Law School Juris Doctorate Candidate.
>
> Daria Soloman, Kimberly M. Cahill Memorial Law School Scholarship. May 2020 Western Michigan University Cooley Law School Juris Doctorate Candidate.
>
> Danielle Rogers, Philip F. Greco Memorial Law School Scholarship. May 2020 Michigan State University College of Law Juris Doctorate Candidate

Please join us as we celebrate the Macomb County Bar Foundation. The Gala is a ticketed event. To purchase your tickets contact any Foundation board member or call the bar office at 586-468-2940.

Speaking of *Legally Speaking,* this Emmy Award winning television show continues to educate the public at large about the law and legal issues. About a year ago, the Foundation partnered with Lakeshore Legal Aid to put *Legally Speaking* back into a regular production cycle. Lakeshore CEO Ashley Lowe hosts important and thought-provoking discussions on critical legal issues that not only educate but impact the communities we serve. Through the amazing Executive Production efforts of Lakeshore Legal Aid's Beth Ann Richardson, six shows have been completed and have aired on several municipal cable television networks and on-demand at www.MacombBar.org and www.LakeshoreLegalAid.org. Click on the links to view the shows and, if you have any ideas for a show, please feel free to give us a call!

Recent *Legally Speaking* Titles:

- Women on the Michigan Supreme Court
- Eviction
- Lead Paint 2019
- Domestic Abuse
- Expulsions in Schools
- Elder Abuse

The Macomb Bar Association welcomes its newest board member, Saima Khalil. Saima was appointed to fill a vacancy created from the election of Lori Smith as Treasurer. Saima works for Lakeshore Legal Aid and also serves on the Board of the Macomb County Bar Foundation.

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Circuit Court Corner

By Macomb County Circuit Court Administration

MI-Resolve

The Michigan Supreme Court has rolled out a new online dispute resolution pilot project. MI-Resolve provides online dispute resolution services for small claims, landlord-tenant, neighborhood, and general civil matters. Individuals can either use this tool to negotiate directly, or they may seek assistance from a mediator from the Mediation Center. All mediators are affiliated with The Resolution Center and have completed a 40 training program and an internship. For more information, or to use this system, please visit www.courtinnovations.com/MITRC. Craig Pappas, the Executive Director of the Resolution Center, stated "The Resolution Center was thrilled to be chosen as pilot site for this cutting edge dispute resolution tool. We worked closely with the SCAO and Court Innovations for nearly a year in the development and beta testing of this software and are looking forward to providing efficient dispute resolution options in our service area. This allows attorneys, pro se litigants and anyone involved a dispute access to a forum for resolving a lawsuit without formally appearing in court!"

Chief Judge James M. Biernat, Jr., stated "We are always looking to embrace new and innovative ways to encourage dispute resolution. Mi-Resolve will serve as one more tool for parties to attempt to resolve their issues without incurring all of the costs and time associated with formal court proceedings. I think this will be a great program."

Some Evidence

By Hon. Carl Marlinga,
Macomb County Circuit Court Judge

Experience is a great teacher – except when it is not. A lot of us get comfortable with the rules of evidence from going to trial time and time again. We learn to recognize patterns in the way that judges admit evidence, and we buy into the conventions that judges and other lawyers adopt in the courts where we typically practice.

For the most part, these conventions do no harm. Even if evidence is not properly admitted under one rule, chances are it can be admitted under another. Also, many times these gaffes are harmless. As an example, there used to be a "rule of evidence" known as the Recorder's Court exception to the hearsay rule. Every lawyer and judge in the Recorder's Court for the City of Detroit held to the view that if an out-of-court declarant said something in front of the defendant, the statement would be admissible. Nobody could cite any case law, but, again, case law was not necessary to buttress what everyone "knew" was true. Newbies in the Recorder's Court would make the proper hearsay objection, and find themselves bewildered when the judge would overrule the objection without a moment's hesitation – and sometimes with a scornful look at the new attorney for making such a frivolous objection.

It is hard to know for sure how this silly departure from the real rules of evidence came about, but my guess is that some judge's foggy remembrance of law school was responsible. Perhaps the judge recalled that a statement made by a co-conspirator of a defendant, made during the conspiracy and in furtherance of the conspiracy – and upon independent proof of the conspiracy - was admissible. (This is now codified in MRE 801(d)(2)(E).) Another possibility is that the judge recognized that such a statement was offered only to show that the defendant was on notice or had knowledge of where the declarant was going or what the declarant was planning to do. (Example: "I am going to Harry's house to get the guns.") After a string a cases where things said in the presence of a defendant were admitted for the right reasons, perhaps judges and lawyers jumped to the conclusion that *everything* said in the presence of a defendant was admissible. That mistaken notion of the hearsay rule has now faded away, but other stubborn misunderstandings remain.

There is still, for example, in the mind of some attorneys the faulty notion that a photograph may be admitted only if the person who took the picture testifies as to its authenticity. This absurd notion finds no support in MRE 901. A common (and truly bizarre) misunderstanding of the hearsay rule rears its ugly head at times when an attorney asks the question: "Okay, do not tell me what the person said, but tell me what you learned from that conversation?" I previously devoted a column to this abomination, so I won't launch into a further diatribe again. *See "Some Evidence,"* Bar Briefs, Vol 36, p 12, April, 2018. What one learned from the conversation is, of course, the hearsay that is absolutely prohibited.

One area that seems to continually bedevil attorneys is the statements of physicians to their patients. Sometimes these statements are hearsay; sometimes, they are not. Like the "Recorder's Court Exception to the Hearsay Rule" it is quite possible that experience in this area may have been a bad teacher, leaving attorneys overconfident about the admission of such statements when they may not be admissible, and, conversely, leading attorneys to give up too soon on getting the statements admitted when they are, indeed, perfectly admissible. A possible source for the confusion may be that multiple rules seem to touch on the topic, and,

sometimes, it is hard to sort out which rule or rules actually apply.

The first possible way that the rules may be conflated to create this confusion is that we all know that statements made by a patient for purposes of medical treatment or medical diagnosis are admissible as an exception to the hearsay rule under MRE 803(4). In the fog of a trial we may harken back to this rule and assume that everything in the conversation between the doctor and the patient becomes admissible. Not so! The reliability of admitting into evidence what the patient said in reporting his or her symptoms, circumstances, and history to the physician is premised on the reasonable assumption that when one's health and life are on the line, one does not lie to his or her doctor. *See People v Garland,* 286 Mich App 1, 777 NW2d 732 (2009); and *People v Meeboer,* 439 Mich 310; 484 NW2d 621 (1992). The statements of the physician back to the patient do not have that same motivation and reliability. There is also the real possibility that the patient's recollection of the technical diagnosis given by the physician may easily be mischaracterized. Therefore, MRE 803(4) makes admissible the statements of the patient, but not the statements of the physician. Another rule that relates to the topic is MRE 803(6). Under this rule, hospital records are deemed to be an exception to the hearsay rule. This rule expressly admits a "memorandum, report, record, or data compilation in any form, of… *conditions, opinions, or diagnoses,* made at or near the time…[of the condition, opinion, or diagnosis.]" (Emphasis added.) *See Merrow v Bofferding,* 458 Mich 617; 581 NW2d 696 (1998). Getting the hospital records into evidence is no big deal, provided that an attorney prepares in advance. Under MRE 902(11) the custodian of the records can certify by a written declaration under oath that a record admissible under MRE 803(6) is authentic, and, therefore, admissible. Woe to the attorney, however, who comes to court without this certification or a live witness to lay this foundation.

Given these two exceptions to the hearsay rule, I can easily see that an attorney could have tried a number of cases where the records of the physician or the hospital contained both the statements of the patient seeking treatment and the statements of the physician diagnosing the condition, injury, or disease. The natural takeaway in the attorney's mind is that as a matter of course, both statements will always be admissible. Then, in a case where the doctor's diagnosis is not contained in the medical record, the overconfident attorney may simply ask the patient/client what his or her doctor said. When the proper objection is made that the doctor's statement is hearsay, the attorney may for the first time realize that, without the hospital record, the question is truly calling for a hearsay response.

A further complication is that it is not hearsay for a person/patient to testify from his own personal knowledge about his or her self-evident medical condition. It is not hearsay for a person to say, "I had a cold." We all know the names given to common illnesses, and so we can testify about them because we have personal knowledge under MRE 602. It would be hearsay, however, if the person/patient testified that "I have pneumonia localized in the left lung." Such a precise diagnosis could only come from hearsay information relayed by a physician. So, if the diagnosis of the pneumonia is already in the record as a result of the hospital records containing that diagnosis, there is no harm and no error in letting the person/patient tell the jury that which is already in evidence. Likewise, if the physician takes the stand, he or she can tell the jury what the diagnosis was. Without the records or live testimony, however, a diagnosis is an out of court statement, asserting that a fact is true, not subject to cross-examination, and, therefore hearsay under MRE 801(c).

There is a further nuance which must be addressed. Sometimes, statements made by a physician to his or her patient are not hearsay at all. To be sure, a diagnosis, which is an assertion of fact, is, and always will be hearsay. When a physician gives advice, writes a prescription, or tells a patient what the course of treatment will be, he or she is not asserting a fact. The statement, "Take two aspirins and call me in the morning," is not hearsay. It is not an assertion that something is true. It is not capable of being true or false. Therefore, such a statement is not hearsay under

MRE 801(a). One might argue – although it would be error – that such a statement contains an implied assertion of fact; namely, that one has a fever or pain and, accordingly, is in need of medication. Judges, attorneys, and scholars who would argue that such implied assertions are barred by the hearsay rule have a point, but it is a point that has been carefully considered and clearly rejected. (If one gets this distinction and understands why a doctor's advice or instructions are not hearsay, one is well on the way to intuitively understanding everything one needs to know about hearsay.) In the best article ever written on hearsay, former Wayne County Chief Judge William Giovan carefully and clearly lays out the reason why implied assertions are not hearsay. *See* Giovan, "The Neglected Defense to the Hearsay Objection", Michigan Bar Journal Nov. 1984, p 1064. Judge Giovan, sitting by assignment to the Court of Appeals, was also the author of *People v Jones;* 228 Mich App 191, 579 NW2d 82 (1998) which stands as the controlling case authority explaining that hearsay is limited to statements which are *express* assertions, and rejecting exclusion under the *implied* assertion theory. Under MRE 801(a) an utterance which is not an express oral or written assertion is not hearsay. *People v Stewart,* 397 Mich 1, 242 NW2d 760 (1976); *People v Gwinn,* 111 Mich App 223; 314 NW2d 562 (1981); *People v Davis*, 139 Mich App 811; 363 NW2d 35 (1984); *People v Watts,* 145 Mich App 760; 378 NW2d 787 (1985). *See also* Park, " I Didn't Tell Them About You. Implied Assertions as Hearsay Under the Federal Rules of Evidence", 74 Minn. L.R. 783, 786-787 (1990).

This necessarily means that

even if a patient cannot testify to the fact that his or her doctor diagnosed his or her illness as cancer, the patient can nevertheless testify that he or she was referred to radiation therapy and/or chemotherapy at a cancer treatment center. Yes, the jury will know that the diagnosis was cancer, and yes, the proffering party will impliedly get in the essence of the diagnosis that could not be testified to directly, but such information is not barred by the hearsay rule.

Since advice, treatment recommendations, and even prescriptions are not hearsay, and since diagnoses are admissible under MRE 803(6), it is easy to understand why some seasoned trial attorneys can make the mistake of thinking that a patient should always be able to tell the jury what his or her doctor said. On many, if not most occasions, what the doctor said is not hearsay; or if it is hearsay, it is admissible as an exception to the hearsay rule, or it is cumulative and harmless. But watch out for the times when what the doctor said is truly inadmissible. The rules of evidence do not have an exception for "that's the way we've always done it."

I realize that this article has been long, and, hopefully, somewhat confusing. I say that because I want the reader to feel assured that if he or she feels that there are too many rules and too many moving pieces when it comes to making the call if a physician's statement might be hearsay, he or she is not alone. It is similar to what physicists say when talking about quantum physics: If you say you truly understand it, you are probably missing something.

Endnotes

[1] As a teaching golf professional would say: Practice does not make perfect; it makes permanent.

[2] For my observant Jewish friends, this is like serving shrimp wrapped in bacon. The information (what was learned) is rank hearsay, made all the worse by the fact that the witness now gets to put his or her own subjective spin on what was said, thereby making the hearsay even more unreliable and impervious to cross examination.

A Guidebook to Private Practice

By Chris Metry, Young Lawyer Section Director

As most of you know by now, I am in a private practice working with my father in Mount Clemens. What many of you may not know is that prior to returning to Michigan I worked with the Federal government in Washington DC in Medicare Appeals. A part of me knew I would always return to Michigan, and after three years in the capital I headed back to Michigan to start my own practice.

Starting your own practice can be difficult and very stressful, but I can offer pointers to young lawyers wanting to make the leap like I did. First, you must get your face recognized in court. Work on meeting with every district court Judge in the county and getting on their court appointed list. The process of getting on these lists usually consists of having a resume ready to give each judge so that they can be sure that you are capable of litigating the cases they appoint you to. Not only is it great experience doing a wide variety of cases, it also is a good way to meet potential future clients. Further, court-appointed cases can add up and be a way to supplement your income during certain months. I have had a number of court appointed clients who have referred friends and family members to me after they were very satisfied with my work for them. In that regard, I take every court appointment very seriously. Also the more you work in the district courts, the more familiar you will become with the judges, prosecutors, and court staff, learning the workings of each court so that you are more likely to be successful in your cases. You need to know which courts start early, which courts start late, what issues certain judges take a hardline stance on and what issues some judges evaluate less seriously. By knowing these small nuances of the court you will be much more valuable to your clients.

My next set of advice applies primarily to criminal practices and it is very important. **GO TO THE JAIL.** Your clients are there all day and nothing helps the attorney client relationship more than you going to the jail. Your clients will be happy to see you and many of them will tell their fellow inmates about you, hence referring more clients for you. I usually go to the jail once a week, every week and see an average of five to six people. All of my clients ask me the questions they have and most of them will refer me to their fellow inmates, which may lead to another new client. While visiting the jail may seem intimidating, the jail employees make the process seamless and will tell you exactly where to go.

Another tip I have is to always be flexible and willing to go the extra mile for your client. When you are trying to start a practice your reputation is all you have and word of mouth spreads very fast and far. How you work with people goes a long way and people will remember someone who is fair and treats them with respect. This will help you earn a positive reputation.

As a final tip I would tell you to shadow an older local attorney as they have experienced multiple times what you are going through. Also attend local bar functions, as they can be a great way to meet fellow attorneys and learn from your colleagues.

I hope my advice can help young attorneys take their practice to the next level, and remember beyond everything else the client comes first.

Annual Macomb Bar

Holiday Party

Hosted by Young Lawyers Section

All are Welcome to Attend

Save the Date:
December 5, 2019
5:01pm

If you would be interested in being a sponsor this year, please contact Sherman Abdo at abdo.sherman@gmail.com

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SERVICES

PROBATE SUPPORT SPECIALISTS, LLC - Decedent, Conservatorship & Guardianship packages; Specializing in forensic Account investigation and regular Account preparation (especially those that are overdue!) Medicaid Applications. Liaison to Social Security, IRS, CMH, DHS, VA and County caseworkers and resources. Investigations, inventorying, liquidation of assets and supervised estate clean-outs. Please call Charlene Tope at (586) 415-0136.

CLIENT NEEDING MEDICAL CARE ADVOCACY? Let Alivity Care Advocates partner with you and your client. We provide nursing assessments, develop care plans, and oversee/ coordinate a variety of medical needs such as medication management, medical appointments, and facility placement. Our team has over 50 years of combined hands on experience and has the passion to find effective healthcare solutions for clients and their families. Alivity Care Advocates 248-375-9125 or visit AlivityCare.com

HEALTHCARE SOLUTIONS - Let our licensed and certified aging professionals on staff help you and your clients find solutions for complex healthcare situations. Home Care provides clients and their families personal care assistance, transportation, meal preparation, and supervision. Our Care Management services provides nursing assessments, medical concierge, family crisis assistance, and facility placement support. Relevar Home Care 888-493-3513 or visit www.Relevar.com

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