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December 2019

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Macomb Bar



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Bar Briefs



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Macomb Bar Association

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Year in Review

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

We have come to the end of another very busy and productive year here at the MCBA. I would like to take this opportunity to wish everyone a great holiday season and a beautiful new year. 2020 is shaping up to be a great year and I look forward to seeing all of you!

Looking back on 2019, we accomplished a great deal as an organization, and we still have a lot to do. We could not have done it without the help of countless people, including, but not limited to, our membership, the Circuit, District and Probate bench, CDAM, and all the attorneys who offered countless hours preparing and presenting at the numerous CLE workshops. Also, special thanks to everyone who agreed to be interviewed for the *Bar Briefs* including Judge Annemarie Lepore and Saima Khalil. Additionally, I would like to thank all those who helped in both the Bar Installation and the Foundation Gala. Rick and Dawn knocked it out of the park on both occasions! Also, can I just say Monica Andary is a rock star photographer who did an amazing



job at both events! These two events really came together well and showcased the level of camaraderie and dedication that makes this county the best place to practice law.

This year we partnered with CDAM to bring high quality CLE's to our members and to the greater legal community. Our work with CDAM brought several of the best practitioners in the state to present on a wide array of legal topics throughout the year.

These presenters went above and beyond in bringing us the knowledge we need to better represent our clients. The presentations were held mainly at the Macomb Community College Main Campus in their fine facilities and were some of the best I've had the pleasure of attending. Member feedback has been good, and the sessions were packed.

CLE's were a top priority this year due in part to the mandatory provisions adopted by the MIDC. MIDC went into full effect this year



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and quite frankly has been a game changer. We will continue to change and evolve with the requirements set out by the MIDC and continue to assist our membership in any way we can to ensure compliance and to ensure that we are the best bar in the state. We have done our utmost to ensure that all attorneys have had ample opportunity to satisfy the 12 CLE credit requirement.

Another goal we set was to convert the space outside the bar office into a lawyer's resource center. If you have been to the bar office on the 4th floor you have no doubt noticed that the hallway outside the entrance door is empty and not being fully utilized. Our idea was to create a space for



members to come and work, meet with clients, send emails, or just sit and wonder why they chose this profession. Essentially a safe space for attorneys. However, it could also serve the purpose of satisfying the MIDC requirement that attorneys have a private space to meet with clients. We are currently in discussion with the Court Administration in developing plans for this space and converting it into a real valuable benefit for our members. I look forward to working with Court Administration in making this vision into a reality. We have also begun the process of revamping our website through a new web provider in order to

update our brand and to make our site more user friendly. We have invested in a new site that will allow members to access their profiles online, manage accounts, manage membership, keep track of their CLE credits and expand the scope of their practice through networking and engagement in various law sections.

We have done a lot of good work and set the foundation for

more, but of course there is always a lot to do and lot to consider. We want to know how best to serve you the members and how best to build this bar into the best in the state.

And without going to far afield, or being overly sentimental, I must speak to the level of dedication I see from the members of the bench and bar. I was brought up to believe that the law is a noble profession and that we need to be ever vigilant in our practice. Every day I see my fellow practitioners dedicated to serving the public, the clients, and the greater community. These individuals go above and beyond every day. I see attorneys running from court to court all day long without a breath. Additionally, the attorneys in this community are constantly assisting each other without a question of compensation or quid pro quo. And can I say the young lawyers coming up are very impressive. I see the younger attorneys really bringing their A game all day and every day. Not afraid to go to trial, vigilantly working for their clients! Going the distance without fear. Damn it is inspiring. I am impressed with this community and I am proud to be a part of it.

Jonathan C. Biernat

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Value

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

The Holidays

A time to reflect

A time to give thanks

A time for giving to others

As I look beyond the season's avalanche of advertising and wrapping paper, I find many blessings to be thankful for. There is no doubt that I am most thankful for my family, but as I reflect, I find myself extremely grateful and inspired to work among people who give every day.

The reality is every member of the Macomb Bar gives a gift to every client every day. Justice, no matter how you define it, is the pursuit of peace of mind. Be it a civil suit, family law issue, criminal prosecution or defense, you are there for people at the most important and trying times of their lives, and you give them everything you have to help bring them peace. As a member of the greatest profession (channeling Past President Lori Finazzo), you are the first person to be called by your old high school and college friends, Facebook friends, your homeowners association, local Little League and other community organizations when they need legal help. You say "yes" more often than you say "no" and find a way to fit it into your schedule. Thank you for giving all that you do.

And now I ask that you consider to give more. I ask that you consider giving to your profession by involving yourself more in the Macomb Bar.

Now is the time that the Macomb Bar seeks letters from members interested in being nominated to stand for election to the Board of Directors. The process is really pretty simple. Send a letter or email expressing interest in serving on the board. The Nomination Committee reviews all letters of interest and may nominate up to two times the number of candidates as there are vacancies. If you miss the deadline then you can always petition to be on the ballot by having fifteen member signatures supporting your nomination. See the detailed deadlines on page 9.

The Young Lawyers Section of the Macomb

Bar includes all members under the age of 35 and or practicing law for five years or less. As a Section of the bar, the Young Lawyers have their own set of bylaws with a mission to provide practice support for like attorneys. If you are a member of this election, I ask you to consider standing for election to the YLS Board. The opportunities for the Young Lawyers Section is almost limitless, bring your energy and creativity and help improve your profession.

Leadership is not the only area within the organization where you can give. Currently under development is an Action Group that is focused on increasing the membership experience through unique events. This group needs creative, out of the box thinkers. The time commitment can be minimal or as much as you want. The result will be amazing for the membership.

For those of you that participate in the Lawyer Referral Service, I ask you to consider joining our Lawyer Referral Futures Group to help identify ways that the service can be more productive for you. This is an area where perhaps your key staff person, the one that keeps you on track, can contribute to the success of the service and thus, your success. The Lawyer Referral industry is rich with programs and ideas, but what should we pursue for your benefit? Let's get your office to be a part of this group and improve on the growing success that we have seen over the past year.

This publication, *Bar Briefs*, is always looking for authors. Get published! Submit an article to Dawn at DFraylick@MacombBar.org by the 1st of the month. Typical articles are 1200 to 2000 words and believe it or not, people read Bar Briefs! Be creative! Or, if you are into flyspecking, we could use people to do that too!

The Family Law Committee, Juvenile Law Committee and Criminal Law Committee remain our most active committees. Juvenile and Criminal meet monthly and tackle many practice issues. On several occasions I've been told that the peer to peer learning that occurs at these meetings has provided immeasurable value. The Family Law Committee will soon be announcing the now annual Family Law Camp in partnership with the Oakland and Wayne Family Law

groups. Look for a date in February and a location with a New Orleans theme!

Did you know that the Macomb Bar is very active on FaceBook, Twitter and Instagram? Friend and Follow and keep up with what's going on in your Bar Association. A special thanks to our Veterans of the Armed Forces for sharing your photos with us to be used on our social media platforms last month. We witnessed a huge surge in follows and hits with your super cool photos. We are blessed that you are a part of the Macomb Bar!

Your chosen profession is one of giving throughout the year. The bar association's role is to help you be the best that you can be. In our effort to help you we have established many services, products and opportunities to help you earn money, save money, increase knowledge, transfer knowledge, grow your professional network and have fun.

Macomb County Bar Foundation

Thank you to all of our sponsors and participants in the 2019 Gala. A fantastic time was had by all and the funds raised will help the Foundation meet its mission



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of providing and supporting Law Related ad Civic Education, “for if not lawyers, then who will? We look forward to the High School Mock Trial Tournament in March, Law Day in May, Constitution Day in September, the announcement of more Scholarship recipients in October and many more Legally Speaking television shows with our partners at Lakeshore Legal Aid and Sterling Heights Television.

Congratulations 2019 Law School Scholarship recipients:

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Circuit Court Corner

By Macomb County Circuit Court Administration



CLE for Court-Appointed Attorneys Reminder

Please remember that all attorneys serving as court-appointed counsel for adult criminal defendants are required to complete CLE in accordance with the requirements of the Michigan Indigent Defense Commission (MIDC) and the Department of Licensing and Regulatory Affairs (LARA). Failure to complete the required CLE in 2019 will mean you are ineligible to receive court-appointments in 2020.

Attorneys with two or more years' experience must complete 12 credit hours of CLE, and attorneys with less than two years' experience must complete 28 credit hours of CLE. The MCBA has partnered with CDAM to provide this CLE at no charge to the Bar. If you still haven't completed your CLE, and you intend to continue taking court-appointments, please contact the MCBA immediately at 586-468-2940.

Docket Call Boards at the County Courthouse

New "docket monitors" have been installed by the elevators from the basement up to the sixth floor of the County Courthouse. These monitors display the Court's docket for the day, identifying each case by party name, building where the hearing is scheduled, floor, room, hearing time, case number, and the judge's or referee's initials. "CCB" refers to the Court Building and "OCB" refers to the Old County Building.

Please note that if your matter is being heard before a Friend of the Court referee, you should check in with the Friend of the Court on the second floor of the Old County Building. The monitors will highlight these referee events as a reminder.



2020 - 2021 MACOMB BAR ASSOCIATION BOARD OF DIRECTORS ELECTION NOTICE

Letters of Interest to be nominated for the Macomb Bar Association Board of Directors are due by 5:00 pm on January 15, 2020. The Macomb Bar Association Nominating Committee is actively seeking those regular attorney members who would like to be a member of the Board of Directors. The Board of Directors will meet to nominate the slate for the 2020-2021 Macomb County Bar Association Officers and Directors.

The Nominating Committee is looking for a broad range of candidates that exemplify:

- Service to the Bar
- Commitment to the Bar and related activities
- Consistent desire to be active in the Macomb Bar Association
- Leadership potential

How to Apply

In accordance with the By-Laws of the Macomb Bar Association, the opportunity to lead is available exclusively to regular members of the Macomb Bar Association.

Article VI. Section 1. Nomination of Officers and Directors. The Board of Directors shall appoint a nominating committee of at least five (5) regular members. The nominating committee may nominate twice the number of candidates for the several terms of Directors, two nominees for the term of Treasurer and one for the nominee of Secretary.

For the 2020-2021 elections the Macomb Bar Nominating Committee may nominate:

- One candidate for Secretary
- Two Candidates for Treasurer
- Six Candidates for Director

LETTERS OF INTEREST TO BE CONSIDERED FOR NOMINATION BY THE NOMINATING COMMITTEE ARE DUE TO THE MACOMB BAR OFFICE BY 5:00 P.M. JANUARY 15, 2020.

Article VI. Section 3. Petitions. Any regular member of the Association may be nominated as a candidate for Treasurer, Secretary or Director by a petition signed by at least fifteen (15) regular members in good standing and filed with the Secretary.

VALID PETITIONS ARE DUE TO THE MACOMB BAR OFFICE BY 5:00 P.M., FEBRUARY 19, 2020 NOMINEES AND VALID PETITIONERS SHALL APPEAR ON THE BALLOT FOR THE MAY 2020 ELECTION.

YOUNG LAWYERS SECTION

Interested Members are encouraged to send a letter of interest to the Macomb Bar Association office by January 15, 2020. All letters will be reviewed by the YLS Board. The YLS election results will be announced at the Annual Meeting in Spring 2020, along with the general Macomb Bar Association election results.



Some Evidence

*By Hon. Carl Marlinga,
Macomb County Circuit Court Judge*

This month's column is not about hearsay. It's about MRE 104, 901, 902, and maybe a little bit of MRE 201; but the idea for the column came to me as a result of a presentation I gave at a seminar sponsored by the Criminal Defense Attorneys of Michigan and the Macomb Bar Association regarding the hearsay rule and its exceptions. In the course of the discussion I found myself returning to a favorite theme of mine that I would like to, again, emphasize in this column; namely, that the rules of evidence are set up to favor admission of evidence. For new attorneys, and for attorneys who rarely find themselves involved in litigation, I know that the rules sometimes feel like impediments to getting things into evidence. I find myself driven to counteract that unfounded fear.

I reminded the assembled lawyers that MRE 803 is your friend for a whole number of purposes. I advised the group that the first three exceptions (present sense impressions, excited utterances, and then existing mental, emotional, or physical condition) are what I call the "Holy Trinity" of exceptions to the hearsay rule. If one truly understands those exceptions, along with an understanding of what is *not* hearsay by virtue of the basic hearsay definition of MRE 801(a) and (c), the conclusion is inescapable that the vast majority of utterances that come forth from the mouths of out of court declarants are either not hearsay, or, if hearsay, are admissible under one of the Holy Trinity exceptions. The next four exceptions (statements made for medical treatment, recorded recollection, records of regularly conducted activity, and absence of entry in records of regularly conducted activity) are also useful, but their application is not as common and the case law interpreting these exceptions is more complex.

The remaining exceptions, being (8) through (23), but excluding (24), are no-brainers. These exceptions cover a whole host of records, data, statistical information, and reference materials that contain information which is admissible in spite of the fact that

the sources of information are not under oath and not subject to cross-examination. The basic decision in making these sources admissible in evidence is that it is the common experience of human-kind that the information contained in these sources is almost always accurate and truthful. Yes, we cannot cross-examine them, and they are not under oath, but who cares? The purpose of the rules of evidence is to get reliable information before the fact-finder. Since we, without question, rely on these matters in everyday life, the drafters of the rules made the policy decision to rely on them in like manner in the courtroom. Besides, they are neutral and non-testimonial, that is, they record things that occurred without any possible way of having been influenced by the events now being litigated.

The evidentiary question then is not one of hearsay, but, rather, a question of authenticity. For example, let's say an attorney wants to get in the price of a stock on the New York Stock Exchange on a given day. She offers a print out of a screen shot of the *Wall Street Journal* of June 6, 2017, showing the closing price for the stock as of June 5, 2017. Opposing counsel objects on hearsay grounds. The proponent answers the objection by directing the court to MRE 803(17) arguing that the newspaper fits the description of that exception dealing with "market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in a particular occupation." The court correctly overrules the objection since this is a clear exception under MRE 803(17). Opposing counsel then shifts ground and argues that the proffered exhibit is not admissible because it is a computer copy of a page of the *Wall Street Journal*, not an original, and there is no witness to attest to its authenticity. In response, the proponent of the evidence confidently tells the court that there is no genuine issue on authenticity. She then explains to the judge that she asked her secretary to print out a copy of the archives of the *Journal* for the

day in question and the secretary took this screen shot of the page of the publication and printed it. She asks again that the exhibit be admitted.

The correct decision for the judge is an easy yes; the print out of the screen shot is clearly admissible. (Although I say this is an easy call, *because it is*, I understand that not all attorneys and judges would characterize it as such.)

Let's work our way through the various layers of rules that have a bearing on this issue. The first rule to look at is MRE 902. It lists a number of documents for which extrinsic evidence of authenticity is not a condition precedent to admissibility. According to MRE 902(6) this list includes "Printed materials purporting to be newspapers or periodicals." See *Slocum v Ford Motor Company*, 111 Mich App 293; 279 NW2d 546 (1981). This rule is conclusive, but there is a more general rule which would also apply. MRE 901 says that "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The rule then sets forth a non-exhaustive list of illustrations of factors that should lead a court to conclude that "the matter in question is what its proponent claims." MRE 901(4) provides the greatest leeway in this list; namely, "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Even if MRE 902(6) did not exist, MRE 901(4) in these circumstances would compel a judge to admit the screen shot copy of the *Journal* stock quotes because of its appearance, contents, and distinctive characteristics. See *Haberkorn v Chrysler Corp*, 210 Mich App 354; 533 NW2d 373 (1995) and *People v Martin*, 150 Mich App 630; 389 NW2d 713 (1986). The easiest way to remember MRE 901(4) is that it is the rule codifying the maxim that "if it looks like a duck, waddles like a duck, and quacks like a duck, it probably is a duck."

The opponent still desperately trying to exclude this evidence might try one more tactic. An argument might be made that the proponent of the evidence has a problem in admitting the print out of the screen shot because she told the court that it was her secretary who looked up the web page, and it was the secretary who printed out the screen shot. Surely this is an impediment to admission since the secretary is not there to testify, and even if he or she were there, an attorney cannot put herself on the stand because that puts her credibility at issue; and, the argument goes, if the attorney cannot

testify, neither can her agent.

As creative as this argument might be, it is without merit. Under MRE 902, the document is self-authenticating; i.e., no witness is needed. Under MRE 901, a witness is necessary for authentication only under MRE 901(1) *Testimony of witness with knowledge*. The other subparts of the rule do not require that a witness introduce or testify about the document. Further, even if there were a need for a witness to lay a foundation to satisfy some aspect of MRE 901, we have to remember that the task of ruling on the admissibility of evidence is done by the judge in a process in which the rules of evidence do not apply. See MRE 104(a). See *Howard v Kowalski*, 296 Mich App 664; 823 NW2d 302 (2012). Therefore, if a judge believes that the attorney is accurately conveying information from her secretary, there is no problem in allowing the attorney to explain the genesis of the exhibit.

If the judge were somehow still ambivalent as to whether the stock price screen shot should be admitted, there is always one last fallback position. MRE 201(b) allows a court to take judicial notice of a fact (here the stock price on June 5, 2017) if, in the words of MRE 201(b), the fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See *Thomas v Thomas*, 176 Mich App 90; 439 NW2d 270 (1989).

I have referenced MRE 803 (17) in this article as an example, but the same analysis would obviously apply to any of the other types of documents or data in the MRE 803 (8) through (23) exceptions.

Let's walk through one more hypothetical, and add a criminal law twist. A man who lived alone is found dead in his home on March 28th. He died of stab wounds. There is substantial circumstantial evidence pointing to the defendant who is charged with the crime. The medical examiner places the date of death approximately two weeks prior to the 28th. The defendant has a rock solid alibi establishing that he was out of town from and after March 14th. The prosecutor wishes to admit into evidence newspapers found on the porch of the decedent with the earliest one bearing a date of March 13 and ending with the March 28 edition of the paper. The purpose of the proffer is to be able to argue to the jury that the homicide occurred prior to the time that the defendant left town. The defense objects to the introduction of the newspapers on the grounds that they cannot be authenticated, that the dates are hearsay, that the newspapers could have been delivered any time, and/or that the deceased could

have been alive after March 13 but simply failed to pick up the newspapers off his porch. Additionally the defense argues that it would be a violation of the Sixth Amendment's Confrontation Clause under *Crawford v Washington*, 541 US 36; 124 SCt 1354; 158 LEd2d 177 (2004) to admit the newspapers because they cannot be placed under oath or cross-examined.

The correct answer is that the newspapers are admissible for the purpose of showing the dates. MRE 902(6) says that they are self-authenticating. There is still the hearsay consideration, however. MRE 803(17) is of no help to the prosecutor since this is not a compilation of market quotations, tabulations or lists, nor does any other exception under MRE 803 apply. Further, if the prosecutor were attempting to admit what was reported in one of the articles such content would be inadmissible hearsay under MRE 801(c) and MRE 802. The dates of publication, however, are different since the date is not an assertion as defined by MRE 801(a). If you asked the question "Is March 13 true or false?" it would be an absurd question, since there is nothing inherently true or false about March 13. Therefore, it is not an assertion of fact – which is the essential *sine qua non* of hearsay under MRE 801(a). *Crawford* does not apply

because that case and its progeny apply only if a statement is hearsay and the statement is testimonial. As already explained, the date is not hearsay, and it is certainly not testimonial. The remainder of the defense objections (not knowing if the newspaper were delivered on the dates indicated or not knowing how often the deceased picked up the papers off his porch) are jury arguments, but are not reasons to exclude the evidence.

This newspaper hypothetical was first put to me by famed Evidence Professor Jim Robinson in 1977 when he was working for the committee developing the Michigan Rules of Evidence. His point then, which has stayed with me throughout my career, is that if it feels right and logical that some evidence has a bearing on what you think really happened, the rules of evidence will find a way to let that evidence in.

Every litigator should know these rules by heart; namely, MRE 104, 201, 901, and 902 – or he or she should have a quick reference "cheat sheet" to quickly reference them. If a judge excludes evidence on grounds of relevance, hearsay, privilege, or some other substantive grounds, so be it; but authenticity should never be a problem.

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November 13, 2019





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Past President Hon. Julie Gatti enjoying the Gala.

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Building and Maintaining Referral Relationships

*By Mickey McCollough, Sommers Schwartz, P.C.
Young Lawyers Section Director*

Coming out of law school, it can be a daunting task trying to figure out how you will generate business. Indeed, while law school teaches you the law and its application, you are left to learn the ins and outs of being a lawyer after you have already become one. Referring relationships are something that every successful attorney should know how to groom and maintain. This article addresses some of the fundamental elements in maintaining these relationships, both when you are the referring attorney and also when a case is referred to you.



the client's number, not just the other way around. This is critically important in securing the client. It happens far too often where I receive a referral that the attorney indicates that Jon Doe will be contacting me, and I never hear from the client. I later find out that Jon Doe's sister instructed him to call her brother in law's second cousin who happens to be a lawyer. This result can be avoided by providing the client's number to the attorney to initiate the contact right away.

When You Refer Cases

Whenever possible, before referring a case do some intake yourself! Do not expect the other attorney to be your intake department. It is important that both attorneys respect each other's time. Taking down basic information, such as the date of the injury, possible defendants, medical history and the client's theory of negligence, can really fast track the review for the other attorney. I provide my referring attorneys with a medical malpractice intake sheet that has pointed questions that will help expedite my review. Of course, depending upon how the case came to you, you may not be able to do a full intake; but it is good practice to do so whenever possible.

When referring a case, give the attorney

When You Receive A Referral

At the onset, you must be aware that your treatment of the client is a direct reflection upon the attorney who referred you the case. The easiest way to lose a referring attorney is by you providing inadequate representation to the client. This is important even if you end up turning back the case. Indeed, that individual may need legal assistance sometime in the future, and will be more prone to contact you (or the referring attorney) if he found your previous interactions to be pleasant and informative.

When you get a referral, make contact with the client ASAP! We live in a society where immediate gratification is the norm, and where technology gives prospective client's endless access to seek out representation. You never know

how many attorneys the prospective client has contacted. Earlier this year, I was referred a case and called the client that morning, did intake, and signed the client up. Later that afternoon, another attorney at my Firm came by my office to let me know that he was just referred the same case by a different attorney. If I had not reached out immediately, it would have been another attorney's case, not mine, and my referring attorney would have lost the referral.

It is important to set deadlines and to keep the attorney updated. Almost nothing frustrates an attorney more than for him/her to find out six months or a year later that you have done little to no work on the case, or that you turned the case back months ago and they never received notification of same. When you receive a referral, set a deadline for your review to be completed, and keep the referring attorney updated with these deadlines. For example, when I am referred a birth trauma case, I let the referring attorney know the statute of limitations, what records I will need to obtain and review, and provide a general timeline for which it will take me to determine whether the case has merit. This can be done by email, and does not take more than a minute to do. It is further my practice to send the attorney the retainer agreement, the Notice of Intent, the Complaint and the Case Evaluation Summary. Not only is this a good way to keep the attorney updated on the progress of the case, but it is also a good opportunity to “show off” your legal acumen and writing skills and to show that attorney that, indeed, you are the expert in that field.

Lastly, and maybe most importantly, do not make the referring attorney chase you for their referral fee. This is bad business and an easy way to spoil the relationship. When you settle a case or get a verdict, let the attorney know! There is no better feeling than

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sending a referring attorney a check. Once you do this, I can assure you that that attorney will be sending you more cases, and will be telling other attorneys to do the same.

The tips provided above are just a few examples of how you can maintain a healthy business relationship with other attorneys. These relationships will lead to more referrals, will lead to better representation of the client, and will assure you continued success moving forward.

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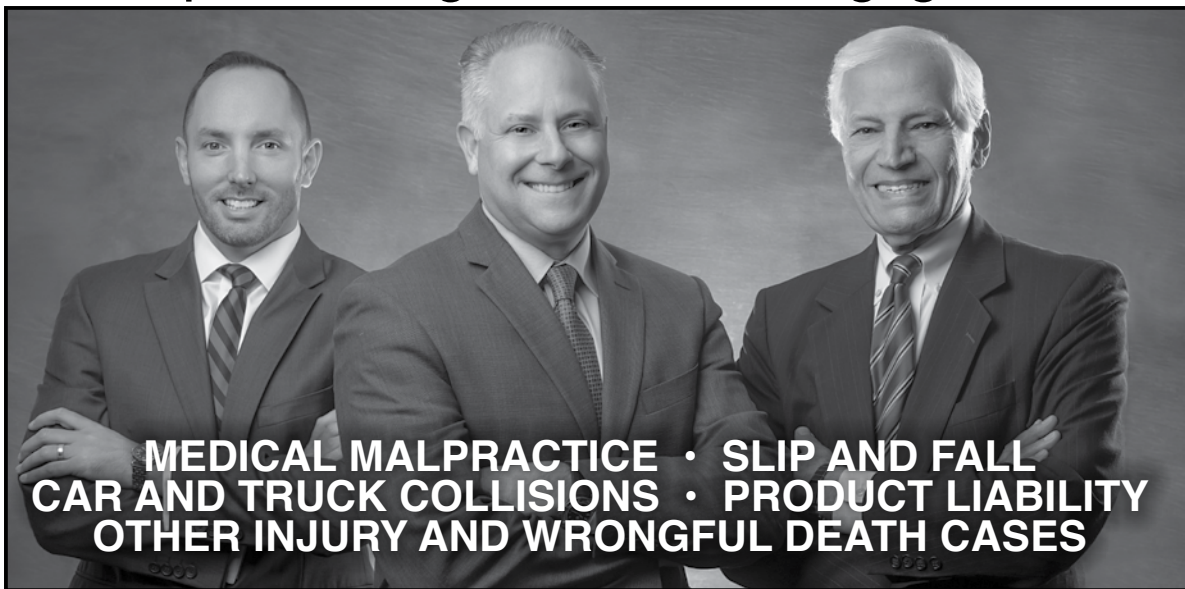
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