

BAR BRIEFS

Official Publication of the Macomb Bar Association

January 2023



FACILITATIONS, CASE EVALUATIONS UNDER NEW RULE 2.403 & ARBITRATIONS

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- 40 years personal injury litigation
- 18 years as a plaintiff attorney
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New Adventures Are Around The Corner

By Lori K. Smith, President of the Macomb Bar Association

The new year also brings about the half-way point as my term as President of this fantastic association. I am truly grateful for all of your support this year. I want to once again thank everyone who made the Thanks for Giving event in November a success. Thanks to the 8 amazing teams who participated in the event, the generosity of our sponsors and all of the members who attended the event -we were able to make a \$1,000 donation to the Friends of Foster Kids as their team, The Real Probate of Macomb County, won the overall event. In addition, I am elated to report that due to this generosity we were also able to send a \$500 donation to Lakeshore Legal Aid as the Access to Justice League team fiercely competed for Lakeshore's benefit and secured 2nd place in the event. Furthermore, a donation to each of

the remaining team's charities was made in the amount of \$125.00. Those charities include: Razom for Ukraine, the Macomb County Bar Foundation, Butterfly Collective, Macomb County Meals on Wheels, and the Clinton Township Goodfellows.

We have accomplished quite a bit to this half-way point but we are far from done. There are still many new adventures around the corner. I am hoping that at least one of the upcoming events will peak your interest and that you will consider joining us.

After a several year hiatus, I am pleased to confirm that the Macomb Bar will be hosting the Bench Bar Conference at the University Center located Macomb Community College campus on Friday February 28th.

We will be heading to downtown Detroit to watch the Red Wings take on the Chicago Black Hawks on March 8th. Our group will be seated in the gondolas high above Little Caesar's arena. I am told that it is an experience that everyone, well everyone without a debilitating fear of heights, should try at least once.

Later that month, we will be heading back to Top Golf for our 4th annual event on March 30th. It is a great night and lots of fun – even for those who are not avid golfers. I can attest to that from my own personal experience.

We are also changing things up a bit this year and have changed the location of the Annual Golf outing. This year's golf outing will be held on June 19th at Gowanie Golf Club in Harrison Township.

There are several other events, including our annual meeting, that are still in planning stages but I will continue to provide updates as things develop. I continue to welcome any questions, comments, suggestions or feedback that you may have so please do not hesitate to contact me at lsmith@orlaw.com.

Wishing you and yours a safe, healthy, and prosperous new year!

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Appointments in Juvenile Court?

By Linda Harrison, Chief Juvenile Referee

Are you looking to expand your practice in 2023? Have you ever thought of accepting appointments for Juvenile work? In Juvenile Court, protective proceedings have attorneys that represent parents and children that are primarily court appointed. All children are represented in delinquency cases.

The Court obtained a grant which allows us to also appoint attorneys to represent on ancillary proceedings that touch and concern the underlying neglect case, including, but not limited to, domestic and probate work. If you are a new attorney, or new to juvenile practice, you can request

to be paired with a mentor to answer questions through the first year on the list. You are required to observe the required hearings in a delinquency or neglect matter prior to the time of receiving appointments.

Still interested? The application to obtain appointments is on the Circuit Court website. Click on Civil/Criminal and then on Apply to Represent Indigent Persons, or, visit MacombBar.org and click on Interest Groups, Law Practice Committees and you will find a link to the application under the Juvenile Committee header.

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And... Here We Go!

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

2023, it's time to Rock and Roll.

Bench Bar Conference, TopGolf Tournament, Red Wings, Mock Trial Tournament, Gowanie Golf Outing, Law Day, Annual Meeting & Awards Banquet, Law Practice Committee connection parties and more are already scheduled and, there are more opportunities in the pipeline.

For example, here is an opportunity for you to nominate someone that you admire for a Macomb Bar Award. It won't be long and we will be gathering for the Annual Meeting and Awards Banquet. At this event, we learn who our new board members will be and who represents the best of the Macomb legal community. Categories of Awards include; Extraordinary Service Award, Distinguished Public Service Award Kimberly M. Cahill Civility Award, Pro Bono Award, and the Special Service Award. A nomination form is located on MacombBar.org. Just click on the About Macomb Bar and then Macomb Bar Awards. Once there you will see past recipients, like last years Civility Award recipient Keith Cermak, Distinguished Public Service Award recipient Janet Welch and Extraordinary Service Award recipient Aaron Hall. The list of past recipients is remarkable. Take a moment. Think of someone that you admire and nominate them.

January also marks sign up time for two very important groups within our community.

The Macomb Bar's Lawyer Referral service works every day to help our members and the public. Samantha and I field calls every day from people with all sorts of problems. When there is a need for legal representation and they want to hire a lawyer, we refer them to the panelists in the Lawyer Referral Service. We help many others by guiding them to appropriate human service agencies. If you are interested in joining the Lawyer Referral Service, let me know and I will help get you started. If you are a Sustaining Member of the bar, you receive a 50% discount too!

The other group represents a growing list of philanthropists among us, the Macomb Bar Foundation Trustees. These wonderful members of the legal community contribute \$150 each year to the Foundation so that it can continue to accomplish its mission of providing and supporting Law Related and Civic Education for people of all ages. With the support of the Trustees the Foundation has been able to provide Law Day, High School Mock Trial Tournament, the Emmy award winning Legally Speaking television show, Reading Book Clubs for all ages, Historical Mock Trials and more. If you wish to become a Foundation Trustee, simply mail in a check made payable to the Foundation or visit MacombBar.org for a link to contribute by credit card. An orange button is right there on the home page, Become A Foundation Trustee. While you are there click on About the Foundation.

And here is a potential money saver for you. Announcing: INCREASE IN PERSONAL PROPERTY TAX EXEMPTION FOR 2023.

For 2023, the small business personal property tax exemption will be increased from \$80,000 to \$180,000, MCL 211.9o as amended by Act 150 of 2021. To claim an exemption for property valued between \$80,000 and \$180,000 the exemption form, 5076, and personal property statement, 632, must be filed annually. If the value is less than \$80,000 you only need to file the exemption form once with the assessor. These forms are available on... you guessed it, MacombBar.org.

Special thanks to member Frank Krycia for this info!

Speaking about money saving, if 2023 has you making a big move, hanging out a shingle, or setting up an office, don't forget to check with the bar office about benefits that can save you time and money. From Edge Communications for all of your telephone and connectivity need to LawPay credit card acceptance, we have options for you.

2023, Rock Out and Roll On!

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Can a Medical Expert Determine Injury in Motor Vehicle Accidents?

By Ernest P. Chiodo, M.D., J.D., M.P.H., M.S., M.B.A., C.I.H.

Have you ever wondered how a plaintiff or defense medical expert can with absolute confidence know that the plaintiff was or was not injured in a motor vehicle accident?

If the motor vehicle accident is of a nature where there are obvious acute injuries such as multiple broken bones and a lacerated liver or spleen, the answer is obvious. The plaintiff was fine when they entered their motor vehicle. After the accident, they spent three weeks in an intensive care unit. Unless there is an unusual circumstance, causation of injuries is clear. The janitor at the hospital could tell you that the cause of the injury was the motor vehicle. The janitor would not be able to testify at a trial because the janitor does not have medical credentials. However, there is likely to be no debate about causation of claimed injuries. Expert opinion as to causation of injury is rarely needed in such a matter.

The common circumstance where medical causation experts are utilized is when the injury involves soft tissues such as the discs of the lumbar or cervical spine or a torn rotator cuff. In this circumstance, the medical expert is usually some type of surgeon. The other common treating physician and testifying expert for plaintiff is a pain management physician. The defense attorney will then retain the same type of surgeon or pain management physician to provide opposing testimony.

In cases involving soft tissue injuries, the plaintiff's treating surgeon or pain management physician has the advantage. The treating surgeon or pain management physician has the luster of being the treating physician or surgeon. In addition, the treating surgeon or pain management physician has the advantage of what appears to be a strong logical basis for their opinion. The logical basis goes like this: My patient was fine before the accident. After the accident they were not fine. Therefore, the reason why they are not fine is the accident. The combination of the luster of being the treating surgeon or physician combined with the apparently strong logic of their opinion makes the treating surgeon or physician with proper credentials difficult to beat.

On the other hand, the defense surgeon or physician is a retained expert. The retained expert does not have the luster of being the treating physician or surgeon of the plaintiff. In addition, the retained expert does not have the benefit of being able to provide as easily to understand basis for their opinion as that provided by the treating physician or surgeon.

However, there is a serious problem with the apparently strong logic of the plaintiff's expert. The problem with the logic of plaintiff's expert is that it is a logical fallacy. In fact, it is such a well known logical fallacy that the ancient Romans knew that it was faulty logic. That is why the logical fallacy has a Latin term. It is the *post hoc ergo propter hoc* fallacy. *Post hoc ergo propter hoc* means after this therefore because of this. In other words, if A comes before Z, then A must be the cause of Z. To be logically correct, other causes for the plaintiff's claimed injury must be excluded. This is rarely done. Any expert opinion based upon a logical fallacy is not a reliable opinion.

In most cases the treating physician/surgeon or the retained medical expert does not have a proper basis for their opinions as to injury causation. This is because they do not know the forces in the accident. If a physician or surgeon does not know the forces generated in an accident, then they cannot know whether or not the forces caused the claimed injuries.

The wise plaintiff or defense attorney will not simply assume that a physician or surgeon has a reliable basis for their opinion as to injury causation in a motor vehicle accident. Proper representation requires an exploration of the basis of the opinion of the opposing medical expert.

Ernest P. Chiodo, M.D., J.D., M.P.H., M.S., M.B.A., C.I.H. is a physician, attorney, biomedical engineer, and toxicologist. Attorneys wishing to explore the issues in this article with Dr. Chiodo can contact Debby Hill at (586) 405-2349.



Government Use of Drones & The Fourth Amendment

By Joe Pernicano, Pernicano Law, PLLC
& Young Lawyers Section Director

I recently had the opportunity to volunteer as a “Justice” at the American Moot Court Associations Eastern Michigan University Tournament where undergraduate students presented appellate arguments on a hypothetical case. One of the issues was whether the warrantless use of an advanced unmanned aerial vehicle (“drone”) was a violation of the 4th Amendment. After hearing some excellent arguments from the undergraduate competitors, I couldn’t help but wonder where Michigan stands on Governmental use of drones and the Fourth Amendment implications.

As far as statutes or legislation goes, Michigan has not yet enacted any statutes placing warrant requirements on governmental drone searches.

That leaves a Michigan Court of Appeals opinion from 2021 that addressed the issue of warrantless drone searches in *Long Lake Township V Todd Maxon*¹. The court examined whether the warrantless aerial drone search of Maxon’s property was a violation of the Fourth Amendment. The Court held the warrantless drone search of Maxon’s property was a violation of the Fourth Amendment.

The Court found that “persons have a reasonable expectation of privacy in their property against drone surveillance, and therefore a governmental entity seeking to conduct drone surveillance must obtain a warrant or satisfy a traditional exception to the warrant requirement.”²

In addressing *Kyllo*, the court reasoned “just because technology develops new and innovative ways in which a person’s privacy can be violated must not dictate whether that person retains a legitimate expectation of privacy...”³

The Court further held that “Drones are qualitatively different from airplanes and helicopters: they are vastly smaller and operate within little more than a football field’s distance from the ground, a drone is therefore necessarily more intrusive into a person’s private space than would be an airplane overflight. Unlike airplanes, which routinely fly overhead for purposes unrelated to intentionally-targeted surveillance, drone overflights are not as commonplace, as inadvertent, or as costly. Drones are intrinsically more targeted in nature than airplanes and much easier to deploy.

Furthermore, given their maneuverability, speed, and stealth, drones are – like thermal imaging devices – capable of drastically exceeding the kind of human limitations that would have been expected by the Framers not just in degree, but in kind.”⁴

The Court concluded that “much like the infrared imaging device discussed in *Kyllo*; low-altitude, unmanned, specifically-targeted drone surveillance of a private individual’s property is qualitatively different from the kinds of human-operated aircraft overflights permitted by *Ciraolo* and *Riley*.”⁵

This decision was appealed to the Michigan Supreme Court and was vacated and remanded for the Appeals Court to address the applicability of the exclusionary to the images obtained by the warrantless drone search.⁶

The Court of Appeals on remand held the exclusionary rule should not be applied on the grounds the images were obtained for a zoning dispute, and not for a criminal investigation, and therefore excluding the images would not serve the intended purpose of the exclusionary rule.⁷ The Court assumed there was a Fourth Amendment violation in their analysis of whether the exclusionary rule should be applied.

This case is currently pending on application to the Michigan Supreme Court on Plaintiff’s petition.

So where does Michigan stand on warrantless drone surveillance and searches? It appears the Fourth Amendment standard in the Initial Michigan Court Appeals opinion is the current standard for which government agencies should operate under. However, the Michigan Supreme Court’s May 20, 2022, Order vacating and remanding the original *Long Lake I* Michigan Court of Appeals decision muddies the waters. The Michigan Supreme Court vacated the entire opinion from *Long Lake I*, leaving us with the most recent *Long Lake II* Opinion. Since the Court’s *Long Lake II* Opinion assumed there was still a Fourth Amendment violation, I would argue there is currently a requirement for government agencies to obtain a warrant prior to conducting a drone search.

It will be interesting to see if the Michigan Supreme Court accepts the Application and eventually publishes an opinion. This is an ever-evolving area of the law that we should keep an eye on.

If you have questions regarding the governmental use of aerial vehicles or constitutional violations of clients rights, you can contact Joe Pernicano at pernicanolaw.com, (313) 618-5914 or joe@pernicanolaw.com.

1 336 Mich App 521, (2021) (Long Lake I).

2 Id. at 541.

3 Id. at 533 citing *Kyllo*, 533 U.S. at 29 (2001).

4 Id. at 539.

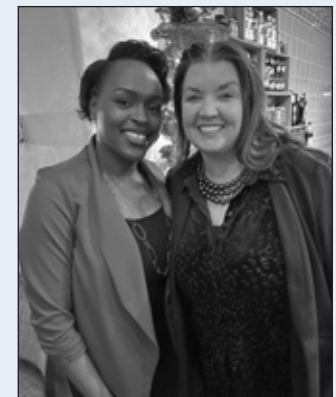
5 Id. at 538, citing *California v. Ciraolo*, 476 U.S. 207 (1986) & *Florida v. Riley*, 488 U.S. 445 (1989).

6 *Long Lake Township v. Todd Maxon*, Order, MSC No. 162946, May 20, 2022.

7 *Long Lake Township v Maxon* ___ Mich ___ 973 NW2d 615 (2022) (Long Lake II).

YLS Holiday Party

December 8th, 2022



Thanks for Giving Event

November 17th, 2022

38th District Court

The 38th District Court is the busiest single judge court in the State. From the humble beginnings of two Justice of the Peace Officers, to two Municipal Judges, the court is now a single judge court handling a large docket with recent increases in felony cases which rose over 25% in 2021 from the previous year.

Justices of the Peace: from 1930 through 1962, the City Charter provided for “two Justices of the Peace to be elected four (4) year terms.” The position of Justice of the Peace were held as follows:

Justices of the Peace *(Two (2) positions)*

William D. Clyne, Sr.	1930-1942
James G. Segesta	1930-1942
Stanley L. Schook	1942-1946
Joseph A. Robbins	1942-1946
Carl Hollinger	1946-1951
John J. McPherson	1946-1962
Harold Heins	1951-1962

Municipal Court Judges *(Two (2) positions)*

In the election of 1962, John J. McPherson and Martin J. Smith ran for and won, the two positions for the elected office of Justice of the Peace. In the very early states of their terms in 1962 by publication according to the Minutes of the City Council on June 5, 1962, the position was changed from Justice of the Peace to Municipal Court. John J. McPherson, who was a non-attorney, was grandfathered in as a Municipal Court Judge for the remainder of his tenure on the Municipal Court. The position of Municipal Court Judges were held as follows:

Martin J. McPherson	1962-1970
Martin J. Smith	1962-1966; 1970-2003
Calvin C. Rock	1966-1975
Joseph N. Impastato	1976-1979
Benedict Segesta	1979-1999
Norene S. Redmond	2000-2003

District Court Judges *(One (1) position)*

In 2004 the Municipal Court was converted into a District Court. The position of District Court Judges were held as follows:

Norene S. Redmond	2004-2008
Carl F. Gerds III	2009-2020
Kathleen G. Galen	2021 –

Judge Kathleen G. Galen

Judge Kathleen Galen was elected to the 38th District Court for the City of Eastpointe in November 2020 to serve a six-year term. She is the Chief Judge and presides over the following types of cases: civil suits involving up to \$25,000; adult criminal misdemeanor offenses; felony preliminary examinations; setting bail in felony and misdemeanor cases; civil infractions; landlord / tenant disputes, small claims, ordinance and charter violations; and land contract forfeitures.



Judge Galen graduated from the University of Detroit with a bachelors of science degree in 1986. She received her law degree in 1989 from the University of Detroit School of Law.

Judge Galen previously worked in private practice specializing in family law, criminal law, and general areas of practice. She served as Assistant City Attorney for Warren.

Judge Galen is a member of the State Bar of Michigan, Macomb County Bar Association, Catholic Lawyers, Irish American Lawyers, and Michigan District Judges Association.

Magistrate Mark Makoski

The Court has one part time magistrate, Hon. Mark Makoski. Magistrate Makoski is a graduate of Michigan



State University and Detroit College of Law. He has over 40 years of private practice experience in criminal and civil litigation. He recently completed six years of service on the State Bar of Michigan Judicial Qualifications Committee, whose function is to

investigate, interview and evaluate candidates for judicial appointments by the Governor for all Courts, from the District Courts to the Michigan Supreme Court. He is also a case evaluator for the Macomb County Circuit Court on the general panel and the commercial panel. Magistrate Makoski is very active with Michigan State University, serving as longtime president and current board member of the local alumni club. The Club's signature causes are assisting former foster care children who are now students at MSU and awarding MSU

scholarships to area students. Magistrate Makoski also serves MSU College of Law as a judge of the oral appellate advocacy and moot court competitions. He also was selected to serve as a judge for the National Trial Competition.

The 38th District Court weekly court schedule:

- City Cases: Monday, Wednesday, Thursday, and Friday
- State Cases: Tuesday and Wednesday
- Civil Cases: Monday and Thursday
- Jury Trials: Mondays
- Court Hours: 8:00 a.m. to 4:00 p.m. (court is closed for lunch 11:30 a.m. – 12:30 p.m. daily)

Practice Tips:

Judge Galen is available to take the bench at 8:00 a.m. Attorneys who have files ready with clients will be seen as soon as they turn their paperwork in to the court officer. Make sure that any plea form is signed by all parties and that there is a current advice of rights completely filled out. For afternoon sessions Judge Galen is available to take the bench at 1:00 p.m.

Jury Trials are held on Mondays and start promptly at 8:15 a.m. Jurors arrive at 8:00 a.m. watch a video. Once the jurors have completed the video they will be brought into the courtroom for jury selection. Witness Lists, Exhibit Lists, and Jury Instructions are to be agreed upon by the final pre-trial to ensure smooth trial process on the date of trial. All motion are to be filed and heard by the final pre-trial.

Magistrate Makoski is available to take the bench by 1:00 p.m. Attorneys are encouraged to visit with clients starting at 12:30 p.m. so that they may be seen as soon as possible starting at 1:00 p.m.

38th District Court Future:

A new court building is currently in the works. The buildings to the east of the current courthouse has been purchased with the intention of building a new court building. Attorneys may park in the front lot of the building if lot space is not available in current court location.



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Protecting a Single Client's Assets

By Kelsey Simasko, Elder Law Attorney at Simasko Law

Dad has dementia and Mom can no longer care for him. She's forced to put him in a nursing home. What can we do to help protect their entire life savings? The last article discussed how Medicaid Planning Lawyers can work with Family Law Attorneys to protect a married couple's assets and income via a family court order of separate maintenance. Dad has recently died leaving mom as a single woman. How can we protect Mom's life savings if she is uninterested in another marriage?

This article continues to explore combining different areas of legal practice to protect a single client's assets from the devastating cost of nursing home care within the rules Medicaid provides. All attorneys can help save their client's entire life savings with a basic understanding of the intersection between Medicaid planning and Social Security Disability planning.

The most common misconception is that all Medicaid plans must be implemented five years before you apply for Medicaid which is called the Medicaid look-back period. The five-year rule only applies to people who are giving away (or divesting to be technical) their money. However, this rule does not apply to gifts made to a disabled child. This means a single individual looking to get on Medicaid is exempt from the 5-year lookback period if they gift their assets to a child receiving Social Security Disability benefits.

There are two types of Social Security and Disability programs: Retirement Social Security Disability Insurance (RSDI) and Social Security Income (SSI). A person may receive RSDI benefits if they are seriously disabled and were previously employed for the statutorily required hours. RSDI benefits are awarded based on a person's prior income and work history so applicants are not required to have assets or income below a certain threshold. The other SSI benefit are for those who have not worked enough to get RSDI. This type of SSI benefit is income and asset based. Both types of disability programs technically work for Mom's Medicaid planning but we can't have Mom

jump out of the frying pan with her Medicaid issues only to jump into the fire with a disabled child's SSI issues. We can't get one qualified only to have the next cut off because they are now over assets.

We look to those children who are on RSDI. They worked for years and now cannot work; this benefit is not based on their assets because the child is merely receiving their retirement social security benefit earlier. These individuals do not have to worry about becoming asset ineligible so they may receive a gift from a parent. They only have to be worried about their financial issues such as divorces or creditors, and their brothers and sisters being mad as hell the money didn't go in their name. So, what can we do to not only protect the assets from Mom's Medicaid issues but also make sure her estate planning desires are carried out?

This is when the Medicaid Planning attorney steps up with the creation of an Asset Preservation Trust. That's the second step of the plan. Step 1: the sick parent gifts 100% of their assets to their child receiving RSDI benefits. Step 2: create an asset preservation trust. These asset preservation trusts can protect the assets from children's creditors, and it can help ensure the other siblings do not find themselves iced out of their inheritance.

These plans are simple to implement but they only work when all the stars align meaning it's a plan that Mom and her children must fully understand and be willing to take part in. Is it worth it? In many situations, absolutely. The Medicaid look-back period goes from 5-years to 0-years given the fact that nursing home costs around \$10,000 per month. The families might not want to implement this type of strategy but they should at least know that it is available and let them decide how to proceed.

If you think you might have any clients that are facing a nursing home and trust me – attorneys are not exempt from needing nursing home care, please give me a call to discuss this further.



Macomb County Bar Association Family Law Committee Social Event Announcement

By Donald Wheaton, Esq., Family Law Committee Chair

As the wedding and party planning season heads into its quiet time the first three months of the new year, Family Law attorneys in contrast often see their busiest months.

Those who ‘just soldiered through the holidays’ find themselves at their wits end and seek us out and want to get things moving. Immediately. “Make-it-your-highest-priority NOW. Nobody else’s case is more important!”

No matter what time of year, as we interview and screen potential clients, we hear stories. Some are garden variety, vanilla, or even mundane. Some are seriously outrageous. Some are truly staggering and almost

unbelievable, the ones that go into the “you just can’t make this stuff up” file. And that’s what we want to highlight: those crazy, crazy chronicles.

So, save the date: Thursday, January 26, 2023, we’ll gather after hours to share these recollections and just to enjoy each other’s company. If you are so inclined to put your account(s) to paper, we will submit the entries to a highly esteemed panel of colleagues to determine the “winner” of the weirdest and wildest whopper.

Some token prize will be awarded, too. Watch your email for an update and further details.

Hope to see you there!



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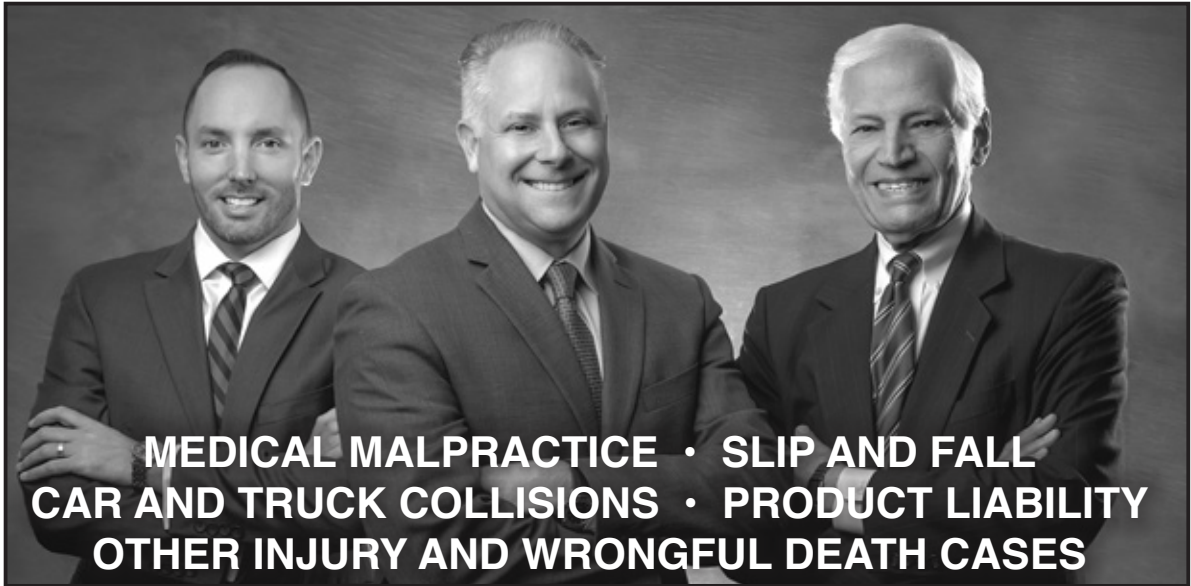
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Macomb County Bar Association

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January 23, 2023 10:00am
by ZOOM

REGISTRATION CODE: MLSC37

HOW TO PREPARE & PRESERVE: IN PERSON

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Macomb Community College
University Center Building
44575 Garfield Rd., Clinton Township

REGISTRATION CODE: MLSC39

ARE YOU IN CUSTODY? INVALID STOPS AND OTHER 4TH AMENDMENT DELIGHTS

January 26, 2023 11:00am
by ZOOM

REGISTRATION CODE: MLSC38

SHOW & TELL - DEMONSTRATIVE AIDS THROUGHOUT TRIAL

February 16, 2023 10:00am
by ZOOM

REGISTRATION CODE: MLSC33

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REGISTRATION CODE: MOL40

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