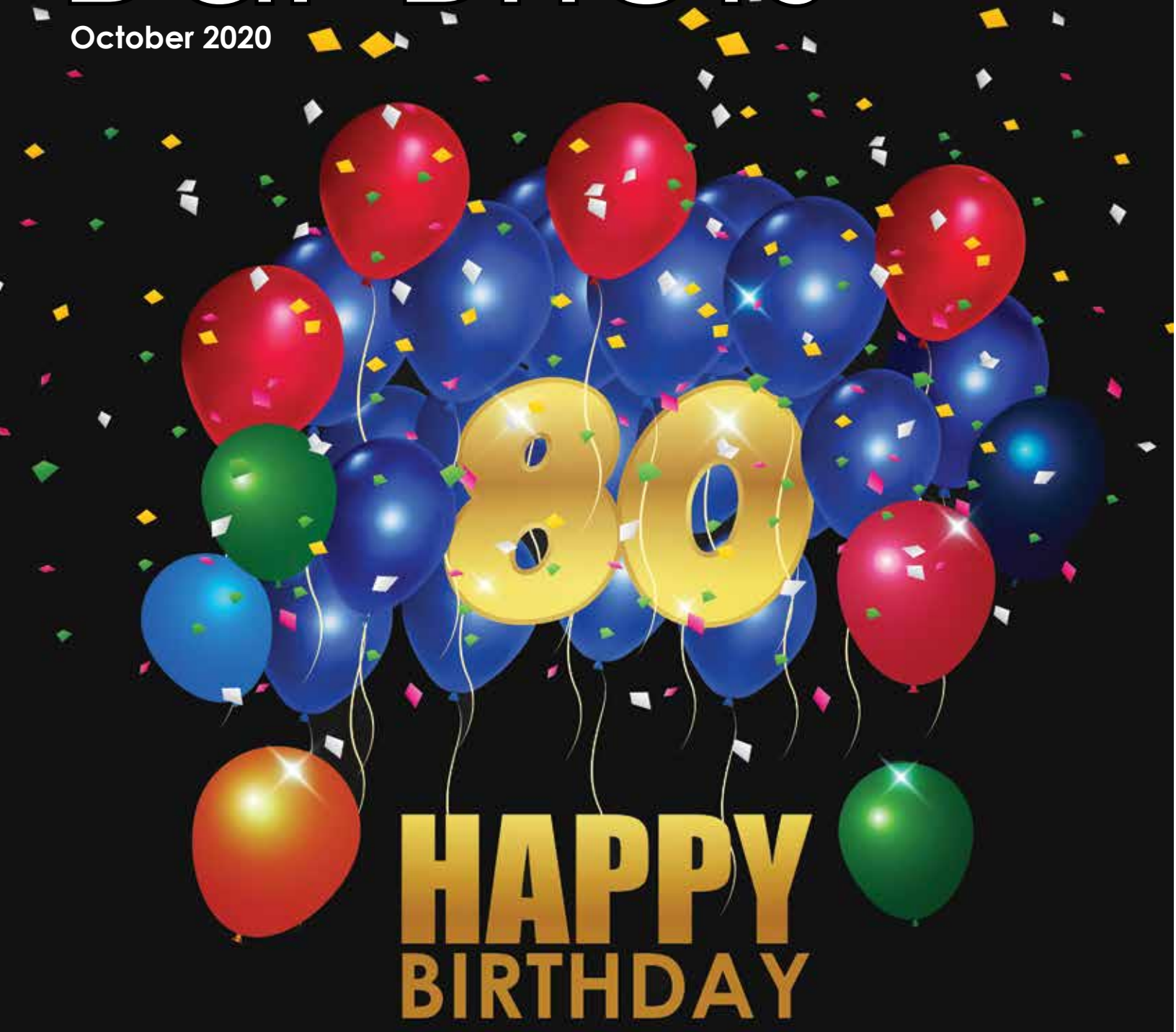
Bar Briefs

October 2020



JOSEPH A. GOLDEN

PRESIDENT OF THE MACOMB BAR ASSOCIATION

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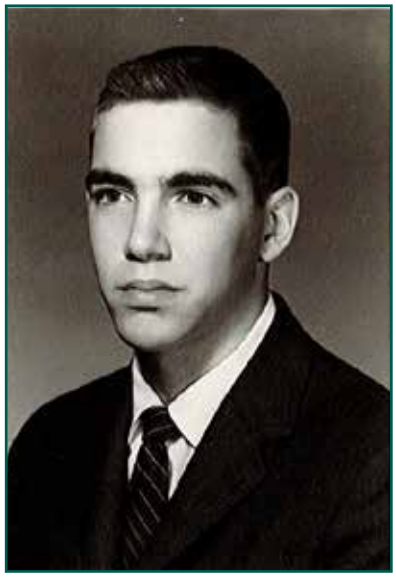
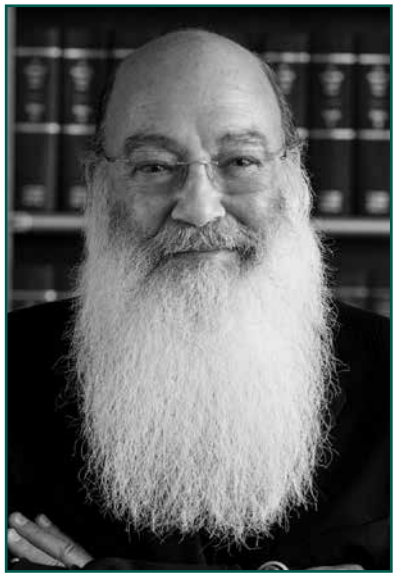
Happy 80th Birthday to the 92nd President of the Macomb Bar Joseph A. Golden





Beyond the Water Cooler

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The Macomb Bar congratulates Reginald Turner on his selection as President-Elect of the American Bar Association. He will serve as President in 2021.

No doubt, there are offices and factories where the atmosphere between managers and workers is collegial and cooperative. But the workplace can also be a tad less idyllic, marked by an *Us* v. *Them* divide. It doesn't take much to tip the balance from Dilbert-like bemusement to animosity.

When someone crosses a legal line, negotiating the fallout requires attorneys with a thorough knowledge of employment law, the patience to sift through conflicting stories and the tenacity to reach the best conclusion for everyone involved.

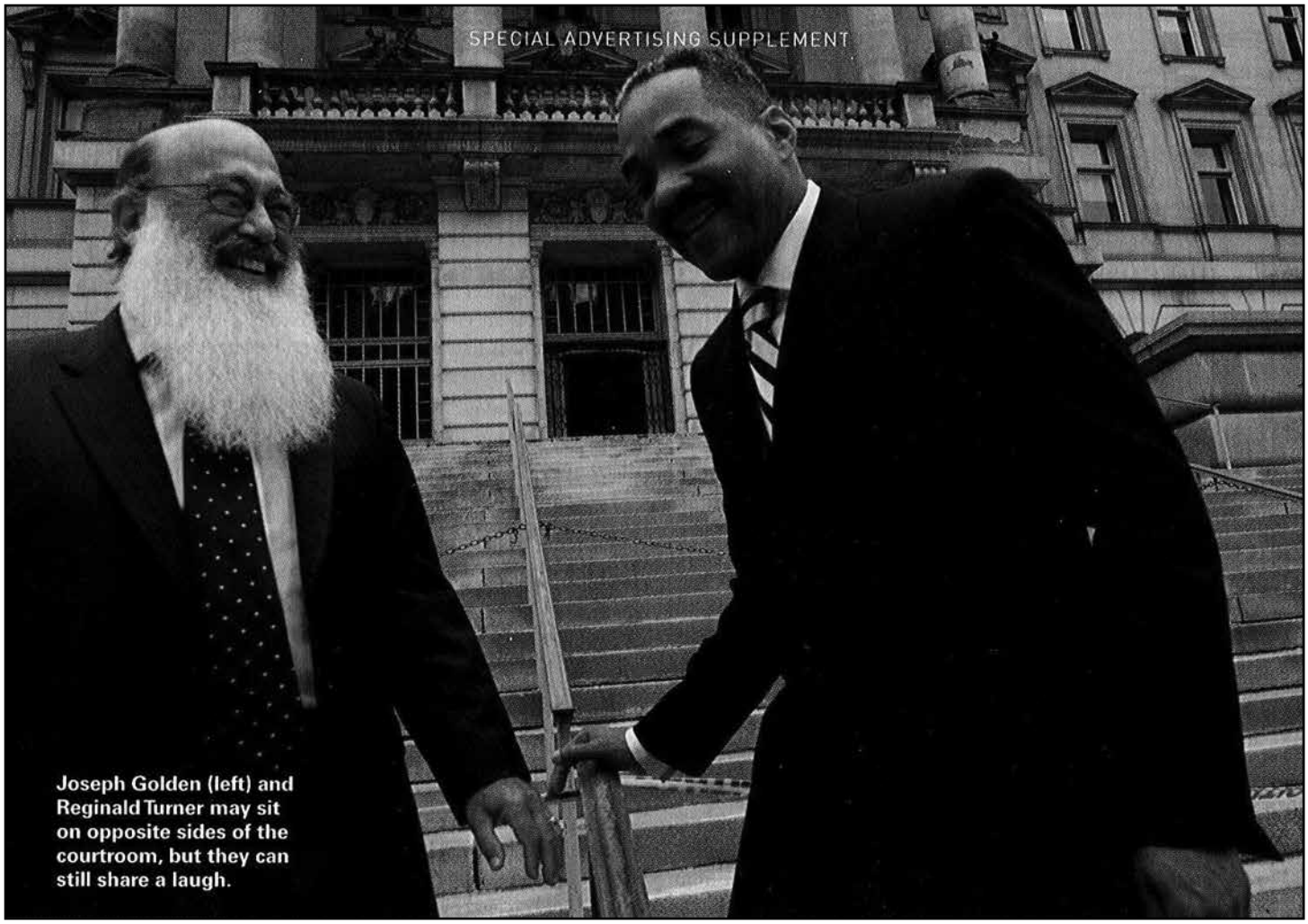
Detroit-area lawyers Joseph Golden and Reginald Turner represent opposing sides in the labor debate but share a common interest: making the workplace more harmonious.

Employee's ally watch Joseph Golden enter a room and you might, as he admits, be taken aback. At 66, Golden has a long, full beard—now more salt than pepper—and a penchant for working in jeans. He is personable and relaxed, and laughs easily. But don't be fooled: Golden is also one of Michigan's savviest plaintiffs' attorneys in employment and labor law. At an age that might have others contemplating retirement, he recently won the biggest verdict of his career.

Even his adversary in that case, attorney Michael D. Ritenour, then with Thomas, DeGrood & Witenoff in Southfield, and now a solo practitioner, describes Golden as "one of the best, most honorable, most skilled attorneys I have ever encountered. And that comes from a guy who lost to the tune of $2.4 million!"

Ritenour didn't start out so impressed. "When I first met him, because of the very long, white beard—and at the time I met him he also had a ponytail—it was very disconcerting. It leads you to think he's not going to do

well in front of the jury, that his appearance will become a focus as opposed to what he has to say. I found that not to be the case. In our particular case, certainly, the jury, as measured by the verdict, wasn't put off by him at all. I don't think his appearance became any kind of a factor. In fact, I think it becomes an asset to him, because he can use it to put people at ease, to joke a little bit about it."



Joseph Golden (left) and Reginald Turner may sit on opposite sides of the courtroom, but they can still share a laugh.

Golden has no plans to slow down.

"I love what I do," he says. "So long as I have the ability and the capacity to meet my responsibilities to my clients, I'm going to keep doing this."

Golden's initial interest in law was sparked more by drama than debate. "I was always interested in performing," he says. "I always liked the stage, never had any problem with speaking in front of a group." During college, part-time jobs helped him discover a fondness for sales and working closely with people. Golden decided that all of these skills would "play well as an attorney."

After graduating from Wayne State University, Golden went on to the University of Detroit School of Law. After working at various Detroit-based firms and running his own practice, he spent 22 years at Sommers Schwartz before joining Pitt, McGehee, Palmer, Rivers & Golden as a partner this year.

Golden has been involved in labor and employment litigation virtually from the start. It feels like a natural fit, he says. He credits his urban upbringing for his ability to communicate well with working people. "If you went to public school in Detroit and grew up in an integrated neighborhood, I think you've got a little bit of 'street' in you. I think that helps me tremendously."

Nowhere have Golden's legal skills been more on display than in the case of his most famous client, the late Bo Schembechler, who gained fame as a winning football coach at the University of Michigan. But it was his dismissal by the Detroit Tigers baseball team, of which he served briefly as president after leaving U of M, that brought him to Golden's door.

In 1992, Schembechler was fired via fax after only two years with the Tigers. He claimed the organization had initially agreed he would head the team until 2000. "He was to finish his working life with the Tigers, until age 70," Golden told the media at the time. "Bo was prepared to honor the 10-year commitment; the Tigers, obviously,

were not." The parties ended up settling, to Schembechler's satisfaction, though he did not stay on with the Tigers.

"I received tremendous notoriety in that case," Golden says. "Not only because Bo was such a legend, but because we appeared to be opposites. One of the first things he was asked by the sports columnists was, 'How did you find a guy with a full beard—and why?' He had a rule for his team that they couldn't have facial hair." But the two hit it off from their first meeting. Schembechler had a series of appointments lined up with potential attorneys, with Golden at the top. After the two spoke, the coach canceled his other interviews. "Our relationship was excellent," Golden says, "and I'll always be thankful for him coming here. To this day, people come to see me and they say, 'Well, if you're good enough for Bo, you're good enough for me.'"

Joe Golden has done that, and so much more. Joe, congratulations on your 80th year!

- Skip Maccarone

"Joseph Golden is a consummate professional who has been a beacon of light for others to follow in litigation and in supporting the work of the bar."

- Reginald M. Turner, Clark Hill PLC

Though Schembechler's case never went to trial, Golden has spent plenty of time in the courtroom over the years. That's when he taps into his passion for performing. But over the past decade, most of Golden's cases have settled out of court and trials have been fairly rare events. Still, when he has the opportunity, he wrings the most from the experience. In 2006, in his first jury trial since 1999, Golden won a verdict of $2.4 million in federal court for Agnes Auvenshine.

Auvenshine, a probationary teacher at Troy Athens High School, had been rated "fully satisfactory" during her first year. Under a new principal, problems arose.

"My client contended that there were four comments made by Principal Catherine Cost that went directly to her national origin [China] as it related to her ability to be a successful teacher. For example, Auvenshine was applying for a job [at the school] for which she was certified. The job went to a woman who wasn't certified. My client directly raised with Cost the fact that she thought her national origin played a role in the decision not to hire her. She contended that Cost said, 'Well, maybe it did, but that's my decision.' Well, that's direct evidence of discrimination.

"The jury not only believed that my client had been discriminated against but acquired some distaste for the principal. The award was approximately $1.2 million against both the school district and the principal, including $600,000 in punitives against the principal."

Golden notes that, these days, 99 percent of his cases never go to trial. "The advent of ADR [alternative dispute resolution], which basically has forced mediation for all of these cases, has resulted in many more cases being resolved," he says. But there may be another reason: He had two verdicts in excess of $1 million when he tried cases in 1999. Golden believes that fact has also prompted defendants to resolve cases before they reach a jury. "Which is why I say the Auvenshine verdict helped me significantly," he says with a laugh. "Maybe I won't have to try another case for seven years."

Then he pauses, reflecting. "I did some of my best work in that case. It made me feel that, although I've been doing this for close to 40 years, I hadn't lost any of my skills. That's important, because I enjoy this practice. The only thing that would really alter my desire to practice is if

Joe Golden Is one of the best plaintiff labor and employment lawyers in Michigan and my friend for over 50 years. He is respected by all good lawyers . Happy Birthday Joe!

- Bob Vercruysse, Clark Hill PLC

I felt my skills were diminishing."

One-time adversary Ritenour says, "Joe Golden knows what he's doing. His word is his bond. He's a genuinely decent guy. It's rare that you encounter somebody in our profession that you can say all those things about—especially when you've lost."

Backing the boss

Defense attorney Reginald Turner, 47, also specializes in employment and labor law, but with a different client: the employer. Turner and Golden haven't crossed career paths, but if they did, they might find they have a lot in common: Both grew up in Detroit, graduated from Wayne State and started their careers representing employees.

Turner, a partner with Clark Hill and the immediate past president of the National Bar Association, represented unions for 10 years. At Clark Hill, which he joined in 2000, he represents employers. "I believe my previous experience is valuable to my clients," he says. "I understand the issues from a variety of perspectives."

Clearly, Turner's background gives him insight into employer/employee disputes. But it was a career move that many plaintiffs' attorneys, including Golden, can't imagine making.

"There were two principal reasons why I made that switch," Turner says. "First, I wanted the intellectual challenge of growing my practice through representing clients on the other side, in the business community. Second, I began developing a government-relations practice, and I saw Clark Hill as a very good base from which to grow that practice. Its labor and employment group was very strong and, with a lot of work by a lot of folks, it has become even stronger today."

His employer-clients are glad Turner made the move.

"I first met Reggie 20 years ago or so, when he was a summer intern here on the GM legal staff," says Frank Jaworski, managing attorney for labor personnel matters at General Motors. "So I've known him since he was in law school. … He has the temperament and personality to be effective with both his client as well as with the opposition."

Neither side of the employment debate was originally on Turner's radar. "At an early age, I wanted to be a police officer, like my father," says Turner, whose

I've known Joe for over 40 years, both as a friendly colleague, and a tough opponent (we both practice employment law, Joe mostly on the Plaintiff's side, and I on behalf of employers). Joe has always been an honest and principled advocate. When we opposed each other, it was with the knowledge that he would be tough but keep his word and not engage in "fast" practice. I wish Joe a happy birthday and success as president of the Macomb Bar!

- Thomas G. Kienbaum
Kienbaum Hardy Viviano Pelton & Forrest, PLC

I first encountered Joe Golden in 1972. I was a poor dumb country kid fresh out of law school. Joe represented unions and I represented employers and we have remained adversaries to this day. However, Joe taught me a lot about practicing law and we became and remain friends. If Joe Golden gave you his word you could take it to the bank.
Be well my friend and Happy Birthday!

- Len Givens, Miller Canfield P.L.C.

father once served as Detroit's deputy chief of police. Then a job at United Parcel Service during his undergraduate years triggered Turner's interest in labor and employment relations. He went on to the University of Michigan Law School, taking all the labor- and employment-law courses he could.

Turner has seen his two interests—law enforcement and the law—intersect in the employment arena.

"I've had a number of trials over the last few years for a municipal employer in which we've defended decisions to discharge police officers who were violating employer policy—and, in some cases, violating the law," says Turner. "In one case, a police officer was hanging out with the wrong crowd. The matter came to a head when it was discovered that one of the members of this crowd was a person who was wanted by his department." The officer, says Turner, didn't reveal the man's whereabouts to his police agency. "In another case, we were able to uphold the discharge of a police officer with a substance-abuse problem that was affecting his work. Despite repeated chances, he had failed to correct the problem.

"As the son of a police officer, I understand the importance of the code of ethics for law-enforcement officers."

While representing defendants these days, Turner is committed to improving the workplace for everyone.

"The law is pretty well settled," he says. "Employers know what they can and can't do." Where there is confusion on an employer's part, Turner and his team offer assistance, "to help them create a work environment that is free of bias and provides employees with equal employment opportunities.

"Occasionally, mistakes occur. A great deal of my value to my clients is helping them to correct the mistake so they can continue to manage their core business rather than spending time litigating matters."

Like Golden, Turner sees most disputes settled before they come to trial.

"I think the trend toward alternative dispute resolution has been good for our clients in many cases," he notes. "I'm finding, however, that lawyers and clients are re-evaluating the efficacy of alternative dispute resolution for certain types of cases." Turner questions whether mediation offers the same protections for both sides in more traditional settlements or trials. "It's possible that the pendulum may swing back a bit toward conventional litigation."

Regardless, it seems inevitable that workers and their bosses are destined to continue finding themselves on opposite sides of many issues as they confront a mutually uncertain future. "Labor and management have both been challenged by the globalization of the economy and the opportunities it provides for growth, along with the obstacles created by the need to change old practices in order to meet global competition," Turner says. Rising health-care costs and the need for more efficiency are among the challenges.

These are particularly significant issues in the dramatic ebb-and-flow economy of the metro Detroit area. The automotive industry is a prime example of a sector that has struggled to stay afloat.

"Growing up in southeastern Michigan gives me a unique perspective on the way labor and employment law impacts the economy and the quality of life in the region," Turner says. "In order for our manufacturing industry to be

"I had my first case with Joe approximately 30 years ago. I have always found him to be affable, approachable and completely professional. Joe can also be rather inventive when it comes to finding a solution to issues/problems that impede a settlement. The only problem I have ever had with Joe (and I have told him this to his face) is his penchant for believing that every case he has is worth $1,000,000 or more. Seriously, Joe is a great role model for younger attorneys who may be trying to figure out how to practice law." Happy Birthday!

- William Moore, Clark Hill PLC

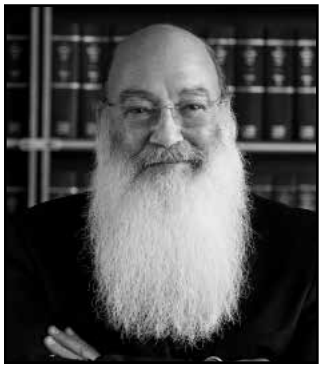
healthy and provide jobs, there has to be a delicate balance between creating a good quality of life for employees and ensuring that employers can receive a return on investment that will allow the industries to continue to be viable."

Turner also has a passion for equality—which has inspired civic and political activism.

"Reggie is certainly a leader in the community," says Casandra Ulbrich, senior director of development at Wayne State University and an elected member, along with Turner, of the Michigan State Board of Education. Ulbrich points to Turner's opposition to a proposed ban on affirmative action, which was on the ballot when he ran for the Board of Education. "He risked his own political race to help out in this other cause that he felt so passionately about," says Ulbrich.

Despite a long list of civic activities, Turner never takes his eye off the ball. "Employment and labor law is just a fascinating area," he says. "In addition to the dollars-and-cents issues, there are human stories involved in almost every case. While the issues are complex, they never take you too far away from people."

On that point, Reginald Turner and Joseph Golden see eye to eye.



The Study of Law

By Joseph A. Golden,
President of the Macomb Bar Association

One of the last large gatherings I attended before the pandemic hit was my grandson's high school graduation from Utica Community Schools. Each valedictorian, having maintained a 4.0 or above, had his / her name, college and major area of study announced to the audience. Out all those smart kids, forty five in numbers, no one declared pre-law as an undergrad major. A year earlier, same high school, older granddaughter, this time thirty-five valedictorians, only one pre-law – my granddaughter.

Over two years, one out of one out of eighty – why? What have we done or failed to do as a profession that has intelligent young adults at least in my sampling, looking for careers in medical research and engineering, but not law?

Is it the image? The public sees and hears too much of Michael Cohen and Rudy Guliani, and not nearly enough of Ruth Bader Ginsburg? Certainly, every profession has its own bad actors. So, I don't see those two guys as the reason my grandchildren's peers have no interest in being lawyers.

So why no interest? I believe kids today have no idea what a lawyer does or could do. Unless they've had an opportunity to live or work with an attorney in their formative years, how could they know? Although they've been going to a doctor since they could remember, young people usually don't form that type of bond with a lawyer and that doesn't necessarily change once they've reach adulthood. Many of my clients ages 30-50 had never been to an attorney before our meeting. All of this leads to the question: What will this Bar Association do to improve the image of this honorable profession in the communities we serve?

Answer: We've already started. Last year, before Covid-19, your Bar Association had agreed to assist the Romeo Community Schools in 1) Establishing a curriculum and 2) Providing professional expertise to facilitate the establishing of an academy for pre-law education and law enforcement within their K-12 programs.

Although that project has been slowed by the pandemic it is a clear indication that the Macomb Bar Association is prepared to invest it's collective expertise and make considerable individual commitments to the Romeo Schools and other school districts within Macomb County for the betterment of the citizens we serve and the profession we respect.

Stay safe.
Joseph A. Golden

Foundation's Scholarship Spotlight: Taylor Wells

By Dana M. Warnez, Immediate Past President of the Macomb County Bar Foundation

Due to the pandemic, the Foundation was unable last spring to appropriately feature an update about our scholarship program. Now, as the 2020-2021 Foundation year begins in full swing, we are glad to be able to introduce you to the 2020 Trustees Scholarship recipient, Taylor Wells.

Ms. Wells, a lifelong Warren resident, expects to graduate from Wayne State Law School in May 2021. She is a graduate from MSU/ James Madison College, and attended the International Academy located in Warren, Michigan.

While in law school, Ms. Wells has sought out a wide range of practical experiences in different areas of law and throughout the tri-county area, which should serve her well as she chooses her next professional opportunity. She has worked as an intern at Wayne County Prosecutor's office, a student assistant researcher with the Office of Regulatory Reinvention in Lansing, a law clerk at Darren Findling's Law Firm in Royal Oak, and a summer associate at O'Reilly Rancilio in Sterling Heights.

In addition to the practical experience she has garnered, Ms. Wells has also contributed significantly within her academic community. She is the article editor of The Journal of Law in Society, competed in mock trial programs, and is the Secretary of the Women's Law Caucus, all while maintaining a high academic rank and GPA at Wayne State Law School. The Foundation is super pleased to help Ms. Wells as she finishes school and establishes herself in the legal community, by awarding her the Trustees Scholarship for 2020.

This year, in addition to the Trustees' scholarship, we hope to also award our memorial scholarships awarded in the name of Kimberly Cahill and Philip F. Greco. Please consider becoming a Trustee and donating to our Gala fundraising to keep up our tradition of helping deserving local students launch their professional lives in Macomb County and beyond. Also, if you know of talented, hard working, law school student leader, encourage her or him to fill out one of our scholarship applications.

Some Evidence

By Carl J. Marlinga, Circuit Court Judge

Lawyers tell me that some of my more useful articles are the ones derived from actual trial experiences. That makes sense because real life scenarios, as opposed to law school hypotheticals, always involve inconvenient and messy details that blur the bright line application of the rules; the analysis, therefore, must be more nuanced and layered. Because the exercise is more interesting, the lessons remain with us longer.

A recent bench trial in a criminal case unexpectedly brought out a detail of the excited utterance exception to the hearsay rule, MRE 803(2), which I would like to share. The rule allows admission of a hearsay statement if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The facts of the case were that the police were called to a house to respond to a report of domestic violence. As the officers were approaching the house at about 3:00 A.M., they heard a male voice say, "Do you want me to hit you again?" When they entered the home the officers observed one man and two women in a small bedroom. They were dressed in street clothes. One woman with injuries to her face was standing on the bed with her back to a wall. The man was standing at the foot of the bed with his hand raised displaying a clenched fist. The other woman, without visible injury, was standing near the man. On the top of a dresser next to the bed there was a handgun. Of the three individuals in the bedroom when the police walked in, the man appeared to be the one closest to the gun – basically within arm's length.

The officers separated the three individuals and placed the man under arrest for domestic violence. A computer check also revealed that the man had a felony record.

The police questioned the two women about what had happened. The women reported that the man had assaulted his girlfriend which was the woman who had been found standing on the bed with the visible injuries. As the women told their stories they displayed all of emotions of just having gone through a stressful, traumatic event. The police then questioned the women about the gun. They responded to the police questioning by saying that the gun belonged to the man who committed the assault, and that he stayed at the house regularly, and that the room in which the gun was found was his bedroom.

The case went to trial on two counts: (1) felon in possession of a firearm, a 5 year felony, and (2) domestic violence, a 93 day misdemeanor. Despite diligent efforts by the prosecution, the two women who witnessed and reported the event did not show up for trial.

At trial, the prosecution was able to fairly easily put in the proofs regarding the assault. The police testified to the one male voice heard making the threat. (He was the only male found in the house.) The officers also testified to observing the injuries to the victim and the defendant holding up a clenched fist as they entered the room.

Without the two women being present in court to testify, however, the assistant prosecutor had to find a way to admit the statements given by the women to the police officers attesting to the defendant's possession of the gun.

The assistant prosecutor carefully laid the foundation for admission of the excited utterance. It was

clear that the rule was well satisfied with respect to the requirement that the declarants were still under the stress of excitement caused by the assault. The defense still objected, asking for exclusion of the statement.

The defense, of course, was right. I ruled that the statements of the women were hearsay and that the excited utterance exception to the hearsay rule was not applicable with respect to the ownership or possession of the gun.

The rule speaks directly to what may be admitted; namely, testimony regarding the specific event that caused the stress and excitement. In this case the stress and excitement were caused by the man hitting one of the women. The gun was not used in the assault, and, accordingly, nothing about the gun's presence at the scene contributed to the stressful event, nor was the gun's possession and ownership related in any way to the excited utterance. If the police had heard a male voice saying, "I am going to blow your head off," and/or if one of the women had reported that the man had threatened to shoot her, then, of course, the excited utterance would have been admissible on the topic of the ownership, possession, or use of the gun.

The fact that a person is exhibiting signs of stress and excitement does not mean that every word that comes forth from his or her mouth is admissible as an excited utterance under the rule. Only the circumstances of the event that produced the stress and excitement qualify. In *People* v *Gee*, 406 Mich 279, 278 NW2d 304 (1979) the Supreme Court held that to come within the excited utterance exception to the hearsay rule, an out of court declarant's statement must meet three criteria: "(1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion." (406 Mich 279, 282.) [Emphasis added.]

Applying these criteria would not appear to be so difficult, but trial courts do sometimes go off the rails to admit statements once it has been established that the declarant is in an excited state. In *People* v *Flum*, Docket Nos. 229084, 229129, unpublished opinion of the Court of Appeals, May 20, 2003, 2003 WL 21186603, the Court of Appeals affirmed a murder conviction but noted that admission of a co-defendant's statement as an excited utterance was error. Two perpetrators, Thomas Flum and Mary Beth Keimer, were charged with the murder of Keimer's mother. About twenty hours after the murder, the police arrested Flum. While being transported after his arrest, Flum was in a highly agitated state. Despite being given Miranda warnings, Flum could not stop talking. In talking about the events leading up to the homicide Flum said that it was "Mary Beth's plan" and that she stood to inherit $40,000 to $50,000 if "her mother was out of the way."

The trial court judge amazingly admitted these statements by Flum as statements of a co-conspirator under MRE 801(d)(2)(E) and as excited utterances under MRE 803(2). The Court of Appeals quickly and appropriately dismissed the argument that these were statements of a co-conspirator. To be admissible the statements must be made "during the course and in furtherance of the conspiracy." Once a person is arrested, it is no longer possible to argue with a straight face that the statements meet that two-pronged test.

As to the excited utterance analysis, the Court of Appeals noted that a declarant's excited state is not enough. The excitement and stress must relate to the circumstance of the startling event. The Court noted that although a person could possibly be under the stress and excitement of having committed a murder after twenty hours had elapsed, the proximate cause of the stress and excitement for Thomas Flum was far more likely the fact that he had been placed under arrest.

Although the trial court's admission of Flum's statements were clearly erroneous, the Court of Appeals held that the error was harmless because of overwhelming evidence of Mary Beth Keimer's guilt – including her confession.

With respect to the trial before me, the astute reader will have identified a co-occurring Sixth Amendment Confrontation Clause problem under *Crawford* v *Washington*, 541 US 36; 124 SCt 1354; 158 LEd2d 177 (2004) and *Michigan* v *Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed2d 93 (2011). Although answers to police questions at the scene of a crime may be admissible in limited circumstances (i.e. where the police questions are necessary to assess the emergency) statements of witnesses that go beyond what is necessary to assess the emergency are regarded as testimonial in nature. In this case, I determined that when the police moved the focus of the investigation from the assault to the separate inquiry as to who owned the gun, the answers shifted from the basic information that would be allowable under *Bryant* to testimonial responses that are prohibited under *Crawford*.

But now let's turn to some of the nuances that I referenced in the first paragraph of this article. Once I ruled that the statements of the victim and the other woman could not come in as excited utterances with respect to the possession of the gun, the assistant prosecutor moved to amend the information to at least

save the assault charge. Remember the case had been charged as a felon in possession of a firearm and as a domestic violence. Without the testimony (or admissible statements) of the two women there was no way for the prosecution to establish that the victim was a current or prior girlfriend of the defendant. Because a misdemeanor domestic violence charge carries the same 93 maximum penalty as an assault and battery, the prosecutor wisely moved to amend count two of the information to charge the crime of assault and battery – which is essentially the same charge as the domestic violence misdemeanor but without the relationship element. The defense had no objection because at that point defense counsel sensed the impending victory on the felony charge which was obviously the most significant issue in the trial. The case ended with my finding the defendant not guilty of felon in possession of a firearm but guilty of assault and battery. Defense moved for immediate sentencing, and the defendant was sentenced to 93 days in jail with credit for 93 days time served.

An interesting question which was never addressed (because neither side cared) was whether the excited utterances of the two women could have been used to establish the relationship element for the domestic violence charge. (This could have been an issue of some importance if, hypothetically, the defendant had been charged with an enhanced domestic violence felony because of prior DV convictions.) It would certainly be possible to argue that the victim's description of the beating at the hand of her boyfriend would be part of one continuous flow of information relating to the assault – given while she was still under the physical pain and emotional stress of having her loved one inflict an injury upon her. I think that her statement would have been admissible for such purposes. Likewise, I think that under *Michigan* v *Bryant* the responses to the police questions would have been admissible because the police questions about the circumstances of the assault (as opposed to possession of the gun) would of necessity involve a need to understand the relationship that brought the perpetrator and the victim together in the same house, in the same room, in the middle of the night.

For those of you who are wondering why the defendant's possession of the handgun could not have been proved in some other way, here is the explanation: The gun was never tested for prints, and the room was never searched to find out if the defendant had any of his belongings in the room (clothing, identification, photographs, or other personal items.) The usual ways, therefore, to show constructive possession were unavailable. Additionally, the defendant's address at the time came back to a house in Detroit. Other than the statements of the two women, the prosecution had nothing.

Oh yes, there was one weak argument that when the police entered the bedroom they found that the defendant was within an arm's length of where the gun was lying; but the room was so small, and the movement of the occupants so dynamic, it was anybody's guess as to who really owned or possessed the weapon. This was not even close to evidence establishing guilt beyond a reasonable doubt.

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Pro Bono? What's a Private Practioner to do?

Grace J Crivello, Law Offices of Fischer, Garon & Hoyumpa and Director of the Young Lawyers Section

The State Bar has designated October as pro bono month. In Michigan, we don't have a state bar requirement to engage in any set number of pro bono hours per year. Each attorney is encouraged to engage in pro bono services and there are a number of ways in which attorneys can get involved with pro bono cases. The Voluntary Standard for Pro Bono Participation was adopted by the State Bar Representative Assembly and states:

All active members of the State Bar of Michigan should participate in the direct delivery of pro bono legal services to the poor annually by:

1. Providing representation without charge to a minimum of three low income individuals; or

2. Providing a minimum of thirty hours of representation or services, without charge, to low income individuals or organizations; or

3. Providing a minimum of thirty hours of professional services at no fee or at a reduced fee to persons of limited means or to public service or charitable groups or organizations; or

4. Contributing a minimum of $300 to not-for-profit programs organized for the purpose of delivering civil legal services to low income individuals or organizations. The minimum recommended contribution level is $500 per year for those lawyers whose income allows a higher contribution.[1]

The voluntary standard also recognizes that an attorney recognizes that individual attorneys may not be able to provide direct client representation and allows for the standard to be met by serving on a committee or board of directors for a legal aid or legal series program, providing training through a structured program, engaging in community legal education programs or advising non-profit, or public interest organizations. The State Bar publishes a list of eligible programs to which such services or donation may be provided.[2]

In addition to this voluntary standard, the Michigan Rule of Professional Conduct 6.1 states that it is the ethical responsibility of every Michigan attorney to render public service legal interest which includes pro bono legal services.[3] This tracks the American Bar Association's Model Rule 6.1 which encourages each attorney to aspire to providing 50 hours of pro bono service per year.[4]

As noted on the State Bar of Michigan's website, the pro bono movement has a long history which first began in larger metropolitan cities in the early 1990s and moved to many mid-sized cities in the 1960s. The pro bono movement led to the establishment of local legal aid offices in many major cities, beginning in Detroit and Grand Rapids. In 1983, a Legal Services Corporation federal regulation was first adopted. This required federally funded legal aid programs to establish and maintain pro bono programs, many of which were joint programs with the local bar associations. [5]

Pro bono work has substantially increased since the adoption of this regulation, but the federal funding has remained stagnant for the most part. Many of these LSC funded legal aid programs work on limited budgets with attorneys who carry a heavy caseload. These full-time staff positions have much lower salaries when compared to attorneys in private practice. The amount of people in America who need these services has only grown; in 2010, the number of people living in poverty in Michigan increased by 50% from the 2000 levels. The national report published by LSC in 2005 and updated in 2009, estimated that legal representation was available for only 1 person in 5 who faced a civil legal problem.[6] With the Covid-19 pandemic, we are again facing a potential recession and a potential avalanche

of debt collection, homelessness and domestic cases similar to that seen post-2008 recession.

The promise of Public Service Loan forgiveness in 2007 was a welcome relief to many young attorneys who began at legal aid offices. According to the Public Service Loan Forgiveness Program, a borrower must make 120 qualifying payments while working for an employee who qualifies for the public service program. However, according to a September 21, 2018 CNBC article, only 96 people out of the 30,000 people who applied for public service loan forgiveness in 2017 actually received the forgiveness offered.[7] This included individuals from all professions and did not make a distinction between attorneys and other professionals who qualified. This was a crushing blow to many young attorneys who believed that the exchange of a lower salary for the eventual loan forgiveness would be the best option for them. Many of these young attorneys were able to follow their dreams of working in public service while relying on the fact that such forgiveness of debt would be forthcoming.

As a young attorney, I made this choice. I graduated from Michigan State University College of Law in 2013, while the world was trying to recover from the 2008 crash. Throughout college and law school, I dreamed of working in public interest and helping people who were most in need of assistance. I was given the chance to work at the Counsel and Advocacy Law Line (CALL) of Lakeshore Legal Aid as my first position as an attorney. I worked on the hotline assisting people across the lower peninsula by providing intake and brief legal advice; CALL is a necessary triage for providing legal services. It acts as a way to provide brief service and to get cases with a high priority (generally defined as having a barrier for accessing justice such as unable to represent themselves, experiencing domestic violence, or a potential language barrier) to the local legal aid offices. The attorneys who staff the hotline are some of the most generous, experienced, knowledgeable and compassionate people that I have ever have the pleasure to meet. I was able to move to a litigation position in the Macomb County office of Lakeshore Legal Aid where I was able to first serve seniors and those living in poverty. Lakeshore Legal Aid expanded while I was there, grants were shifting and Lakeshore Legal Aid is now able to serve those in poverty and seniors in the tri-county, Bay County area and the Thumb Counties. Lakeshore Legal Aid and the other local legal aid offices like it (Legal Services of South Central Michigan, Legal Services of Western Michigan and Legal Services of Northern Michigan, along with their related legal clinics and smaller organizations) are extremely important organizations to handle the deluge of clients who require legal services.

As a staff attorney at Lakeshore Legal Aid, I was able to carry a caseload of a mixture of litigation, brief service, estate planning and limited negotiation to attempt to resolve cases without litigation. Lakeshore Legal Aid also provided direct outreach by going to senior centers in the local Macomb community once a month and going to the local courts to engage in clinics for landlord/tenant matters. As a young attorney, I was able to gain invaluable experience in a number of civil legal areas and was able to gain courtroom experience very quickly. My experience formed the basis for my practice and prepared me for civil legal practice. Unfortunately, given the state of the Public Service Loan Forgiveness, I was not able to remain and transitioned to private practice. Even though I am no longer a staff attorney, I still use the lessons learned on a daily basis.

So, where do we go from here? How are private attorneys able to manage the voluntary standard with a busy practice? Also, how do we manage to find cases which fit into our practice and experience? The State Bar has a step by step guide to how to find pro bono cases and to partner to receive these cases. In the tri-county area, Lakeshore Legal Aid has a Private Attorney Involvement (PAI) component.[8] Lakeshore Legal Aid even has an online form to express your interest in taking on a domestic case, helping with a clinic, representing tenants in 36th District Court and several district courts in Macomb county or representing clients in Bankruptcy. Even if you do not practice in one of those areas, Lakeshore Legal Aid will likely be able to find a case in an area you are comfortable taking on.

In general, a legal aid office receives an intake, determines the eligibility of the client for services and refers priority cases to the supervising attorney who may determine that the staff attorneys are not able to take the case due to the current caseload. These cases which are priorities but are not able to be placed with a staff attorney, are referred to PAI. The PAI coordinator reaches out to attorneys on his or her roster who meet the practice area or specialty of the priority case. You will receive a call from the PAI coordinator and determine if you wish to request this file and allow the client to contact you. From there, the case proceeds

in a normal manner, the potential client contacts you and you meet with him or her. You determine if you wish to take the case and the client determines if she wishes to retain you. If you are retained, you contact the PAI coordinator to advise him or her. But what about malpractice coverage? You carrier may extend coverage to a pro bono case. If it does not, typically the LSC organization's malpractice covers volunteer attorneys and if this is the case, it will be extended to your work on this file at no cost to you. If it does not, the State Bar's MI-LAPP program may be able to offer coverage.[9] From there, you work with the PAI coordinator, track your hours to ensure that the LSC program is able to report this to their funders, apply for waivers of fees and costs for indigent clients and follow the guidelines of the LSC program for reimbursement of any out-of-pocket costs which may exist. You may need prior approval, so it is crucial to remain in contact with the PAI coordinator.

But what if you generally represent corporate clients rather than handle domestic matters? Or if you have a practice which is 90% criminal defense? Many pro bono programs offer support and training to their volunteer attorneys. There are in-house sessions, jointly sponsored programs or webinars. The most common areas for low income clients to require legal services are domestic, landlord-tenant, debt collection defense, public benefits and estate planning. The State Bar also provides training in these areas. On a personal note, if any MCBA members have any questions about these areas, I am always available for questions or consultations. Volunteer attorneys may also find support through the American Bar Association[10], Michigan Legal Help (michigalegalhelp.org)[11], Michigan Poverty Law Program[12], the Pro Bono Institute,[13] and ProBono.net[14].

And if you can't afford the time but want to make a difference? These organizations run on a grant schedule. It is an intensive process and involves rigorous federal scrutiny for those who receive funds from LSC. If you can't contribute the time, the Access to Justice Fund is the best place to make a financial contribution.[15] The Access to Justice Fund (ATJ) is a partnership with the State Bar of Michigan, the Michigan State Bar Foundation and Michigan's non-profit civil legal aid. These contributions are deductible when made to an eligible organization and they coordinate the private support of attorneys for the legal aid programs. The Michigan State Foundation passes 100% of gifts designated to specific programs directly through to the program and any income from the endowment is distributed according to the grant application and evaluation process. These funds are used to assist in meeting the overwhelming need.

We are all struggling in these current times. We are all hoping that our loved ones are safe, that our practices will continue and that we will survive these unprecedented times. But there are people who are dealing with this current pandemic and trying to negotiate homelessness, debt collection, domestic violence and trying to plan for their medical and financial needs should they become incapacitated. If you are able to give time, please do. If you are able to make a donation, please do. If you are only able to triage clients and refer them to the appropriate legal aid programs, please do. The intake hotline for CALL is 1-888-783-8190. Clients may also go to michiganlegalhelp.org/mlh_intake_call to fill out an online form to determine their eligibility. If you take nothing else from this article, please remember this number and website. Once a client calls or fills out the form, their case will be evaluated, and the local legal aid will determine their eligibility for services and whether a case can be placed. And maybe, you will be able to receive that phone call or email from the PAI coordinator to take a case and help ease the burden a bit.

Endnotes

1 https://www.michbar.org/programs/atj/voluntarystds

2 https://www.michbar.org/file/mastersection/pdfs/probonomenummls_cweb2.pdf

3 https://courts.michigan.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf

4 https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service/

5 https://www.michbar.org/programs/probonomanual/pbmsection1

6 http://www.lsc.gov/sites/default/files/lsc/pdfs/documenting_the_justice_gap_in_america_2009.pdf

7 https://www.cnbc.com/2018/09/21/the-education-department-data-shows-how-rare-loan-forgiveness-is.html

8 https://lakeshorelegalaid.org/pro-bono-legal-services/

9 https://www.michbar.org/file/programs/atj/pdfs/probonoinsurancecoverage.pdf

10 https://www.americanbar.org/groups/probono_public_service/

11 https://michiganlegalhelp.org

12 https://mplp.org

13 http://www.probonoinst.org

14 https://www.probono.net/network/

15 https://atjfund.org/how-to-give/

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