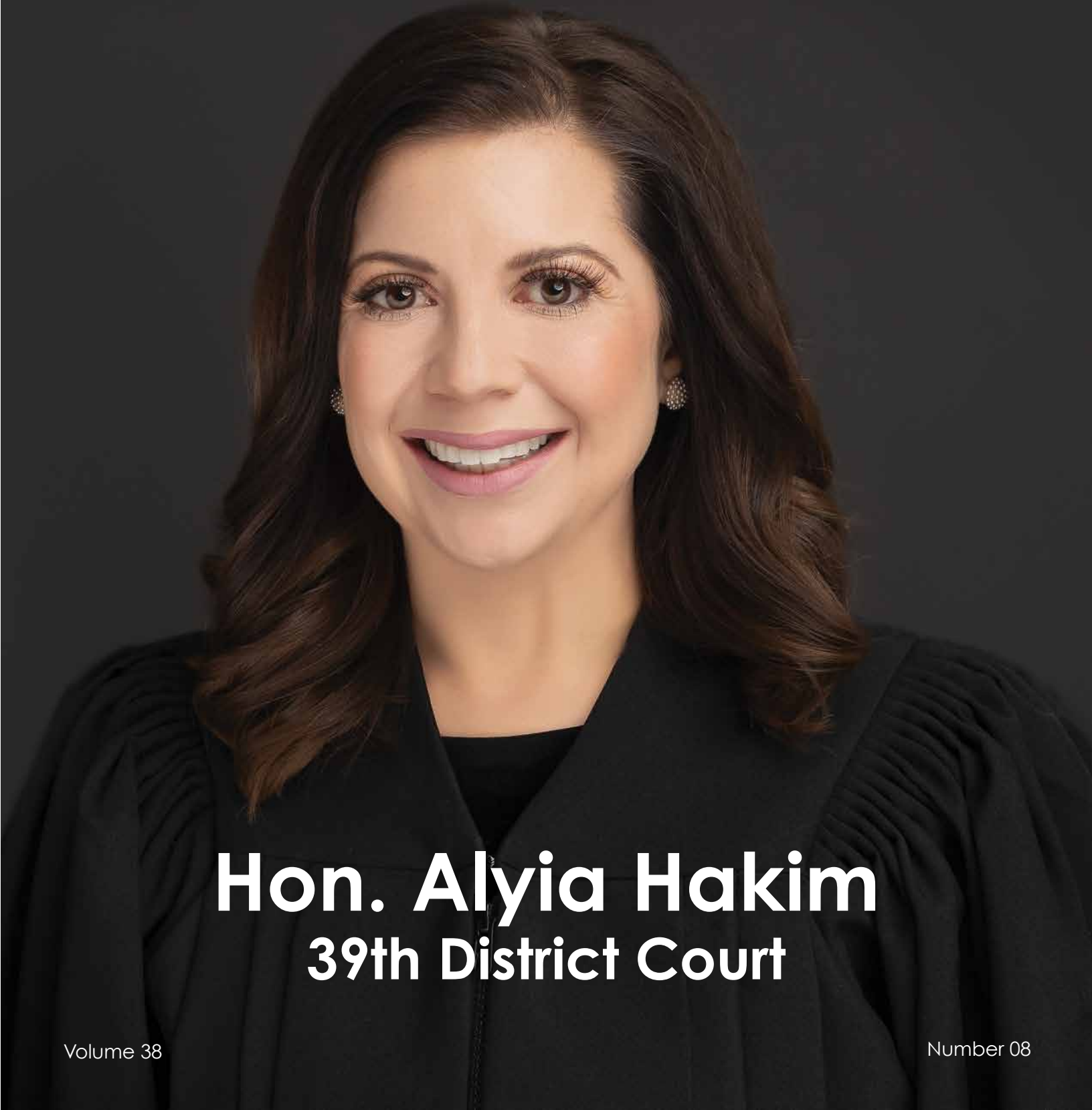


Bar Briefs

Official Publication of the Macomb Bar Association

February 2020



Hon. Alyia Hakim
39th District Court



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I Feel a Change Comin' On

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

I am writing this month about the creation of the Macomb County Public Defender Office. I am doing this in part to educate our members and to possibly quell any uncertainty and or unease felt by those who practice indigent defense.

By now, everyone is aware of the standards set out by the Michigan Indigent Defense Commission.

For the purposes of this article, I am focusing on MIDC Standard 5, Independence from the Judiciary. Standard 5 requires that: "The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services."

Standard 5 effectively removes the court appointed system from the 16th Circuit Judiciary as well as Case Management and Judicial Aide. The task of managing and appointing representation for indigent defendants will be handled by a Public Defenders Office. In order to facilitate this transition, the County Executive's office is currently in the process of creating this Office. This Public Defenders Office will handle the management and appointment

of indigent counsel in Macomb County Circuit Court matters as well as matters charged in 42nd District Courts.

The Public Defender's Office will consist of an Administrator, a Public Defender, Staff Attorneys and office assistants. Currently only one position has been posted for application, the Administrator position. This

position's summary was included in our E-Briefs sent to all members over the past couple of weeks. Please note, Macomb Bar members received all relevant County employment information directly from us the hour the job is posted on the Macomb County website.

In terms of the Public Defender position, while that has not been posted, it is my understanding that this position is tasked with providing legal defense representation to indigent persons in criminal matters, while serving as

a counterpart to the state and/or county prosecutors throughout the courts in the county.

Public Defenders Offices typically handle anywhere from 15% to 30% of all court appointed matters in any given jurisdiction. According to the Macomb County Case Management and Judicial Aide, the total number of court appointments administered by the Macomb County Circuit Court in 2019 were



7,783. This includes the following:
4,813 Probable Cause Conference appointments;
2,638 Probation Violation appointments;
332 Domestic appointments;

(Please note, these numbers do NOT include appointments in juvenile matters. As an aside, juvenile matters are not covered under the MIDC standards.)

Given these figures, I assume that the Public Defender's Office will, at least in the beginning stages, handle a limited caseload. Also, I am assuming that the office will be more focused on administering and managing the appointment of counsel at the County-funded courts.

The trend statewide is towards the development of Public Defender Office. As of 2015, only six public defender offices were operational within the state, with a seventh starting operations in 2016. However, in the ensuing years we have seen a dramatic increase in the creation of public defenders' offices throughout the state.

The following is a list of counties with Public Defenders Offices:

- Bay
- Berrien
- Calhoun
- Chippewa
- Houghton
- Ingham
- Isabella
- Kent
- Kalamazoo
- Lenawee
- Ottawa
- Saginaw
- St Clair
- Washtenaw
- Wayne

(Also: SADO and the Federal Defenders Office)

In conclusion, I believe that creating a public defender's office is long overdue and, if done right, will benefit both our membership and our community. I look forward to the creation of

a public defender office and hope that the bar and its members will be adequately represented. I have always believed that the attorneys who serve the indigent members of our community do an amazing job with very little in the way of compensation or benefits. My hope is that the creation of the Public Defender's Office will not only increase our ability to effectively represent our clients but give us an opportunity to be adequately compensated for our services. The key to this office being successful, as always, is funding. The state must continue to fund the standards set out by the MIDC to ensure that indigent defendants are adequately represented.

It is my hope that the County Executive will consider the great depth of knowledge and experience our members have in not only practicing indigent defense but in organizing and administering legal representation. Additionally, it is my sincere hope that the creation of this office and its implementation will continue to improve access to justice for the members of the public who need our assistance and our counsel.

Jonathan C. Biernat

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Seminar qualifies for (4) MIDC Annual Hours.

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- 12:00pm-1:00pm Lunch
- 1:00pm-3:00pm Closing Statements featuring Thomas Tomko

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For questions call MCBA Executive Director Rick R. Troy (586) 468-2940 or
CDAM Executive Director Ramona Sain (517) 579-0533



Online Renovation

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

On January 1, 2020, the Macomb Bar launched a new website and membership database.

Implementing a new association management system and building a new website became one of ten priority action items approved by the Board of

informative.

We want to thank member “Great Uncle” Larry Katz for his assistance with the “History of the MCBA” section of the website located under About Macomb Bar. We invite you to grab a cup of coffee



Directors in March of 2019. This is the first major renovation of the website and database since 2006 and we hope that you find it to be fresh, clean, colorful and

and enjoy reading this interesting piece.

MacombBar.org is fully mobile enabled, which means that you can access the entire site from your

phone. Search the Member Directory, sign up for events, check the calendar, nominate colleagues for awards, get your CLE info and connect with other members.

MacombBar.org has been built for easy navigation with links to Member Discounts, Legal Resources, the Macomb County Court Directory and so much more.

MacombBar.org. Bookmark it on your office computers and use it to stay informed about the legal community that you are a part of.

Macombbar.org is only part of the online renovation. As a member it is extremely important for you and your staff to know how to access all that is available.

To access the new member portal please follow these steps:

- click on “Member Center” then “Create an Account”.
- Submit your name and email address.
- Check your email for a message from Macomb Bar Association. Click on the link provided
- Set up your username and password.

Once logged in you have access to all the amenities of the new member management system. You have the ability to:

- Update your profile photo
- Update your contact information
- Add a biography
- Join Committees
- Update your Business information
- Add your business logo
- and much more

We have emailed and posted on Macombbar.org under “Explore Membership” short videos explaining how to use your Macomb Bar profile. These directions are fast and easy to learn.

Congratulations New 39th District Court Judge Alyia Hakim!

And thank you for your continued service as a member of the Macomb County Bar Foundation Board of Directors!

Criminal Law Think Tank

Once a month, a dozen or so criminal defense attorneys gather for lunch at the Circuit Court to talk about cases. I recently sat in on a think tank and was very impressed at the diversity of knowledge that was transferred among those in attendance. Discussion on case law, practical and real time knowledge of traversing certain issues, and specific ins and outs of various courts in the region. If you are practicing criminal law, this free education is truly priceless. I encourage you to check out a Criminal Law Think Tank.

Cell Phones in Courts

The Michigan Supreme Court has adopted amendments to court rules to explicitly allow the public to bring cell phones into courthouses and courtrooms. The changes also allow the public to photograph court records. Previously, rules regarding cell phones and other personal electronic devices varied widely from court to court and often posed a barrier to court access. Courts have until May 1, 2020, to implement the rule change.

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Circuit Court Corner

By Macomb County Circuit Court Administration

As we enter the new decade, the Circuit Court is bidding farewell to two Referees: Zaira Maio at Friend of the Court and Karen Transit at the Juvenile Division.

Zaira began her employment with the Macomb County Friend of the Court October 31, 1985. Zaira was originally hired as an Attorney Judicial Service Officer. She was first responsible for monitoring



and presenting all of the recommendations made by our support investigations department, to the Court. Zaira also spent time as an attorney in the parenting time department, as well as our interstate department, where she developed policy and procedure and helped in the overall improvement of the departments. Zaira was then promoted to the referee position where she remained for over three



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decades. Friend of the Court Thomas Blohm stated “In every position Zaira held, she brought her trademark energy, and enthusiasm. As a referee, Zaira was known for her compassion, wisdom, and phenomenal orders. Replacing her knowledge and experience will be difficult.” The Friend the Court will begin interviewing candidates for the Referee position in January, 2020. In the interim, Chief FOC Referee Brian Nicholas will reassign open cases to other Referees.

Juvenile Court offers its heartfelt congratulations to Referee Karen Transit on her retirement. Karen was appointed as a Referee on March 8, 1999 and has served the families of Macomb County for more than 20 years. Prior to her appointment, she practiced family and criminal law in Macomb County. Chief Juvenile Referee Linda Harrison stated “I have had the honor of working with Karen for my entire career and she has personally trained every Referee in Juvenile Court. Karen had a quiet and deliberate way of approaching every case and never let the stresses of the day or the changing

form of the docket ruffle her. She had a genuine connection with the kids on her docket and could recall minute details about what is going on in a child’s life at any time.” With Karen’s retirement, Referee Kristin Stone will be assigned to Judge Yokich. Until the position is filled, all current Referee files assigned to Judge Matt Switalski will be distributed between the remaining Referees. New filings for Judge Matt Switalski will be assigned to Chief Juvenile Referee Linda Harrison.

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Some Evidence

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

This month's column was inspired by (a) questions posed by a fellow judge and (b) the traditional American folk fiddle tune "Cotton-eye Joe."

Let's do the judge's questions first.

It was only a passing comment in the elevator, but my understanding of the judge's inquiry was: What is the evidentiary basis for the admission of driver's licenses, utility bills, and/or letters addressed to the recipient to show ownership or control of property. The question arises when the prosecution offers such paper evidence to try to establish that drugs or evidence of crime were found at defendant's house or apartment. There appears to be a potential hearsay objection since these papers are, arguably, being offered to prove the truth of the matter stated on them; namely, that the defendant lives here.

The basis for admission is that, using the process laid out in MRE 104, a judge makes a logical deduction that it is more probable than not that such papers would usually be found at a place where a person normally resides. Sure, a friend or relative might have left his or her stuff in the room, but the most likely explanation for finding these papers is that they belong to the defendant, and are in the place of the defendant's usual abode. The more such paperwork that is found, the more likely it is that this is defendant's place.

As for the worry that there is some hearsay intertwined with reading the name and address, or other identifiers, and accepting the information as true, the rules of evidence tell us that we should have no such worries. MRE 801(a) says that a statement is hearsay only if it is intended as an assertion. Although driver's licenses contain a person's name and address, the secretary of state does not intend that the license be an assertion by her that the named person lives at the address. Yes, we use it for such purposes, but neither the secretary of state, nor anybody in her department, is saying that "I know this is where this person resides."

Rather, the secretary of state is merely compiling information submitted by the applicant for the driver's license. The secretary has no idea if the information is true or not, and, accordingly, there is no way that the secretary is making an assertion attesting to the veracity of the person's name and/or address. Without the intent to make an express assertion, an out of court statement is not, and cannot be, hearsay. The same analysis applies, of course, to phone bills, electric bills, and water bills. Even the addresses placed on envelopes or letters from personal friends are not placed there as an express assertion that "I know my friend lives at this address." Like notices and bills from the secretary of state and public utilities, friends write down a name and address not as a personal assertion, but simply as the only way known to them to get a letter to his or her friend – usually based on information supplied to them by the friend.

In real estate transactions we have often heard that the three most important factors in evaluating real estate are "location, location, and location." In like manner, the three most important factors in analyzing hearsay issues are "assertion, assertion, and assertion." Prior articles have dealt with the notion of whether *implied* assertions qualify as assertions. The answer is no. See, for example, November, 2019, Bar Briefs "Some Evidence." See also *People v Alphonzo Jones*, 228 Mich App 191; 579 NW2d 82 (1998). To be hearsay, a statement must be an express assertion which the declarant intended to be an assertion.

The admission of such papers to show ownership, possession, or control, therefore, is simply a matter of evaluating the admissibility of circumstantial evidence. Under MRE 901(4) "distinctive characteristics and the like" and MRE 902 "self-authentication", most things will easily pass the authentication requirement. (See December, 2019, Bar Briefs "Some Evidence" article.) MRE 104 makes the process of admission easy since the logic tree of determining whether something is admissible does not require that admissible evidence be

used to make the call. The sole question then is whether under MRE 401 it is slightly more likely than not that such identifying papers would be clustered together where a person lives. The answer to that, of course, is an easy yes.

Now for part two of this article.

If it hadn't been for Cotton-Eye Joe

I'd been married a long time ago.

Where did you come from, where did you go?

Where did you come from, Cotton-Eye Joe?

This lyric came to mind when I was thinking of the judge's question – with specific application to that part of the question which dealt with letters. Yes, the name and address of the person to whom a letter was sent is not hearsay; but much (but maybe not all) of a letter's contents will likely be hearsay. Here then, is the hypothetical that came to mind.

Let's say that as a defense attorney you are defending Lawrence Hatfield who is accused of murdering Seth McCoy. One of your lines of defense is that you believe that some other person might be responsible for the killing, and you hope to introduce some evidence to create a reasonable doubt in the minds of the jurors by pointing the finger at another person with motive and opportunity to commit the crime. You are in possession of a letter from Seth McCoy, the deceased, which he wrote to Joe Walsh, who was commonly known in these parts as "Old Joe" or "Cotton-Eye Joe." Joe's body was recently found near Seth McCoy's property. The Medical Examiner determined that Joe's death was a suicide. The letter from Seth McCoy, the deceased in the murder case, to Cotton-Eye Joe says this: "You are a worthless varmit and lower than a snake. I would have been married a long time ago, if it hadn't had been for you. You seduced my true love with that damn fiddle of yours. Go to hell, Joe."

You have retained a hand-writing expert to authenticate that the author of the letter was Seth McCoy. You would like to introduce the letter to show that there was enmity between Seth and Cotton-Eye Joe, but you know that the judge is a stickler for hearsay. What is your argument to get the letter into evidence?

From a hearsay rule perspective there is no problem with admissibility because there is no hearsay. Each sentence of the letter is hearsay-free. "*You are a worthless varmit and lower than a snake,*" is obviously an expression of an opinion and/or an insult. It is not meant to

be taken literally, so it is not appropriate to ask whether the statement is true or false. Whether or not Seth McCoy was a worthless varmit or lower than a snake is not a fact of consequence in the case. That sentence is not hearsay. The next sentence, "*I would have been married a long time ago if it hadn't had been for you,*" may or may not be true, but the truth of the statement does not matter. The purpose of admitting the statement is to show that Seth McCoy believed that Cotton-Eye Joe was the person responsible for his losing his true love. Whether or not that belief is true is irrelevant. If a statement – even an assertion – is not admitted for the truth of the matter asserted, it is not hearsay under MRE 801(c). The very same analysis applies to the next sentence, "*You seduced my true love with the damn fiddle of yours.*" The last sentence, "*Go to hell, Joe,*" is, of course, not hearsay because it is a wish, command, or expletive; it is not capable of being true or false.

As for the admissibility of the letter, the handwriting analysts and MRE 901(4) will get you past the authenticity question. The real question comes down to how the judge will handle relevance under MRE 401 and the more prejudicial (or confusing) question under MRE 403.

The letter is relevant under MRE 401; that is, if there were enmity between Seth and Joe, it might make it likely that they had an argument which resulted in Joe killing Seth. Also, the fact that Joe committed suicide shortly after Seth died, lends some credence to the idea that, perhaps, Joe had a guilty conscience about Seth's death. Also, the fact that Joe's body was found near Seth's property suggests that the motive for Joe's suicide had something to do with Seth's murder. As a defense attorney, of course, you wish that the letter was written the other way; it would be great for your case if the letter were from Joe threatening Seth. However, you are stuck with the reality of what you actually have.

As a judge, I would admit the letter. The connection is tenuous, but MRE 401 does not care about whether something is tenuous. Even a feather-weight of relevance is enough. Although, the prosecution might object on MRE 403 grounds, this is not really a question of whether something is more prejudicial than probative. It is simply a question of whether the evidence means anything at all.

If that is the question, MRE 401 requires that the letter be admitted. *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002).



Meet the New Judge Hon. Alyia Hakim

*By Elyse Culberson, O'Reilly Rancilio PC
Young Lawyer Section Director*

You were appointed to the 39th District Court bench in November 2019. Can you describe that process?

The process is long and can be very mentally and emotionally difficult. It started by filling out an extensive application which I submitted accompanied with over 60 letters of support from various community members. Once the application was in process, two main interviews were conducted. Although intimidating, the first was with the State Bar of Michigan. That half hour of my life is still a blur to me. Once selected for a second interview, I went back to Lansing for an interview with approximately 3-4 people from the Governor's Office. This is usually your final interview. Once that interview is complete, all you can do is wait - which is terrible for a person like me! The waiting is definitely the hardest part. During this time, there is little-to-no contact with yourself and the Governor's Office so I found myself working every day to seek out added support from additional judges, community officials and organizations. This made me feel like progress was always being made. If you are selected, you are set up with a phone call from the Governor. I was in court when my phone call came and was lucky enough to have Judge Annemarie Lepore allow me to use her chambers to take it. It is a surreal experience and one of the best phone calls I've ever received!



What is your educational background?

I obtained my Bachelors Degree from Western Michigan University and my Juris Doctorate from Wayne State University Law School.

Do you have any mentors?

My parents have always been my first mentors. After I graduated from law school, my dad, Maroun Hakim, took me into his firm and exposed me to so many types of law. He gave me access learning all areas of law while giving me the freedom to choose my own passions. My mom, Lidy Hakim, constantly shows me how to be a mother with compassion, dignity, and grace while juggling all of the other stressors of life.

Judge David Allen has been my most

influential professional and judicial mentor. He embodies all of the traits of a true public servant. He is kind, courteous, and respectful of all parties in his courtroom. I am so thankful for his constant guidance and support.

What experience do you bring with you to the bench?

Prior to becoming a judge, I practiced law in district courts daily throughout Macomb and Wayne County. This practical experience laid a foundation for me in understanding the real legal challenges being brought before the court. I also have a lot of experience with specialty treatment courts which I am hoping to expand in the 39th District Court. I truly understand the impact the court has on the people before it and the greater community.

When was your first docket?

My first docket was on December 3, 2019. It was a criminal docket for the City of Fraser. I was nervous to take the bench so quickly but was fortunate to have so many of our local judges reach out and offer me help, guidance, and advice. Judge Boedeker and Judge Tocco have been readily available to lend a hand or answer questions. And my infamous gold glitter binder from Judge Lepore is my greatest resource for running my courtroom as smoothly as possible!

What do you look for in attorneys that appear in your courtroom?

Be prompt, be prepared and be polite. This adage has been passed down to me by several judges and initiated by Judge Kaye Tertzag. I think it sums up everything attorneys should strive for. So much of the practice of law involves working with opposing sides and advocacy does not need to be contentious.

Because you handle both civil and criminal dockets, do you prefer one over the other?

Criminal is definitely more of a comfort zone for me. I have dedicated so many years to its practice and I think it's such an important area that safeguards

constitutional rights. That being said, I am excited to learn more about all of the different types of civil matters coming to the court. No matter what type of case I am handling, my goal is to always ensure that I am providing equal access to justice for all people in my courtroom.

What do you consider your greatest achievement?

My greatest achievement is my family. Nijad and I are blessed to have three amazing children, Emilien, Gisele and George. I am so lucky to watch them grow into amazing little people and I strive daily to be a positive role model for them to look up to.

Do you have any advice for young attorneys?

Seek help and advice from older and more experienced attorneys. There is no match to the real life practical experience that they have.

What do you enjoy doing when you are not on the bench?

I love spending time with my family (mostly driving my kids around, haha), trying out new restaurants with Nijad and our friends, vacationing, cooking, and binge watching my favorite shows on Netflix.

Young Lawyers Board of Directors

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Macomb Bar Awards

Nominations Now Being Accepted

Please submit nominations to Rick Troy at RTroy@Macombbar.org or by mail at 40 N. Main St., Suite 435, Mt. Clemens, MI 48043

EXTRAORDINARY SERVICE AWARD

The Extraordinary Service Award is awarded to the most involved member during the year. The Board only chooses a winner in this category when a member stands out as deserving of this honor.

SPECIAL SERVICE AWARD

The Special Service Award is given to those individuals who initiated and/or completed special projects for the MCBA during the year.

KIMBERLY M. CAHILL CIVILITY AWARD

The Kimberly M. Cahill Civility Award is given to the member who has brought respect to himself or herself and the legal profession through both dialogue and conduct by cultivating considerate, professional conduct with opposing counsel, especially in the presence of clients; encouraging clients to adopt meritorious positions and avoiding inflammatory and retaliatory tactics and behavior; welcoming and encouraging attorneys of all races, ethnicity and genders; assisting and mentoring new and inexperienced attorneys; avoiding disparaging comment and criticism of the bench and bar, and commending the profession's members when appropriate.

PRO BONO SERVICE AWARDS

In recognition of the unmet legal needs of low-income and senior residents of Macomb County, and in support and honor of those attorneys performing pro bono services in Macomb County, the MCBA has established Annual Pro Bono Service Awards.

DISTINGUISHED PUBLIC SERVICE AWARD

This award is given to recognize a member for extraordinary service in the public sector. The criteria for the award are: Past or current service to the public which strengthens the American system of justice under the law; Demonstration of the highest standards of integrity, fairness, excellence, leadership, dedication to the ideals of principle and democracy; and has made a lasting contribution to the nation, the state or the community in which the person lives or serves

MEDAL OF ACHIEVEMENT AND COURAGE

The Medal of Achievement and Courage is given out from time to time only when The Board of Directors, decides a candidate's achievement in a challenging situation is an undeniably significant example of the noble practice of law. In selecting recipients, the Board considers Macomb County lawyers who have achieved great success for their clients and who have demonstrated courage in the face of adversity to represent the rights of the opposed, disadvantaged or destitute. Such acts represent the spirit of the Constitution of the United States of America and honor the highest principles of the practice of law. Because of this stringent standard, the award is the highest expression of esteem the Board can confer on an individual.

LIBERTY BELL AWARD

The Liberty Bell Award is given each year in conjunction with Law Day to honor outstanding citizens within the local community. The award recognizes outstanding service performed by a non-lawyer citizen who has given of his or her time and energy to strengthen the effectiveness of the American system of freedom under law, in keeping with the spirit of our Constitution. Such service may include activities which promote a better understanding of our form of government, especially the Bill of Rights; encourage greater respect for the law in the courts; educate people in the contrast between totalitarianism and freedom under law; or stimulate the deeper sense of individual responsibility to the end that citizens recognize their duties as well as their rights.

Please visit Macombbar.org for Past Recipients

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Macomb County Bar Association

40 N. Main St., Suite 435

Mt. Clemens, MI 48043

MacombBar.org

2020 CDAM/Macomb Bar Training Schedule

Criminal Seminars for Court Appointments

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

Register at CDAMonline.com

February 14, 2020

Awesome Openings and Killer Closings

10:00am-12:00pm • Lunch • 1:00pm-3:00pm

(4 Annual Hours)

Featured Faculty: Dana Freers and Thomas Tomko

March 20, 2020

Evidence Boot Camp C (Hands on Training)

Oakland County Bar Association

1760 S. Telegraph Rd., Suite 100, Bloomfield Hills, MI

9:00am-5:00pm (8 Skills or Annual Hours)

(Continental breakfast, lunch included)



March 27, 2020

Evidence Boot Camp D (Hands on Training)

Oakland County Bar Association

1760 S. Telegraph Rd., Suite 100, Bloomfield Hills, MI

9:00am-5:00pm (8 Skills or Annual Hours)

(Continental breakfast, lunch included)

Featured Faculty: Pamela Johnson & Michael Steinberg