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September 2021

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Installation Celebration

*By Francesco Briguglio,
President of Macomb Bar Association*

It's September, the dog days of summer are finally behind us and it's beginning to feel a little bit like fall. For those of us with children of school age it's going to be the start of an in-person school year. Hopefully a sense of normalcy for all of us. September is also the month that the Macomb Bar traditionally hosts an installation that marks the start of a new program year and new bar leadership. This return to normalcy is scheduled for September 23 and I hope you accept this invitation to attend.

When I was selecting where to hold this event, I wanted to showcase what Macomb County is about and how our automotive heritage is so important to our county. Our local businesses, our Bar and even our Bench is supremely influenced by the automobile.

We all have fond memories and usually some fun stories of our first car. My first car was a hand me down from my parents. Even though it had a ton of miles, and it wasn't very fast, it was a memorable time. Having an automobile meant getting myself to work, driving to high school and making lifelong bonds via the open road. Cars, especially, in Macomb County can be a fashion statement. The make, model, or color adds a little to your personal style. This year I chose a unique Macomb County venue for the Installation Celebration that gives all that attend a chance to reminisce about their love of automobiles. The event will be held at Stahl's Automotive Museum, a hidden gem of Macomb County. Located in New Baltimore, Stahl's Automotive Museum was founded by Ted Stahl, an automotive businessman and lover

of all things automotive. His museum is home to over ten dozen classic automobiles and vehicles of historic significance. The museum also contains historic gas pumps and the most unique and rare collection of musical organs in the world.

The event includes food and an open bar catered by Lino's North and a short program where I will discuss my goals as bar association president. After the short program all are welcome to explore this incredible museum that celebrates an important part of our county's heritage.

I encourage you all to register for this event as early as you can. Visit MacombBar.org, respond to your emails or call the bar office.

I wish you the best I hope to see you soon.

Regards,
Frank



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Pandemic Pivots

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

It's interesting to me how the verb version of the word "pivot" has come to dominate over its related noun version. My guess is that, pre-pandemic, the majority of people were mostly familiar with the noun version of the word, especially as used here in Merriam-Webster; "the action in basketball of stepping with one foot while keeping the other foot at its point of contact with the floor." Along came the pandemic (or the Friend's pivot episode) and the verb seemed to take over. Conversations and newscasts gave us an earful on how important it is/was to "pivot" our actions. It seems that all organizations, businesses, and schools did in fact, change direction in order to continue to be successful. In a previous article, I shared with you how the Macomb Bar adapted and created frequent and meaningful connectivity between members and members and the bench. While we continue to adapt and adjust, we have also made permanent modifications in preparation for your return to the 16th Circuit Court building.

The "new" bar office features an open space concept to create a self-service office environment. Two walls were removed to create a welcoming type atmosphere, a throwback to the old Lawyer's Lounge, minus the shag carpet. And yet, it is an office equipped with everything you need for your practice. In one corner we created a copy station with all of the tools to sort, staple, white-out and paper clip your way to an organized file. In another corner we have a workstation with a new computer and up to date software. New furniture has been on order and with some luck will be delivered soon. Once the furniture is in place, you will have a comfortable place to recharge your batteries and refresh your energy with a cup of coffee, fresh baked goods, fruit and other snacks from the Snack Bar. We've also added a new television that will showcase episodes of the Foundation's "Legally Speaking." We are happy to provide you with a first of its kind private Zoom Room. A quiet environment that comes with a brand-new computer and webcam so

that you can complete your in-person responsibilities in the 16th Circuit Court then easily Zoom into other court matters. The Conference Room is also available for a maximum of six people and may double as a second Zoom Room using your own device.

Again, the concept behind these modifications is to create a self-service office environment. We welcome you to make use of "your office away from the office." Like any office though, there are some rules.

First and foremost, the Macomb Bar office is for **members only**. At this time, we are following the 16th Circuit Court's lead on masks. So, if masks are required in the court, they will be required in the Macomb Bar office. A maximum of six people are permitted in the office at any one time.

We ask that you observe the six-person capacity limit, clean up after yourself, do not put any liquids in the wastebaskets (use the sink in the hallway, restrooms, or drinking fountains to dispense of liquids), and respect employee's privacy and workstations. This includes cell phone conversations. These should be restricted to behind the closed doors of the Conference Room or Zoom Room.

The Conference Room is on a first come first serve basis. Clients must be accompanied by a member attorney and are restricted to the conference room only. Do not leave clients in the office, they will be asked to leave.

The Zoom Room is on a first come first serve basis.

The Copy Station is brought to you courtesy of the Macomb County Bar Foundation. If you experience copy jams or paper shortage, please ask for staff assistance. Do NOT attempt to repair the copier.

The Computer Station is also on a first come first serve basis. We ask that you be respectful of others that may

need to use the station. Do NOT add software, programs or files of any kind to the computer. Be sure to log out of your email before you leave.

To celebrate the re-opening of the court and the Macomb Bar office, we invite you to an Open House on Monday, September 20. We reached out to Todd Seeburger, owner of Seeburger's Cheeseburgers and he has agreed to return to Mt. Clemens to help us celebrate with a free lunch.

Starting at 11:30am Macomb Bar members and court staff are invited to stop by the courthouse plaza located between the Old County Building and the Court for lunch. We also invite members to stop by their "remote" office on the 4th floor.

Join me in thanking our Sustaining Members who have helped make the office enhancements possible.

2021-2022 Sustaining Members **As of August 10, 2021*

Christopher Alayan	Thomas Charboneau	Adil Haradhvala	Michael Monaghan	Eric Shepherd
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Peter Arvant	S. Wesley Compton	Julie Hlywa	Trish Oleksa Haas	Larry Smith
Heather Atnip	Joseph Cunningham	Roger Hyde	Catherine OMeara	Edward Souweidane
Mayssa Attia	Jeffrey Davis	Robert Ihrle	Timothy Orlando	Steve Sowell
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John Callahan	Aaron Geyer	Mark Metry	Ellen Schreuder	John Walus
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Technical Search Engine Optimization Audit: Domain and Page Errors

By Dawn M. Fraylick, Associate Executive and Communications Director of the Macomb Bar Association

The infrastructure of your website is called technical search engine optimization (Technical SEO) and if there are problems with your search engine optimization your website may not be indexed properly which will effect your websites performance. Make sure you are getting the most out of your website by completing a Technical SEO audit.

To begin a Technical SEO audit you need to specify your preferred domain name for your website, this means using www. or not using it. Using the www or not is a personal preference and has no SEO advantage. But you must be consistent in using the preferred domain. You can check your preferred domain name using Google Search Console. Start with a Google account, if you do not have one, you must create one. Once you have a Google account type in Google Search Console or <https://search.google.com/search-console/about> into your search engine and hit “Start Now.” The first step is to verify your domain. You can do this in two ways, domain verification or URL Prefix. Domain verification requires you to change the DNS records in your domain name provider. If you do not have access to your DNS records you can verify your domain through the URL Prefix. URL prefix has three methods to verify your domain: HTML file verification, HTML tag or Google Analytics. The Google Search Console wizard will walk you through these steps.

The Google Search Console is also used for finding and fixing indexing and crawling errors on your website which is the next step in your Technical SEO audit. Google will not index your website correctly and your website ranking will go down if you have these types of error on your website. The Google Search Console uses the index coverage report and URL inspection tool to do this. The Index Coverage Report shows you

which of your website pages have been successfully indexed by Google or if any pages have an error and have not been indexed. Click the Error tab under the Index Coverage Report page to see which pages have errors.

The possible errors are:

- Submitted URL has crawl issue
- Submitted URL not found (404)
- Server Error (5xx)
- Redirect Errors
- Submitted URL seems to be a soft 404
- Submitted URL marked no index
- Submitted URL blocked by robots.txt
- Submitted URL returns unauthorized request (401)

The “submitted URL has crawl issue” error simply means that some of the page resources (images, CSS, JavaScript) could not be loaded when Google tried to index the page. To make sure there is truly a crawl issue error, visit the page in a new browser window. If it loads without any problems, then the error was temporary. You can also click the “Test Live URL” button in the Google Search Console which makes Google refresh the error report to make sure the error is not permanent. If the error was temporary or refreshing the error report no longer recognizes an error, click “Request Indexing” to resubmit the page to Google. If you still have the “submitted URL has crawl issue” error than go back and click “validate fix” button and Google will email you with the results.

The next error, “Submitted URL not found (404)” or otherwise known as “Page not found” error, is the most common error and easy to fix. It simply means Google could not find the page at the time of indexing. In most cases this is a false alarm. But you want to make sure

that page is there by opening up your search engine and typing in the URL. If the page is found and you want Google to index it, go to the Google Search Console, click on the URL and click “Test Live URL” button, then “Request Indexing.” Then go back to the Index Coverage Report and click “validate.”

If this is a page that indeed returns a 404 code and you don’t want Google to index it, you can either leave it as is and Google will eventually remove the page from the index or redirect the page to another page on your website.

Another error that can occur is “Server Error (5xx).” This means Google could not access the pages because the server was not available at the time. To look into this error click “Inspect URL” in the Index Coverage Report, then click “Test live URL.” If it was a temporary error than you can request that Google re-index the page by clicking “Request Indexing.” If it was not a temporary issue you will need to further investigate your server or the page.

Pages on your website can also have a “Redirect Error” which means Google could not access your page because it goes or redirects to another page that is not found. You can fix this error by going into the Index Coverage Report, clicking “Inspect URL,” Click “Test Live URL,” fix the error by clicking “Request Indexing” and finally click “validate fix” in the Index Coverage Report.

Another error that is caused by a page not being found is the “Submitted URL seems to be a soft 404” error.

You can deal with these errors by removing them from your sitemap so Google will not access them, redirect the page to a valid page, or return a 404 code for pages that are not valid.

The “Submitted URL marked ‘noindex’” comes across in the Index Coverage Report as an error but it is not an error. This happens when the page developer adds a “noindex” tag to the page header instructing Google to not index that page. If the page was improperly tagged you can delete the “noindex tag” and “request indexing” to correct the mistake.

Another error that may show up but it technically not an error is the “Submitted URL blocked by robots.txt” error. This means a page was submitted to Google for indexing but in the sites robots.txt file, it instructs search engines to not index it. If the page should be indexed you can fix it by correcting the robots.txt file.

The last error that you can get on a webpage is “Submitted URL returns unauthorized request (401).” This means that the page is password protected. These pages should be deleted from your webpage’s sitemap, add a “noindex” tag on the page, or block it in your robots.txt file of your website.

Performing a Technical Search Engine Optimization audit can be intimidating. But fixing these errors will help your website become a better resource for you and your firm. Potential clients will be able to find your website easier and Google will rank your website higher.

UPCOMING YOUNG LAWYER EVENTS

FREE 5:01pm Social October 7, 2021 • Madison’s Pub in Mt. Clemens

Holiday Party: December 2, 2021 • Ernies

Meet the New Judges featuring Hon. Jennifer Andary and Hon. Kathleen Galen Coming Soon

Circuit Court Corner

By Macomb County Circuit Court Administration

Juvenile Neglect/Abuse Training Grant Funds

The Juvenile Division has grant funds to reimburse attorneys who are on the neglect/abuse list to attend child welfare related training to improve representation in child protective proceedings. Training requests must be pre-approved by Chief Referee Linda Harrison. Any questions can be emailed to linda.harrison@macombgov.org or nicole.faulds@macombgov.org.

Farewell to Dave Elias and Lisa Goldstein

Two longtime Friend of the Court employees have departed the office. David Elias, who began his career with the FOC in July 1979, has left to become a full-time private mediator. David was a Chief Referee with the Friend of the Court until his retirement in 2012. Since then, he has worked part time with the office as Family Court Counsel/Referee until August, 2021. Lisa Goldstein began with the Friend of the Court in June of 2002. She was promoted to a Referee position in 2006. Including her 11 years in private practice, Lisa had over 30 years of experience in the field of family law. The decades of experience both of these employees provided to the Friend of the Court will leave a void difficult to fill.

In Memoriam Former FOC Director Thomas McDonald

Former Friend of the Court Director Thomas McDonald passed away Saturday, July 31, 2021. Tom began his career with the FOC in 1971, and worked his way up to become FOC Referee, Chief Referee, and finally FOC Director. Tom was FOC Director for more than a decade, and led the office with a steady and compassionate hand. Tom had a tremendous knowledge of family law, and his patience and calming personality was an asset whether he was dealing with employees, or guiding litigants through difficult times. Known for his love of fast cars, and especially Thunderbirds, he was always impeccably dressed and respectful to everyone

he encountered. His son described him as sweet, with just a dash of the old salt and vinegar to make you remember just who it was you were dealing with. Tom's imprint on the Friend of the Court can still be found today through the remaining employees that were lucky enough to work with him, and the positive direction he charted for the office.

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Some Evidence

By Carl J. Marlinga, Circuit Court Judge

In June, 1966, Senator Robert F. Kennedy gave a speech in South Africa in which he observed that each time a person makes an effort to improve the lot of others, he or she sends forth a tiny “ripple of hope” that, when combined with the efforts of countless others, leads to meaningful change.

I am using this month’s evidence column to suggest a change in jury instructions that has troubled me (and many others) for decades’.

It is the jury instruction on “reasonable doubt” in criminal cases. We all know the time-honored definition contained in M Crim JI 3.2(3):

“A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that - a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case.”

In any basic course in logic or English grammar, we learn that the definition of a word must not include the word being defined. We would be rightly ridiculed if we defined the term “fair price”

as “just that - a price that is fair.” Tautologies are not permitted in definitions. Circular definitions are inherently unhelpful. Yet, in this most important definition in criminal law - one that determines freedom or incarceration, and sometimes life or death - we settle for this banal repetition of words.

I have listened over the years to how prosecutors and juries have logically reduced this

standard to something very close to a mere preponderance of the evidence. The thinking, whether urged by a prosecutor or fumbled into by a jury, goes like this:

“According to the express terms of this instruction, you are

permitted to convict the defendant of the charged crime even if you have a doubt, or several doubts. It is normal to have doubts about a serious decision. That happens all the time. What you have to do is to take each doubt and carefully consider it to see if it is reasonable. How do you do that? Well, how do you resolve any doubt that you encounter in everyday life? You think about it. You weigh the evidence pro and con. You apply reason; and you make a decision.”



By analyzing “reasonable doubt” in the way I have just suggested it is easy to see that a standard which is supposed to be the highest standard of proof easily morphs to a simple balancing of pros and cons; but a balancing test is quintessentially a preponderance of the evidence test.

I have often thought that a criminal defendant would be much better off with a “clear and convincing” evidence test. Let’s borrow the wording of civil jury instruction M Civ JI 8.01(b) to see how that would sound in a criminal case:

“The prosecutor must prove each element of the crime by clear and convincing evidence. This means that the prosecutor must do more than persuade you that evidence in support of an element is probably true. To be clear and convincing, the evidence must be strong enough to cause you to have a clear and firm belief that evidence in support of an element is true.”

Honestly now, if you were on trial where your liberty, livelihood, and reputation were at stake, which instruction would you prefer to have the jury decide your fate?

With a clear and convincing evidence test, a defense attorney could tell a jury that the evidence must be “clear.” With a clear and convincing evidence test, a defense attorney could tell a jury that they must be “convinced.” This is much stronger language than telling a jury that from the evidence, or lack of evidence, they may have doubts, and that they should decide whether their doubts are “reasonable.” It is little wonder that wrongful convictions occur with such regularity.

In England and Wales the definition of “beyond a reasonable doubt” has been simplified, so that judge can now tell a jury that they “must be sure that the defendant is guilty.” *Regina v Majid* [Court of Appeal, Criminal Division] [2009] EWCA CRIM 2563 (12 October 2009). This would be a welcome change in American law, but the road to reform in the United States is greatly complicated by the United States Supreme Court’s decision in *In re Winship*, 397 US 358 (1970), which constitutionalized the issue, making proof beyond a reasonable doubt a due process requirement. Trial judges, therefore, are not at liberty to fashion a standard other than proof beyond a reasonable doubt; but the Committee on Criminal

Jury Instructions, with the approval of the Michigan Supreme Court, could amend the definition.

Authorities are split as to whether reasonable doubt should even be defined. In the nineteenth century the Michigan Supreme Court held that the term is self-explanatory and requires no elaboration. *Hamilton v People*, 29 Mich 173 (1874); *People v Steubenvoll*, 62 Mich 329,28 NW 883 (1886). Those cases have never been expressly overruled; however, by order of the Michigan Supreme Court, effective March 1,2014, the Model Criminal Law Jury Instructions must be used in criminal trials if they are applicable, accurate, and requested by a party. Therefore, as a trial judge I must read the flawed definition of reasonable doubt to a jury if requested by a prosecutor even if I think it gives the state an unfair advantage.

In *Victor v Nebraska*, 511 US 1 (1994), the United States Supreme Court held that the constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so. In *People v Allen*, 466 Mich 86, 87; 643 NW2d 227 (2002) the Michigan Supreme Court held that, in the absence of request or objection, the failure to define reasonable doubt is not plain error:

[T]he concept of reasonable doubt is within the common understanding of jurors. It is sufficient that a jury is instructed that proof beyond a reasonable doubt is required in order to convict a defendant. A court’s failure to define the phrase “reasonable doubt” is not a plain error requiring reversal of defendant’s conviction.

My tentative solution to addressing the inadequacies of the reasonable doubt definition is to allow attorneys to argue (if requested) that there are three levels of proof in Michigan law: preponderance of the evidence, clear and convincing evidence, and proof beyond reasonable doubt. Unless convinced to the contrary by a prosecution argument in a given case, or instructed otherwise by the Court of Appeals, I would permit a defense attorney to read from the civil jury instructions (or I would read those to the jury myself) to fully apprise the jury of the different levels of proof. This would permit a jury to fully understand that proof beyond a reasonable doubt is, indeed, a higher threshold than proof by clear and convincing evidence. In other words, if the evidence is not clear and convincing, then it certainly is not proof beyond a

reasonable doubt. Of course, I would not ever require a defense attorney to adopt my way of thinking about this since there are hundreds of defense attorneys who are way smarter than I am and who have their own well thought out and extremely effective ways to overcome the flaws in the jury instruction.

My long-term hope, of course, is to have the Committee on Criminal Jury Instructions revisit M Crim JI 3.2(3) to come up with a better definition. Borrowing from some past iterations of the definition and alluding to the improvement noted above in British courts, I would suggest something along the line of the following:

The term reasonable doubt is self-explanatory and requires no further definition. However, in applying the standard to this case you are required to consider the following:

(A) A reasonable doubt is a fair, honest doubt, growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense.

(B) Be aware that the standard is not proof beyond all doubt or proof beyond a shadow of a doubt. Meeting such a standard would

require absolute certainty, which is normally not possible in human affairs.

(C) However, to satisfy the standard of proof beyond a reasonable doubt, evidence is not sufficient if it merely establishes that it is likely, or even very likely, that the defendant committed the crime. In order to find the defendant guilty beyond a reasonable doubt, you must be sure that the defendant is guilty. Even without an amendment to the definition by the Committee, it is permissible under the authority of *People v Allen*, supra, that the prosecutor and defense counsel could stipulate to use my suggested language, or their own substituted language, if they are troubled by the current definition of M Crim JI 3.2(3).

¹ See the discussion of the struggle and conflict over the years regarding this instruction at *Michigan Model Criminal Jury Instructions with ICLE Commentary, November 2020 Update, Commentary to M Crim JI 3.2 pp 64-65 and Kenneth Mogill's comment in 2 Gillespie Michigan Criminal Law & Procedure, section 662.50 at 415 (2d ed).*

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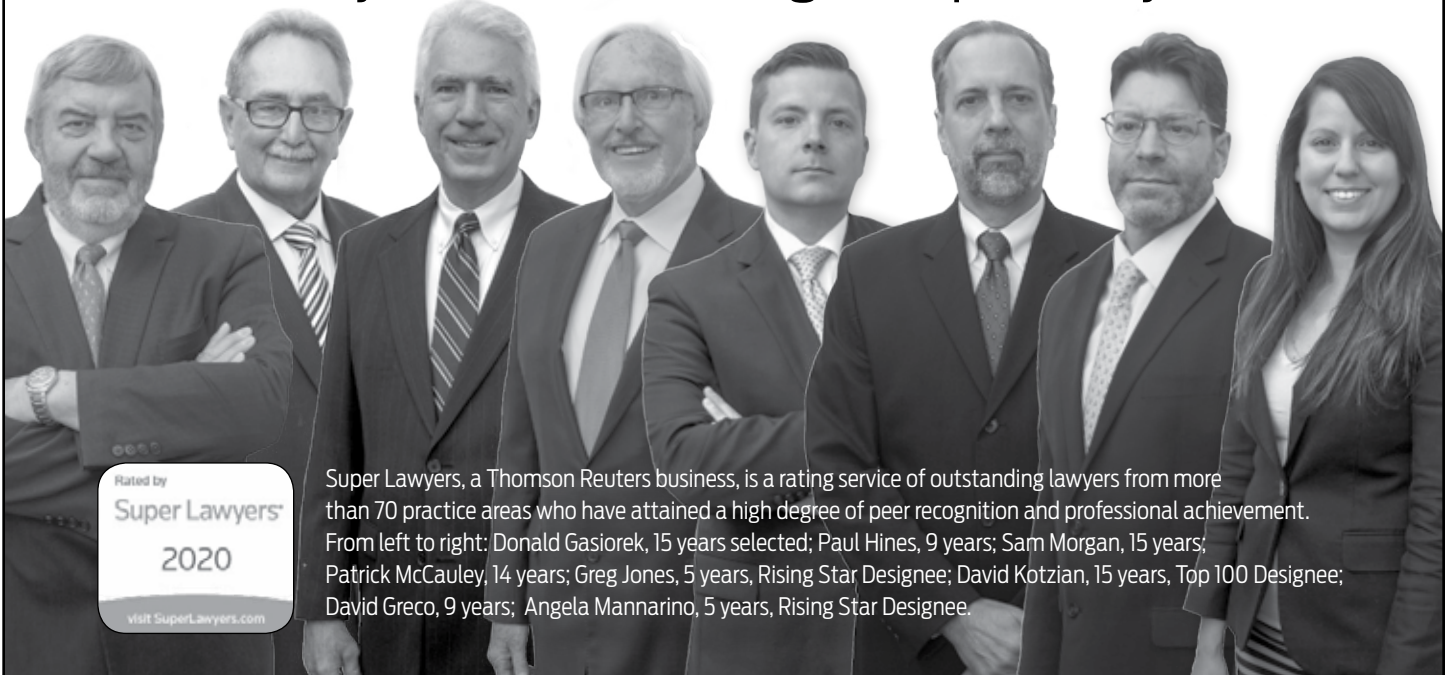
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2021 Kimberly Cahill Memorial Scholarship Recipient Deja Monet Davis

*By Dana M. Warnez,
Macomb County Bar Foundation Past President*

“I have been determined to advocate for individuals, to ensure their voice is heard, and am further determined to be a leader in my community, to stand on the shoulders of giants and one day be the giant on which someone may stand.” - Deja Monet Davis

I am writing, as one who stood upon and continues to stand upon the professional example my sister Kimberly Cahill provided not just for me, but for all of us in the Macomb County legal community, to introduce you to Deja Monet Davis, who is this year’s recipient of the Kimberly M. Cahill Memorial Scholarship awarded by the Macomb County Bar Foundation.

Deja Monet Davis is a 2021, cum laude graduate of the University of Detroit Mercy Law School. Among other things, while in law school at UDM, Ms. Davis served as the President of the Black Law Students Association, was: the Student Chair of the Diversity Committee, a member of the Student Alumni Leadership Council, coached Moot Court competitors, was a student academic mentor to fellow students, and a Patrick A. Keenan Appellate Advocacy Tournament Champion. Outside of school, Ms. Davis gained valuable experience working with the Federal Pro Se Legal Assistance Clinic, and as a law clerk for Lakeshore Legal Aid.

In her undergraduate career Ms. Davis was an All-Academic Big Ten Athlete (track and field 2014-2018) and Dean’s List Honoree, earning a Bachelor of Science degree in Criminology at the Pennsylvania State University.



In reflecting upon all of Ms. Davis’s achievements in law school, the Dean of University of Detroit Mercy Law School Jelani Jefferson Exum describes Ms. Davis saying, “What is remarkable is Deja’s selflessness in using her leadership skills to serve others and to improve the space around her. That is what I find inspiring about Deja Davis.”

Ms. Davis informs me, that upon passing the bar, she plans to take up the practice of labor and employment law with Miller, Canfield, Paddock and Stone, PLC. We wish her best of luck, and look forward hopefully to her joining us in local Macomb County bar community.

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Macomb County Bar Association

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MACOMB BAR ASSOCIATION OPEN HOUSE

Monday, September 20, 2021

11:30am-1:30pm

Macomb County Circuit Court

40 N. Main St., Mt. Clemens, MI 48043

Join us for an Open House to see the office renovations and the grand reopening of the Macomb Bar Office.

Lunch is free for members and court staff. Please bring your County badge or Bar card and enjoy the return of Seeburger's Cheeseburgers to Mt. Clemens.

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