

# Bar Briefs

May 2020



## Law in the Time of Covid



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# Bar Briefs



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# Law in the Time of Covid

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

How does one put into words the scope of the current pandemic? It doesn't lend itself to words especially in the confines of a publication of this kind. To begin, we would like to extend our deepest condolences and sympathies to all those who have lost loved ones. We are devastated. We are with you and our hearts are broken. We are here for you. As a community we stand with all those who have fallen ill and those who have lost loved ones due to this terrible illness. Countless face loss and trauma during this time. My heart goes out to every single one of you.

As a community we face possibly the most difficult crisis of our time. It is by far the most life changing experience both personal and professional. Not only are we facing a healthcare crisis and we risk possible illness, but we are also facing potential financial hardship. We at the Macomb Bar have been working closely with the courts, with the court administration, with the judges, and with the court staff to ensure the safety of all attorneys and clients. As of today's date, most if not all courts in Macomb are conducting hearings either telephonically or by video. This occurred in remarkable time. The first case of Covid-19 was confirmed in Michigan on March 5, 2020. A little over 30 days ago. It feels like a year. In this small

space of time the courts have effectively transitioned from in-person appearances to a virtual docket. This transition, while difficult at times, has been successful.

The community has come together with amazing resolve and cooperation. All involved

have done remarkable work. Will we ever go back to the old system or will this mark the transition to a new way of practicing law. One where litigants and parties appear virtually? We shall see. Whatever the case, I want to



say that we will do our utmost to assist those who fall ill and those who have lost and will lose love ones as well as those who experience financial hardship.

Both the Macomb Bar Association and the Macomb County Bar Foundation are in a unique position to assist and provide resources to not only our members but to the greater community. This is not a foreign concept to us. We assist others on a daily basis. I am astounded at the amount of the strength and determination in this community. My faith is continually restored when I see the amount of assistance that's being offered to each other. I find solace in the fact that so many people have come forward to offer not only their time, but their services

to help others who've been affected. Those who have been quarantined, who fear that they've been exposed, people have stepped up and been brave in the face of terrible uncertainty. And while many dispute the value of social media, I included, I do find solace in the community groups online that exchange information and discuss issues openly. I am again comforted by this. I do not know what the future holds but I do know that if we can remain united in the face of this unprecedented pandemic then we can survive and thrive. We can remain a strong legal community when this is done. When this pandemic has finally exhausted itself, we will pick up the pieces and we will carry-on. Lastly, I want to offer my services, however humble, to anyone who needs me at any time. I am always available to talk, discuss issues, laugh, cry, cover hearings or just lend an ear. Anytime.  
 One love One Heart

*Jonathan C. Biernat*

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# Business As Usual?



*By Rick R. Troy, Executive Director,  
Macomb Bar Association and  
Macomb County Bar Foundation and  
Dawn Fraylick, Associate Executive and  
Communications Director,  
Macomb Bar Association*

As the spring of 2020 surely brings our Michigan fields and forests back to a robust and colorful life, we will overcome these unprecedented times. Undoubtedly, we will have a new normal in the wake of this worldwide pandemic, and Together, we will adapt.

## Some News You Need To Know

The Annual Meeting scheduled for May 15 has been postponed until further notice. There was such an excitement to host a fun annual meeting with BBQ, baseball and friends. Even though the event cannot be held at this time we must persevere with the business aspect of the meeting. You will continue to receive board of director ballots via email. Please take a moment and vote.

Also, please review the Macomb Bar Awards, (detailed criteria can be found on MacombBar.org), and email me a nomination. It hasn't been decided yet when or how, but the Macomb Bar will present awards to deserving members.

- Extraordinary Service Award**
- Kimberly M. Cahill Civility Award**
- Distinguished Public Service Award**
- Pro Bono Award**
- Special Service Award**

Later this month you will receive membership renewal information. Recognizing the economic impact that the crisis has had on many members, we invite you to Join Now and Pay Later and take advantage of quarterly or half year payments. Hardship memberships are also available by request.

Now, more than ever, our law practice committees are communicating specific practice tips to

members via online meetings and directed emails. If you practice Family, Criminal or Juvenile you should be a member of the committee. There is no cost to be a participant of any number of committees. So, how do you join? Activate your membership profile on Macombbar.org by clicking "Member Center" then "Create an Account." Type your name and email and the system will find your information and send you an email asking to reset your password. Once this is done you can login. Once you log in you are in your Info Hub. In this hub you can choose any committee you wish to be a part of by clicking "My Subscriptions" and clicking the box next to the committee you wish to join. Or, contact me or Dawn Fraylick and we will do it for you. While you are on the website check out the Macomb County Court Directory. This valuable PDF is constantly changing. Need to know who does what, where and how to contact them? Check out the court directory!

I recently read an article that described local bar association Lawyer Referral Services as "the gem hiding in plain sight". The Macomb Bar Lawyer Referral Service is that shining gem that continues to be a strong and consistent service to citizens of Macomb County and neighboring counties in need of legal services. Recent advances in online technology and partnership with LRSconnect, Inc. has once again improved our service. If you are not yet a Lawyer Referral Service Panelist, contact me for more information or learn more on Lawyer Referral button at MacombBar.org.

We may never again see business as usual, yet business will continue. You will continue to fight the good fight for justice and for your client. The Macomb Bar will continue to support members in new and innovative ways. Together now more than ever, WE are More.



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# Circuit Court Corner

*By Macomb County Circuit Court Administration*

In order to address the current health crisis and keep everyone safe, while also continuing to perform the emergency and legally necessary business of the Court, we have embraced a range of new technologies to conduct hearings and other business remotely. This has been key to effectuating compliance with the various directives and guidance from the Governor, the State Supreme Court, and the Federal Government.

Many non-emergency matters have been adjourned at this time. For in-custody criminal defendants with time-sensitive matters (arraignments, pleas, sentencings, etc.), the Court has set up Zoom meetings with the attorneys, and provided them with confidential call-in numbers at the jail so that they can speak with their clients. For civil and domestic matters, we have also set up Zoom meetings to insure that some business can continue. The recordings of these Zoom meetings are being downloaded and saved to the Court's FTR software to ensure that the record is preserved. We have procured remote access for our staff so that employees can continue to work from home and ensure that the business of the Court does not grind to a standstill. Probate is also operating Zoom meetings and allowing for polycom meetings from secure spaces at the Courthouse to handle emergency matters.

If you have a hearing scheduled, you will be contacted by the Judges' secretary with information and step-by-step instructions on how to proceed.

We continue to look at new and innovative ways to conduct business remotely so as to ensure everyone's safety. Thank you to all the Court employees who have worked tirelessly to keep our court system operating in the midst of the pandemic. And to the Bar, we appreciate your patience and understanding during this public health crisis, and we look forward to welcoming everyone back to business as usual once this crisis has resolved.

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# Some Evidence

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

Because of the Covid-19 pandemic, I am taking a month off from our regular discussion of the rules of evidence to talk a little procedure. For those of you who might object to my straying from my appointed topic, too bad. I believe that anybody who has a bully pulpit of any sort should risk the displeasure of his or her listeners or readership to talk about this crisis. Out of a myriad of ideas (some good, some not so good) policy makers might find a way to save a few lives.

The proposals that I wish to put forth are aimed at the one goal of drastically reducing the number of jury trials in the coming months. By the time that this article hits the press (May, 2020), we may be seeing the first signs of the “flattening of the curve.” That will not mean the crisis is over; it will only be some evidence of the efficacy of our sheltering-in-place measures. It will likely be months or years before we are back to the pre-pandemic normal. In the interim, business enterprises and governmental entities of every kind will be charged with the moral task of cutting down human interaction, so that the risk and rate of



infection will continue to fall.

For us in the legal system, this means that there is a moral imperative to delay and, wherever possible, waive jury trials.

Some of my suggestions might require legislation. Some might be put into practice with an executive order from the governor or a directive from the Supreme Court. But there are many things that we can do just simply by making the decision to do them. Here are some suggestions:

**1. Prosecuting attorneys should start plea bargaining again.** I know that every elected prosecutor likes to be seen as tough on crime. Every challenger asserts that under her or his leadership the incumbent’s weak record of plea bargaining will be replaced by the brave policies of

a true crime-fighter. In response, or in anticipation of the attack, every incumbent creates even tighter policies and procedures to ban or severely restrict plea bargains. Anyone seeking a plea bargain must write a formal letter asking for a deviation. Only first time offenders are eligible. Assistant prosecutors are not given discretion to plea bargain without approval from some higher-up in the administration.

The truth, of course, is that we all know this is pure political posturing. It is doubtful that a reduction in the charge ever made a much of a difference in the sentence that an offender would receive. Guidelines for lesser included crimes often overlap with the charged crime. If a judge has a certain sentence in mind, the underlying charge will make little difference. Where the guidelines do not overlap, the difference between the bottom of the guidelines on the more serious charge and the top of the guidelines on the less serious charge is often just a matter of a few months. With the advent of *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015) and its holding that the guidelines are no longer mandatory, a sentencing judge is now in an even better position to fashion a sentence that is reasonable, proportionate, and just – without being strictly bound by the guidelines. In a post *Lockridge* world, a prosecutor’s insistence on banning plea bargain is a self-indulgent political ploy that serves no valid public policy purpose.

This is an opportunity for prosecutors to let the public know that the goal of reducing the spread of the corona virus and saving lives is more important than adhering to a no-plea-bargain policy which produces no statistical advantage as measured by length of incarceration. The Prosecuting Attorneys Association of Michigan could adopt a resolution urging all prosecutors to adopt policies that will protect the public by using their discretion to secure convictions through thoughtful, hard-nosed negotiations in which the offender admits his or her wrongdoing. Such policies would greatly reduce jury trials, protect the public from the spread of the virus, provide restorative justice by giving the victims the opportunity to hear the offender confess in open court, and assist in the rehabilitation of the offender. The resolution could also note that the

discretion to proceed on the principal crime as charged would remain in effect for heinous crimes such as murder or criminal sexual conduct.

**2. Judges should make greater use of *Cobbs* agreements.** Under *People v Cobbs*, 443 Mich 276, 605 NW2d 208 (1993) a judge can make a non-binding prediction at a pretrial telling the defendant what the likely sentence will be in order to assist a defendant in the decision as to whether or not the defendant should enter a guilty plea. The judge is still required to use independent judgment in determining what the sentence should be. If on the date set for sentencing the judge determines that more incarceration is appropriate, the defendant is permitted the option of withdrawing the plea. If the sentence is at or below the predicted sentence, the defendant is not permitted to withdraw the plea.

*Cobbs* is a good case which sets forth a wise procedure. I personally became wary of using it because I felt that it gave an offender too much comfort and control in knowing in advance what the sentence would be. I thought that there was some justice in making a defendant “twist in the wind” thinking about what the judge might do. I was also displeased with the practice of the Macomb Prosecutor’s Office working out detailed *Cobbs* agreements with defense attorneys in the back room, only to hear the prosecutor object to the agreement when it was being placed on the record in public. With the author of that charade gone from office, I look forward to the prosecutor’s office being more collegial with the bench in discussing *Cobbs* agreements.

With a mix of plea bargains and *Cobbs* agreements, there is almost no reason for a charged defendant, conscious of his guilt, to want to go to trial. Of course, no amount of breaks or inducements should cause an innocent person to plead guilty to a crime which he or she did not commit, so trials will inevitably go forward to protect the rights of the innocent. The net reduction in trials, however, will still be significant.

**3. Prosecutors should as a matter of course waive their right to a jury trial, and if they don’t, the legislature should repeal that portion of MCL 763.3 which provides for that option.**

Up until 1988 the right of a jury trial in a criminal case belonged to the defendant alone. In Public Act 89 of the Public Acts of 1988, effective June 1, 1988, the legislature amended MCL 763.3 to say that a jury waiver could only occur with the consent of the prosecutor. It was a different time back then. The amendment was enacted to hold in check certain judges of the Detroit Recorder's Court who were openly hostile to the Wayne County Prosecutor's Office. In the years since the amendment it became standard practice for prosecutors around the state to insist on jury trials – based on the assumption, with no statistical evidence whatsoever, that judges are more likely to acquit. The right to a trial by jury for a person accused of crime is a constitutional bedrock of our Republic, and it is likely that defendants will still prefer jury trials; nevertheless, it is probable that a significant number of cases could be resolved by bench trials if the prosecutors of this state would make a decision, at least during this public health crisis, to forego their right to object to a bench trial. The public would be grateful. This is a chance for prosecutors to take advantage of the old adage that good policy is good politics.

**4. The docket for civil jury trials should be suspended.** The right to a trial by jury in civil litigation is of course a long-cherished right going back centuries. It is enshrined in Article 1, section 14, of the Michigan Constitution of 1963: “The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law.” In order to permanently remove civil cases from jury determination, the legislature would need to propose and the people would have to approve a constitutional amendment. This might be difficult to accomplish and the wisdom of doing so is not that clear. Certainly, there are numerous countries which have no juries in civil trials, and they achieve substantial justice for their citizens. Further, the right to a jury trial under the Seventh Amendment to the United States Constitution is one of the rights of the Bill of Rights that has never been applied to the states by operation of the Fourteenth Amendment. Therefore, Michigan would be free to change its constitution to take away juries in civil cases. In

equitable cases and in family law matters, judges seem to be doing a fine job deciding cases by themselves. There is no reason to think that they could not perform admirably in all civil lawsuits. Still, it could be argued convincingly that the corona virus should not cause us to make such a drastic change in our tradition – at least without further study and provided that the pandemic does not get far worse than already predicted.

As a practical matter, however, for the duration of the corona virus crisis, the Michigan Supreme Court can and should (1) encourage all attorneys in civil litigation to waive the right to a trial by jury, and (2) order all civil trials in which juries shall not have been waived to be put on a separate docket which may not proceed to trial for at least six months or until further order of the court.

There may be an understandable reluctance from the plaintiff's bar in scuttling jury trials. The fear is – again without statistical evidence – that judges would be less likely to find liability and much less likely to award substantial damages. In reality, I believe that fear is unfounded. In my very first day as a circuit judge I held a one day trial in a dog bite case. Liability was assured, so the only question was damages. Both attorneys did a credible job. The jury came back with \$5,000. If the case had been tried before me without a jury my award would have been at least \$25,000. I know of many judges who had similar experiences. Attorneys should bear in mind that if they are hoping for the rare case of a runaway jury, judges (either trial or appellate) have the power of remittitur; so, a big damage award unsupported by evidence can still be reduced.

**5. Judges should order all civil cases into case facilitation.** This, of course, is already commonly done, but it should become standard in every case. Also judges should encourage attorneys to move cases to arbitration or other alternative dispute resolutions.

**6. If jurors need to be assembled before the pandemic has run its course, the county must provide onsite testing for covid-19.** Imagine yourself in a packed jury assembly room waiting all morning to be called to a courtroom; or, imagine having to sit in close proximity to 13 other jurors for two to three weeks, not knowing if a fellow juror, or

you, are spreading the virus. By the time that we resume jury trials, there should be an adequate supply of testing machines to test jurors and prospective jurors as they report for duty. Since the risk of infection will persist until a vaccine is developed (best estimates 12 to 18 months from now) the county health department will have to set up shop in the jury room to ease the minds of citizens called to jury duty, and, importantly to safeguard their lives. Otherwise, jury trials will have to be put off until a vaccine is developed.

If we would adopt some or all of these suggestions, we will make a difference.

Let me close with this story. When I was in probate, I tried a contested guardianship case involving a 92 year old gentleman who did not like ground hogs. He liked to shoot at them sometimes firing from within his house and sometimes firing from a position in his back yard. Fortunately, the bullets either hit their target or were buried in the ground. The projectiles could have travelled into a nearby subdivision or they could have struck

persons or vehicles on 24 Mile Road. He could have killed somebody. If he had killed somebody he would have been rightly charged with either murder, manslaughter, or reckless discharge of a firearm causing death. Perhaps his mental state would have resulted in a not guilty by reason of insanity, but there is no doubt that, except for that possibility, his actions were criminal. Of course, he did not think of his actions as criminal because in his mind he was doing a good and necessary thing.

If we, thinking that we are doing a good and necessary thing, call jurors back too soon (June, July, or maybe August) we will be exposing about 180 people per week to the covid-19 virus. Maybe nobody will get sick. On the other hand, maybe 20 to 30 will get sick and one or two will die. It would be hard for us to plead insanity. We do know right from wrong; and we have the ability to conform our actions to that which we know is right.

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# COVID-19: Motions that Could Get Your Appropriate Client Released From the Macomb County Jail

*By Thomas Tomko,  
Macomb County Public Defender Administrator*

By now, most of us have become accustomed to Governor Executive Orders, Social Distancing, “Stay Home, Stay Safe,” and a host of other things that were not on our radar just six months ago. And over time and through the last months, we were actively representing our clients at PCC’s, Preliminary Exams, Probation Violations, Circuit Court Pre-Trials, Pleas and Sentencings. Many of our clients remain out on bond, are scheduled for trial, or plead. Those who plead may be awaiting sentence, or were sentenced to probation, County Jail time, or were given County Jail sentences with conditional releases to programming like in-patient treatment.

With the onset of the COVID-19 crisis, the Jail and Judges have been reviewing the jail population to see what inmates can be safely released to help with social distancing and perhaps prevent a possible overwhelming outbreak of COVID-19 at the Macomb County Jail. Judges have been doing a great job with their review. The County Jail has been doing a great job not only with review, but also with testing persons coming into the jail over the past months, and testing symptomatic prisoners, doing their best to both identify and quarantine persons with confirmed or suspected infection at the jail. In Wayne County, Kym Worthy was part of a task force of prosecutors and defense attorneys who met to review prisoners for possible safe release. Here in Macomb County, with the assistance of SADO, MAACS, and other volunteers, attempts were made to identify clients in the Macomb County Jail who may be safely released. In appropriate cases, SADO has filed motions to seek early release in Circuit Court cases. In the District Court, my office and volunteers have been seeking release of early release of prisoners under District Court sentence.

Some of your clients may have been missed in the identification process, and they perhaps could benefit from your efforts seeking appropriate release. I understand that there are verified cases of COVID-19 currently at

the Macomb County Jail. Here are some ideas of what you can do if you have a client in the Macomb County Jail who is non-violent and/or is at personal health risk, and/or are otherwise appropriate for release. This is important, certainly in the case of persons at high risk, to avoid sickness and death due a COVID-19 outbreak in the Macomb County Jail. Forms for all of these Motions can be found on the SADO website.

## **Clients at the Jail and Concerns Over COVID-19: Motion For Release Pursuant to Executive Order 2020-29**

A motion under this Executive Order seeks a release of a person generally, and in different categories. A person who has served 85% of their sentence could be considered for release as recommended by MCL 801.51a(1)(b)(i) and the 3-31-2020 Joint Letter to Chief Judges issued by ACLU/SADO. Executive Order 2020-29 allows the Court to employ considerations similar to those employed when the jail is overcrowded, and make a COVID-19 release. This relief can be at least sought, even if the offense is an excluded in the overcrowding statute. Where less than 85% of the sentence is served, release can still be requested under Executive Order 2020-29. Such a Motion would highlight the amount of the sentenced which has been served (for example over 50%, 2/3, etc). Attention in the motion should highlight health risks of the client, the CSC’s recommendations about social distancing, and Michigan Supreme Court Justice, Bridget McCormack, and the Sheriff’s Association Executive Director, Matt Saxton’s, joint urging of Judges to reduce or suspend sentences for non-public safety risk inmates because it “WILL SAVE LIVES.” ([http://courts-michigan.gov/News-Events/press\\_releases/documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20\(003\).pdf](http://courts-michigan.gov/News-Events/press_releases/documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20(003).pdf)). Protection of

society and health risk of the client are considerations raised in a motion. Argument of a motion can include protection of the inmate, (from health risks), the practical inability to quarantine large numbers of prisoners at the jail, (who share toilets, showers, sleeping areas, etc.), and protection of the Jail Deputies and staff, (who have continuous contact inmates with searches, feeding, commissary, and medical), making Deputies and Staff possible un-knowing carriers of COVID-19, (exposing their home and families). Clients with health concerns like COPD, HIV, compromised immune systems, diabetes, asthma, breathing problems, and who are over 60, are all at higher health risk and risk of death. Forms for these motions are available in the SADO website.

### **Seek a 25% Sentence Reduction: Motion For Sentence Reduction**

This type of motion could be filed prior to the COVID-19 crisis, and it seeks a 25% reduction of a County Jail sentence. The authority is MCL 801.257, and is based on the "... conduct, diligence and general attitude of the prisoner" that would merit such a reduction. The same type of concerns raised in the Motion under Executive Order 2020-29 could be raised here. An alternative grounds motion for both release under Executive Order 2020-29 and MCL 801.257 can give the Judge alternative grounds to grant release. Forms for this motion are available in the SADO website.

### **Modification of Bond**

Clients who are detained awaiting Pre-Trial, Trial, PV Hearing, or otherwise, can seek to have their bond modified. Typically, the request is for a PR bond. Generally, the court . . . "must order the pretrial release of the defendant on personal recognizance, or on an unsecured appearance bond . . . unless the court determines that such release will not reasonably ensure the appearance of the defendant as required, or that such release will present a danger to the public." MCR 6.106(C). A multi ground motion can be filed seeking modification of bond based on the Court Rule. It can be based on the at-risk medical condition features of your client, and/or the concerns over social distancing, as mentioned in the Executive Order 2020-29 Motion described above. Forms for these types of motions are found in the SADO website.

### **Motion To Modify Terms of Probation**

A person at the jail may be detained due to a Probation Violation sentence. This form of a sentence could, for example, be one that imposes an extension of probation with the first number of days in jail. Michigan statute allows modification of the terms of probation at any time. MCL 771.2(5). Combined with the social distancing concerns referenced in the Executive Order 2020-29 Motion, and the individualized health risks of your client, relief from further jail time can be requested. Forms for this type of motion are available in the SADO website.

### **Conclusion**

The problem with COVID-19 in Michigan Jails and Prisons is real. There is some resistance to a release motion. Partial response to the idea that there is no need for these motions can be found in a 4-5-20 article found in the Detroit Free Press. ("Why Corona Virus Is Running Rampant In Michigan Prisons" by Paul Egan and Angie Jackson). The article notes COVID-19 deaths which occurred in Michigan Prisons, and lists some of the problems with COVID-19 in Prisons. The problems include: inadequate screening of prison employees and prisoners; lack of testing; prisoners hiding symptoms; (for fear of losing phone privileges and other privileges), lack of protective equipment, (for both prisoners and guards), and lack of cleaning. The first prisoner who died of COVID-19 in prison was found deceased/unresponsive in his cell. He did not previously complain of any symptoms. Others have died after displaying symptoms.

In appropriate cases, our clients could be released from the Macomb County Jail in this time of the COVID-19 crisis. Motions have been filed and argued in both Circuit Court and District Courts in Macomb County. The result has been to reduce the Macomb County Jail population, and this will save lives. Judges have had mixed responses to the motions. In many cases they are granted for appropriate persons and charges. In some cases, the Judge has granted what amounts to a furlough, releasing the person now, (perhaps on GPS or SCRAM tether, as appropriate), with a review in 3 months when the person may need again appear and serve out their sentence in jail. With changing parameters for in-patient treatment, Judges also consider release with referral to Community Corrections to assess programming needed prior to release. The important point of this is to represent your clients who are in jail with these alternatives in mind.

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All Trainings will be held at Macomb Community College, University Center 1 located at 44576 Garfield Rd., Clinton Township, MI 48038 unless otherwise stated.

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**June 4, 2020 & June 5, 2020**

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