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Official Publication of the Macomb Bar Association

January 2020



# 2020

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# Bar Briefs



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# New Day Rising

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

Happy new year! Hope your year is off to a great start! The beginning of the year is always a busy time for lawyers. Typically, business picks up briskly after the holidays.

Domestic filings are statistically highest just after New Year's. I assume people's resolutions are easiest to fulfill in January as opposed to June. Additionally, many people experience financial issues, including financial hardship, that

tends to be exasperated this time of year. As such, bankruptcy filings are also statistically higher in the beginning months of any year.

I myself have been practicing bankruptcy law and debt resolution for over 15 years. In 2004, while in law school, I obtained employment at a bankruptcy firm in Warren. This was prior to the major amendments to the bankruptcy code implemented in 2005 and the impending financial crisis of 2008-2009. It was a busy time for bankruptcy practitioners. While the economy has drastically improved in the years since the recession, clients still need representation in a variety of debt related matters.

When a client comes to my office with a debt related issue, I begin by analyzing their

financial situation to determine whether bankruptcy protection is an option. Whether bankruptcy is a feasible option requires a detailed analysis and

a thorough investigation of all assets and liabilities. Potential clients seeking to file personal bankruptcy typically have two options they can file either a Chapter 7 or Chapter 13. Business debtors can avail themselves of the protections afforded them

under Chapter 7 or Chapter 11. What route a client takes depends on many factors and please know this article is not meant to be a comprehensive review



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of the bankruptcy code or of the qualifications for filing a bankruptcy. That type of analysis would not be feasible within the confines of this publication. The first step is to ascertain what relief if any I can provide to a potential client and whether that relief is feasible given their income, expenses, assets, and liabilities. Questions for potential clients include: Has the client defaulted on his or her mortgage? Has the client's wages or accounts been garnished? Have the creditors begun collection? Is the potential client involved in ongoing litigation? Does the client have assets that are potentially at risk? Has the creditor begun harassing the client? These are all issues to be addressed at the first meeting and typically involve a thorough investigation of the debtor's finances. I ask potential clients to bring tax returns, bank statements, pay stubs, and a list of all monthly expenses. This provides me with a better picture of an individual's financial situation. This picture must be thoroughly analyzed in order to ascertain whether a party is a good candidate for bankruptcy.

Next, I analyze the debtor's assets in order to ascertain whether these assets may be at risk of garnishment, seizure, foreclosure, or any other post judgment remedy a creditor may have available to them. Timing is critical as most clients typically contact my office post judgment or with an impending financial crisis. Going through a debtor's assets is at times difficult and a thorough asset search is mandatory. Due diligence is critical as disclosure of any and all assets and liabilities are a strict requirement in the bankruptcy court. Many times, clients are unaware of the risks imposed by filing a bankruptcy and one must be vigilante when detailing a client's assets. I typically ask potential clients a list of questions not unlike the questions asked by the bankruptcy trustee at the creditor's exam. These questions are designed to

elicit answers pertaining to not only assets currently in the possession of the debtor, but assets that may have been transferred prior to the bankruptcy. Assets transferred prior to filing a bankruptcy may under certain become property of the bankruptcy estate if the trustee can establish that the transfer was made within a certain time frame prior to the filing or that a transfer was made fraudulently to hinder and or delay creditors. Again, a thorough analysis of these issues would require a great deal more time and space than we have available in this publication. Safe to say that these are complicated issues that take a good deal of dedication and due diligence. Determining whether a potential client is a good candidate for bankruptcy involves time, effort and diligence. At times, a debtor does not qualify for bankruptcy and debt settlement is the best remedy. Debt relief is a many faceted legal field with opportunities to assist a great number of people in a truly critical aspect of their lives.

*Jonathan C. Biernat*

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# One Short Dance

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

As humans, we have devised many ways to keep track of time. Seconds lead to minutes to hours to years to decades, centuries, millennium and millennia. When I was a young buck, my schoolmates and I could tell time by the passing of the train that ran parallel to our school. And the church bells would ring out in song every hour. We have invented numerous tools to track time; clocks, watches, phones and that little space in the lower right-hand corner of your computer screen. Come on, admit it, you look there too frequently.

## So what do we do with our time?

As we enter this new decade we call 2020, take a calculated piece of time and consider what you are doing with your time. If there was one repeating conversation that I had with multiples of people in 2019, it was about how difficult it was to squeeze in one more thing to do. And that makes sense considering that you are part of the most giving profession. You continually give time to clients, family, and countless organizations. An old lyric that found its way back into my mind as we closed out 2019 was, "It Takes Time To Make Time". Such simple truth! It takes time to make time to do what we want to do! So, for whatever it's worth, I hope your new year is spent the way you want to.

As you consider the plethora of activities that you can spend your time on in 2020, check these out.

Saturday, March 7, 2020 is the day that 16 High School teams will take over the 16<sup>th</sup> Circuit Court for the Foundation's Regional High School Mock Trial Tournament. The only problem that we have had with this event is too many volunteers. So, if you want to get in on the action, sign up to volunteer fast. It truly is an incredible event with "trials" going on in eight courtrooms. In 2021, the National Finals will be held in Kalamazoo!

In November, the Foundation congratulated its 2019 Law School Scholarship recipient, Joseph Zannetti, Kimberly M. Cahill Memorial Scholarship recipient Daria S. Solomon, and Philip F. Greco Memorial Scholarship recipient Marilyn Yousif. Applications for 2020 Law School Scholarships are now available. If

you know of a deserving 2L or 3L, take the time to point them to [Macombbar.org](http://Macombbar.org) where detailed information is available. Deadline is St. Patrick's Day!

Did you know that your Foundation has awarded in excess of \$125,000 in scholarships since 2007? It truly is through the generosity of the Foundation's Trustees, the family of Kimberly M. Cahill and the family and business associates of Philip F. Greco that these scholarships continue to help the next generation of lawyers.

May 1 may seem far away, but that will be the day of the Foundation's annual Law Day event. This year, 1<sup>st</sup> through 4<sup>th</sup> graders will be challenged to create a poster depicting the 19<sup>th</sup> amendment. 5<sup>th</sup> through 8<sup>th</sup> graders will be challenged to write a one-page essay on women's right to vote. Three children in each grade will be presented with an award and a prize on Law Day 2020 in the Board of Commissioners auditorium that will be packed with their family, Macomb Judges and Foundation Trustees. If you have little ones in school, maybe you could take some time to explain to your principal / teacher the fabulous opportunity that Law Day brings to schools. We hope to increase participation and we could use your help.

As this issue of Bar Briefs is being put together several bar members, judges and elected officials are preparing to participate in an incredible Christmas Eve project. Steered by Laura Polizzi and Steve Steinhardt, and assisted by Fred Fox, the Salvation Army and Boston Market to name a few, it is expected that 300 homeless people will enjoy a Christmas dinner at the Rec Bowl. Thank you to all of the organizers, sponsors and volunteer servers.

So, as you consider how to spend time in 2020, keep in mind that your profession has many opportunities for you. The Association has several committees, sections and task forces that are designed to bring relevant benefits to bar members. Bring your ideas!

And, remember, we have one short dance on this planet, so dance the way you want!

# Macomb County Bar Foundation Scholarships Now Being Accepted

## Trustees Law School Scholarship

The Macomb County Bar Foundation Trustees Law School Scholarship is awarded to a second or third year law student who demonstrates a commitment to serve or contribute to the Macomb County legal community, a need for financial assistance, and high scholastic achievement. The \$3,000 scholarship originates from the generous contributions of the Foundation's Trustees.

## Kimberly M. Cahill Leadership Memorial Scholarship Continuing Her Legacy of Leadership and Education

The Kimberly M. Cahill Leadership Memorial Scholarship is to be awarded to a second or third year law student who is currently enrolled in law classes at any accredited Michigan law school. The recipient should demonstrate outstanding qualities of leadership and the ability to inspire and effectively lead others to a defined objective. The recipient must also demonstrate a need for financial assistance and an academic standing (3.0 GPA or above). This \$3,000 scholarship originates from the generous contributions to the MCBF's Kimberly M. Cahill Memorial Fund and honors the memory of Kimberly M. Cahill who passed away January 21, 2008.

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2. The Goodman-Sheikh Family: Saleema Goodman Sheikh motioning for the admission of her son Jaxon Goodman with son Welsey Goodman (left) and father Richard Goodman (right).

3. Michael Shopp being sponsored by his brother into the practice of law.

4. Klara Zierk being sworn into the practice of law.

4.



# Circuit Court Corner

*By Macomb County Circuit Court Administration*

As part of Macomb County's Indigent Defense Compliance Plan, the Macomb County Sheriff's Department has assigned one Sheriff's Deputy to assist in providing confidential meeting space for attorneys to meet with their in-custody defendants at the County Courthouse. Deputy David Hallison will be available during the Court's regular business hours to move in-custody defendants to confidential meeting spaces at the courthouse.



Please bear in mind that there may be some delays depending on demand, so please contact Deputy Hallison with as much advance notice as possible to facilitate your onsite confidential meeting. Deputy Hallison can be reached at 586-493-4874 (desk) or 586-629-8982 (mobile), or at [David.Hallison@macombcountymi.gov](mailto:David.Hallison@macombcountymi.gov).

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# Some Evidence

By Hon. Carl Marlinga,  
Macomb County Circuit Court Judge

Republican House members Devin Nunes and Doug Collins have asked appropriate questions in the impeachment inquiry, which, so far, the Democrats have brushed aside. They are (1) whether there is an actual crime with which the president could be

18 USC 1343, the use of an instrumentality of electronic communication in furtherance of a scheme or artifice to defraud is a twenty year felony. In 1988 congress amended the mail fraud and wire fraud statutes by adding section 1346 which expressly



charged and (2) whether there is admissible evidence (i.e. non-hearsay evidence) that could be admitted in a prosecution for the crime. I do not know why House Democrats are avoiding those questions; but there are answers. Actually, the answers are easy. They are *yes* and *yes*.

The actual crime is wire fraud. Under

defines the term “scheme or artifice to defraud” to include a scheme or artifice to deprive another of the intangible right of honest services. United States Attorneys now regularly bring these charges where it appears that an elected official has used the power of his or her office for his or her own personal benefit. See *United States v Brumley*, 116 F.3d 728 (5<sup>th</sup> Cir.

1997). If the public official acted with a dual intent, that is, if he is found to have acted for both a lawful and an unlawful purpose at the same time, if the jury finds that an unlawful purpose was present, it may convict the defendant. *United States v Woodward* 149 F.3d 46 (1<sup>st</sup> Cir. 1998) cert. den. 525 U.S. 1138, 119 S.Ct. 1026, 143 L.Ed.2d 37. A private citizen acting in conjunction with a public official may be adjudged guilty of a conspiracy, under 18 USC 371, in a prosecution for deprivation of honest services. *United States v Woodard*, 459 F.3d 1078 (11<sup>th</sup> Cir. 2006). In *Skilling v United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed 619 (2010), the Supreme Court re-affirmed the constitutionality of deprivation of honest services indictments under 18 USC 1346 for traditional bribery and kickback schemes involving public officials. An indictment against the president, therefore, would read like this:

As President of the United States Donald Trump had a duty to provide honest services to the United States in the way that he conducted foreign policy. In violation of that duty Donald Trump engaged in a scheme and artifice to defraud the United States in which he used his power as president to attempt to obtain a favor from the government of Ukraine to aid him personally in his re-election campaign. It was a part of this scheme that Donald Trump would indicate to the president of Ukraine that Donald Trump could be influenced to deliver military aid to Ukraine and that he could be influenced to schedule a White House visit with the president of Ukraine if the president of Ukraine would announce and pursue investigations which Donald Trump saw as helpful to his re-election. In furtherance of this scheme, Donald Trump entered into a conspiracy with Rudolph Giuliani and others to accomplish its purposes. In furtherance of this scheme and conspiracy Donald Trump, on or about July 25, 2019, committed an overt act when he spoke to the Ukrainian president by telephone, an instrumentality of interstate or international communication, asking for the favor set forth above. The actions of Donald Trump complained of herein are felony

violations of the criminal laws of the United States; namely 18 USC 371 (conspiracy), 18 USC 1346 (deprivation of honest services), and 18 USC 1343 (wire fraud); the penalty for which is imprisonment for up to twenty years.

If this would be the charge, then the Federal Rules of Evidence answer the next question as to whether there exists admissible evidence to prove the charge. From the testimony adduced so far, a judge would have to rule that statements attributed to Rudy Giuliani, and others, would be admissible against Donald Trump, since such statements are not hearsay.

Under FRE 801(d)(2) a statement which meets the following conditions is not hearsay:

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

The key link, of course, is Giuliani. He is only a private attorney for Trump, so he should not be meddling in Ukraine at all. Circumstantially, his presence in Ukraine provides some initial evidence that the president is doing something outside of normal diplomatic channels. The timing of the delay in the payment of the aid to Ukraine also supplies circumstantial evidence supporting the existence of a conspiracy. In addition, Ambassador Gordon Sondland testified that Trump personally told him to talk to Giuliani about these matters. From this evidence a United States District Court Judge could determine that the requirements of FRE 801(d)(2) are satisfied. (Chief Justice John Roberts would be the jurist who would make the call in an impeachment trial.) This determination is made pursuant to FRE 104(a) using a preponderance of the evidence

standard, rather than a beyond a reasonable doubt standard. *Bourjaily v United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed. 144 (1987). Note also, that unlike state practice (MRE 801(d)(2)(E) for example) the statements of the alleged co-conspirators “must [not *may*] be considered” in determining the scope and existence of the conspiracy. This is different than state practice where a conspiracy must be proven by separate and independent proof.

It would, of course, still be possible to admit the statements of an aider and abettor, or joint venturer, without charging a conspiracy under 18 USC 371. *United States v Rinaldi*, 393 F.2d 97, 99, cert den. 393 U.S. 913 (1968); *United States v Spencer*, 415 F.2d 1301, 1304 (7<sup>th</sup> Cir. 1969). Still, wherever possible, a wise prosecutor will charge conspiracy to better tell the tale.

The problem for the Democrats is that they are not thinking along these lines at all. Instead of trying to charge one distinct but provable felony, they are on a grand mission to bring down the Trump presidency, or at least wound him for the 2020 campaign, by alleging all manner of suspicions and grievances. They forget (or don't care) that this is a case which will be tried in the senate where it will take a two-thirds vote to convict. Since the Republicans hold a majority of senate seats, a conviction will necessarily depend on a goodly number of Republicans crossing party lines to convict the president. I still believe, even in this cynical age, that if the evidence of the commission of a felony is sufficient, there are enough Republican senators of good conscience who will vote to convict. If a distinct, real felony is not alleged and proven, however, the case will surely fail. This is not because Republican senators are too politically motivated. Rather the House Democrats, as the prosecutors in the senate trial, appear to be making a common prosecutorial mistake of overtrying their case. Typically, if a prosecutor mixes good charges with weaker charges, the impression on the jury hearing the case is to start doubting everything. In the reality of Washington, a Republican senator would be willing to put his or her political career on the line if felonious conduct is proven. If the charge is simply “abuse of power” co-mingled with bygone tales of the old Russian collusion investigation, there is no reason to believe that any senator will risk losing his or her senate seat.

There is one other problem which the Democrats created for themselves. Twenty-one years ago President Bill Clinton faced impeachment. His crime was perjury, and the evidence to conclude that he was guilty of perjury was overwhelming. The Democratic-controlled senate acquitted the president. At the time, the Democrats were peddling the talking point, which the country bought, that the impeachment was just about sex. It was not. It was about the Chief Executive of the United States committing the crime of perjury. It was about the person who appoints Supreme Court Justices and federal judges knowingly and purposely lying under oath. Yes, having sex with an intern does not strike at the heart of the republic; but having a president who is a perjurer does.

Whether the Republicans will follow the lead of the Democrats twenty-one years ago remains to be seen.

#### ENDNOTES

<sup>1</sup> At the time of writing this column for the January issue of Bar Briefs, the articles of impeachment have not yet been drafted. I could be surprised but my assumption is that the articles will not contain language tracking the wire fraud charge.

<sup>2</sup> It is at least arguable that President Trump's conduct, if proven, exceeds the misdeeds of Clinton when it comes to the impact on the republic. In Federalist 75, Alexander Hamilton warns of the use of presidential power for personal political gain: “An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents.”



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# Macomb Bar Association Sustaining Members

## Macomb Bar's 2019-2020 Sustaining Members!

These members renewals were received before Bar Briefs went to print. You too can be a sustaining member and enjoy added benefits while contributing to the success of the Macomb County Bar Foundation.

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