

BAR BRIEFS

Official Publication of the Macomb Bar Association

October 2024



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Committees Come Alive!

By Dana Freers, President of the Macomb Bar Association

The Macomb County Bar Association has a strong tradition of using committees to represent all our members who practice in the various areas of law. I'm excited to continue that tradition and introduce you to this year's committee chairs! They are a dynamic, committed group of individuals who have some exciting things planned for their committee. Read on!

Civil – Karen Trickey Pappas has been an attorney since 2000 and was on the MCBA Board for over 15 years including serving as President.

She was on the MCBF Board for over 5 years and currently works at Progressive House Counsel and has been there for 6 years. She has practiced insurance defense work for 13 years. She has been



married to her husband, Craig for 15 years and they have two kids, Nic (13) and Alyse (10) and a pup Harry.

“As Chair of the Civil Law Committee, I intend to bring together attorneys from all focuses of Civil Law. In doing so, we can determine the most important changes/issues in all areas of civil law and schedule seminars/panel discussions with attorneys and judges to educate our attorneys.”

Criminal – After graduating from Michigan State



University with a double bachelor's degree – B.A. in criminal justice and B.A. in political science in 2006 – Robyn Kennedy pursued her legal education at Thomas M. Cooley Law School and obtained her Juris Doctor in 2010.

While attending law school, Robyn worked

as a child welfare specialist investigating allegations of child abuse/neglect with the Michigan Department of Health & Human Services. She served as a lecturer at Oakland University where she emphasized the importance of child welfare, the prevention of child abuse and neglect, and how to best serve a diverse community. Robyn uses her experience to defend parents accused of abuse/neglect in both the criminal and family courts.

Robyn is a resident of Macomb County where she lives with her husband Gary Kennedy and their four children. When Robyn isn't in the courtroom, you can usually find her on a football or baseball field with Gary and the boys.

Robyn looks forward to working with the MCBA and specifically the criminal law committee. Robyn plans to continue the work of prior chairs by identifying and addressing issues directly impacting Macomb County criminal practitioners. She will work to ensure Macomb practitioners grow in their practice through education. We will continue educating criminal practitioners with case law updates, training opportunities and meetings to share ideas and experiences as criminal law practitioners. Please feel free to contact Robyn with questions or ideas at (586) 580-7752 or via email at robyn@kennedylawofficepllc.com.

Diversity, Equity and Inclusion – Saima Khalil is a local attorney and maintains an office in downtown Mt. Clemens.

She previously worked for Lakeshore Legal Aid and is now in private practice. Saima's legal practice focuses on criminal defense, civil cases, family law, and appeals. Saima volunteers with several non-profit organizations, including Hearts for Homes, a nonprofit that helps families needing housing, and the Clinton Township Optimist Club.



As chair of the DEI committee, Saima hopes to partner with State Bar affinity groups, law schools, regional bar associations, and building a building a mentorship program. Saima lives in Sterling Heights and, along with her parents, she cares for her niece and nephew. She is also a mom to 4 cats.

Family – Lori Smith has practiced exclusively in the area of domestic relations law since 2011. Initially, she had no



interest in practicing family law, but the universe had other plans. She learned this area of law through the ICLE Family Law Certification program, from more experienced members of the bar who were gracious in bestowing their knowledge and experiences, and from listening to interactions

from Judges and attorneys during court hearings. Lori believes that continuing legal education is of the utmost importance and is planning to have the Family Law Section host some seminars during her term as chair of the committee.

Lori is also a former president of the Macomb Bar Association, Macomb Bar Foundation, and Women Lawyer's Association of Michigan, Macomb Region. In addition to serving as this year's Chair of the Family Law section, Lori is the current president of the Friends of the Macomb County Veteran's Treatment Court, and the Mental Health Treatment Court Charitable Foundation. She is current Treasurer of the Bar Foundation, a director for the Macomb Humane Society, and serves on the advisory counsel for the Capuchin Soup Kitchen's Jefferson House.

Lori wants to hear from you! If you have any questions, suggestions or ideas for this year please contact her at lsmith@orlaw.com.

Juvenile – Susan L. Dunn has been practicing juvenile and criminal law in Macomb County since 2002. After completing her Bachelor's Degree from Wayne State and receiving her Juris Doctorate from The University of Detroit School of Law, she started her career with the Wayne County Prosecutor's office in 1997. In 2002, she started her own practice and has had a successful private practice ever since. Practicing juvenile law in Macomb County remains a large part of her practice.



As chair, she plans to meet with other practicing juvenile attorneys in Macomb to exchange ideas and concerns, keep informed of training opportunities, and stay updated on juvenile law.

Professional Mental Health – Whitney Lemelin has been practicing criminal defense in metro Detroit since 2001. He opened his office in 2003 and hasn't looked back. He has a passion for representing those who are unable and/or unwilling to help themselves. In this type of practice, attorneys often find themselves thrown into situations, cases and helping individuals that most humans would strive to avoid. At the end of the day, after dealing with some of the most hideous people and situations imaginable, attorneys are expected to go home to our families and friends and lead "normal" lives. Sometimes, after a difficult day or case, Whitney finds that he



wants to decompress and dump. He wants to pick up the phone and let go of the negativity that he's been surrounded by and dealing with all day. Of course, it's not fair to dump on a family member or friend who may or may not understand. He thought it would be a good idea to develop a group of other attorneys who also deal with and are affected by this type of work trauma. The goal is to share, unload and dump all this negativity so that we can be better people both in and out of work.

Whitney shared this idea with a few people other attorneys who also recognized there was a need and were very receptive and willing to join such a group. He also shared it with our then future MCBA President and now he's chairing a Committee. The Professional Mental Health Committee will be a group of attorneys who want to help each other to lead happier, healthier lives. The rough idea is to meet once a month in a hybrid meeting setting (in person but Zoom participation is available) at Live Rite Recovery Center at 27700 Gratiot Ave. in Roseville. Attorneys will share stories, unload, exchange numbers and get rid of some of the negativity that plagues our profession. Whitney is also going to work on getting speakers to come in to talk about various ways attorneys can deal with the trauma and stress they may encounter at work.

Whitney Lemelin can be reached any time at (248) 763-9472 and at whitney@lemelinlaw.com. Please contact him if you have any questions or want to dump! Dates and times will be released once confirmed. Whitney wants thank Dana Freers and the MCBA for allowing him the opportunity to help himself and others to be a better attorneys and individuals.

Member Spotlight

Judge Stephen S. Sierawski: 25 Years and Counting!



By Aaron J. Hall, MCBA Director & Editor-In-Chief

Stephen S. Sierawski was born and raised in Lansing, MI. After graduating from Grand Ledge High School in 1979, he attended the University of Notre Dame, where he earned a degree in Economics in 1983. Outside of academics, he was an active member of the Notre Dame Boxing Club, competing as a Welterweight and serving as the Club's president. During his time as president, he trained over 100 fighters for the annual "Bengal Bouts," a boxing event that has raised money for Bangladesh Holy Cross missions since 1931.



After graduation, he faced a major decision: attend law school or follow in the military footsteps of his father, a WWII veteran and Purple Heart recipient who survived the Battle of Okinawa. Ultimately, Stephen chose the military path, enlisting in the Air Force the same month he graduated. He served active duty in the Strategic Air Command (SAC) and B52s for five years. He also sat "nuclear alert" every third week. "We would go onto the base and sit with approximately 24 nuclear weapons on our B52, which I inspected."

He was stationed in upstate New York, near Utica. Coincidentally, the district he now oversees includes Utica, MI. He often jokes that he "went from Utica to Utica." In 1987, he married Elizabeth ("Liz"), also from Grand Ledge, and they moved to New York. In the fall of 1988, they relocated to Harper Woods, MI. Stephen worked at Selfridge Air National Guard Base as a navigator with the Air Force Reserve.

In January 1989, Stephen and Liz welcomed twin sons, Anthony and Patrick. While continuing to serve in the Air Force Reserve, he began attending Wayne State University Law School in June 1989. He was a full-time student by day, but flew at night and on weekends to support his family. In the fall of his second year, his unit at Selfridge was activated for Desert Shield, which later became Desert Storm. Steve took a leave of absence

from law school to serve as a C-130 navigator from October 1990 to April 1991.

He re-enrolled in law school in the summer of 1991 and graduated in December 1992. In 1993, Macomb County Prosecutor Carl J. Marlinga hired him as an assistant prosecuting attorney, where he joined his law school friend, Jurij Fedorak. During his time as an APA, he served in several key roles, including Drug Unit Chief, Juvenile Unit Chief, Deputy Chief of the Domestic Violence Unit, and as the "spillover" trial prosecutor for retired Judge Frank E. Jeannette. "It was a tremendous experience," he recalls.

In 1996, Stephen ran for 41-A District Court Judge and finished in second place. He ran again in 1998 for a vacant seat, competing against 11 candidates in the primary. He won the primary with 25% of the vote and then went on to win the general election.

In January 1999, he assumed the bench. He said, "My experience as a prosecutor was very helpful, so the transition was smooth. As a prosecutor, you practice in front of all the judges, so you learn the temperament and style you would like to have as a judge."

In 2003, he was appointed by the Michigan Supreme Court to serve as Chief Judge of the 41-A District Court. The initial project was updating the security standards. "At that time, all of the courts still functioned like airports pre-9/11.

People could just walk into court. We needed to protect the public and court staff."

2003 also marked the completion of 20 years of military service. Judge Sierawski flew 2,500 sorties (flights) and over 5,000 hours.



Since 2003, he has served approximately 15 years of different terms as the Chief of 41-A District Court. He is proud of the 41-A District Court. "With the high quality jurists, magistrates, administrators, and court staff, we are able to provide stable and efficient courts."

Since COVID, his Court has adopted a hybrid approach with Zoom and in-person hearings. "I believe there is still a human benefit to seeing the attorneys and often far more efficient for the parties to get together and resolve their matters."

His judicial advice:

- Don't forget where you came from.
- Treat attorneys and the public just like you want to be treated.

Judge Sierawski also shares his commitment to public service with his family. Liz is a full time registered nurse and actively involved in community government. On November 4, 2008, she was elected to serve on the County Charter Commission, which established the new structure for the county government, including 13 Commissioners and an elected County Executive. Since her time on the Charter Commission, Liz has served on the City Council for Sterling Heights and is currently the Mayor Pro Tem.

The twins followed in their father's footsteps in two distinct ways. Patrick attended the same law school as his father and is now an assistant prosecutor for Macomb County. Anthony chose to serve in the military and currently holds the rank of major in the United States Marine Corps. Judge Sierawski and Liz welcomed two more sons; their third son, Steve, is active in the business community, while the youngest, Nick, just completed his first year of law school at the

University of Detroit Mercy. Judge Sierawski and Liz are also proud grandparents.

Outside the courtroom, Judge Sierawski is a lifetime member of the Shelby Lions Club, VFW, AMVETS, and the American Legion. Although he no longer boxes, he enjoys competing on the golf course. In 2015, he won the Michigan Match Play Championship in the Senior Division. He also participates in the annual MCBA/MCBF golf outings, which provide a fun-filled time for judges and practitioners alike. Additionally, he is a member of St. Lawrence Parish, where he has served as an usher and is now a lector.

Congratulations to Judge Stephen S. Sierawski on his 25 years on the bench!



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New Realtor Rules For Divorce

By Timothy P. Flynn and
Frank L. Briguglio, Clarkston Legal



Amid much angst and confusion, a new set of realtor's rules took effect recently. The new rules alter the method by which a home buyer's commission is paid. This article examines how the new commission rules operate and how they may impact divorce proceedings.

The manner in which real estate agents allocated their commissions has been in place for about a century. Basically, the seller's realtor charges a commission based on a percentage of the sale price for the house: between 5.5 and 6%. If a buyer comes along represented by a realtor, then the industry convention calls for the seller's realtor to split the commission with the buyer's realtor. A group of homeowners in Missouri did not like this convention among realtors and sued the National Association of Realtors. The lawsuit resulted in a \$418 million settlement agreement whereby qualifying sellers may be getting some additional money from the sale of their home. The new rule emerging from the settlement is that seller's realtors are no longer bound by the industry convention to split or share their commission with the buyer's realtor. Importantly, and perhaps confusingly, they are not prohibited from doing so.

This has raised questions within the real estate industry. It did not help that the rules differ from state to state, from broker to broker, and even from agent to agent. As an offshoot of the new commission rule, a prospective home buyer is now expected to execute a contract with their agent before going to a showing. This, of course, does not apply to open house style showings. Therefore, buyers and their agents are realizing that the buyer may be on the hook for all or a portion of the commission for the buyer's agent.

This change is not going over very well within the industry. To further complicate matters, many listing agents are agreeing to "do things the old way" and simply planning to continue splitting their commissions. Problems are arising where, if a seller does not agree to split the commission, the buyer's agent may "steer" their prospective buyer to different properties, with realtors who agree to play ball under the old rules.

On the other hand, if under the new rules, a buyer executes an agreement with her agent to pay the agent's commission, there is an incentive for the agent to show the prospective buyer more expensive homes. Therefore, some

industry professionals are recommending that buyer's agents charge hourly rates or flat fees.

Confusion seems to abound among realtors, many of whom profess that this so-called new rule changes nothing. This is true to the extent that such realtors remain committed to splitting their commission with a buyer's agent. If they want a steady stream of showings, it seems like the old way may prevail, despite the national settlement in the lawsuit.

How will these rules affect the divorce process? In many divorces, the marital home is sold during or immediately following the divorce process. Realtors are utilized to expedite this process and are instrumental to convert real estate into much needed cash.

When one spouse desires to retain the marital home, they sometimes bargain for a buy-out price that often includes basic costs of sale such as a realtor's commission. Whether this commission will continue to be calculated at the standard of 6% remains to be seen. Statistics show that homes that sold with lower buyer's agent commissions sat on the market longer and often sold for less than the asking price.

Another common divorce scenario is that a spouse leaves the marriage, and the marital home seeking a quick replacement residence. Often, that spouse is short on liquid cash to make the purchase. If they have to kick in several thousand dollars to their realtor, it will affect what they can afford. Rather than splitting the commission with their former spouse, they may now be paying 50% of the seller's commission on the marital home and 100% of the buyer's commission for their replacement residence.

If there is confusion among the realtors in the upcoming months and years about whether they can cut side-deals or go onto websites other than the MLS to make commission arrangements (surely some will try) then selling a home within a divorce proceeding could get complicated. The lawyers representing the homeowners in the now-settled lawsuit have warned against this practice and say it could spawn additional litigation.

Clarkston Legal is a group of attorneys practicing in the areas of Family Law, Probate and Criminal Defense centrally located in Northern Oakland County. The firm is only minutes away from Oakland County Circuit Court and practicing in all adjacent counties.



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Taking Seriously the Right to a Preliminary Exam

By Bill Barnwell, Barnwell Law, PLLC



Sometimes you never fully appreciate something until it's no longer there. In Michigan, practitioners can take for granted the right to a preliminary exam. But when confronted with a case where I didn't even have the option to set the matter for an exam, it reminded me how critical of a hearing exams are, and why waiver should not be presumed, even on a relatively solid prosecution case.

Several years ago and shortly after being licensed in Florida, I was retained on my first felony case in the Sunshine State. It was a very weak child abuse case. Had the case been in Michigan I would have quickly set it for an exam. But in Florida, relatively few cases are afforded a right to preliminary examination. Instead, cases just skip over the County Court (our equivalent to District Courts and encompass entire counties) and move right to the Circuit Court (usually a collection of several counties).

It would have been an ideal case to set for exam on the merits, as the allegations did not meet the elements of the offense. Right at the outset the State Attorney's office wanted to quickly plea the matter out and insisted the case was stronger than I believed. After several pretrial type hearings, the matter was set for jury trial. On the eve of trial, the case fell apart because of uncooperative witnesses. Had there been an option for an exam, it would have saved everybody a lot of time and energy for the case to collapse much quicker. Instead, I was gearing up a jury trial I felt quite confident about but ultimately never wound up having to take to a jury.

However, too many assume exams are only useful when witnesses might not appear, and many Judges often uncritically bind cases over. Yes, preliminary exams only require a low threshold standard of evidence. And yes, statistically, the vast, vast majority of cases, even defense-friendly cases, will meet that burden and standard. However, the fact that exams constitute a "low burden of

proof" does not mean bindover should happen as flippantly as defense attorneys, prosecutors, and even Judges assume. And here is another area where defense attorneys need to make better records during their bindover arguments and in motions to quash.

"The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it." *People v Perkins*, 468 Mich 452; 662 NW2d 727, citing MCR 6.110. However, less frequently discussed are considerations that a case should not be bound over if it is clear that prosecution will not be able to convict the defendant at trial. *People v Goecke*, 457 Mich 442 (1998).

"More important, for purposes of avoiding the temptation to overcharge, it does not dilute the prosecutor's responsibility to be mindful that 'the preliminary examination should identify not simply those who are probably guilty but more precisely those who are probably convictable.'" MCR 6.107 (now MCR 6.110), Commentary to the Proposed Rules of Criminal Procedure, 422A Mich 31 (1985).

Exams are designed to screen out cases that are not suitable for trial. The standard is a probable cause standard, but is distinguishable from the probable cause standard required to make an arrest. The probable cause required for a bindover is based on an inquiry into both the probability that the defendant committed the crime and the probability that the government will be able to establish guilt at trial. *People v Cohen*, 294 Mich App 70, 76; 816 NW2d 474 (2011). Other case law suggests that if the Prosecution is unlikely to overcome a directed verdict challenge at jury trial, a matter should thus not be bound over at the District Court level. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992)


What about the majority of cases where issues of fact abound? Factors to consider are: Is a District Court resolution possible? Is there potential uncharged conduct and additional counts that could be added at exam? Is there a potential offer on the table in Circuit Court?

In certain counties, an offer is quickly made to a defendant and opposing counsel warns that the offer will be revoked if the defendant dares exercise their right to an exam. Usually, this is an empty threat. Matters are often renegotiated up in Circuit Court and holding the exam can expose weaknesses that weren't previously realized in a case or enlighten overconfident defendants of the strength of a case. While there are examples to the contrary, cooler heads can usually prevail in high-pressure counties where office policy attempts to extract a felony plea immediately at the Probable Cause Conference.

Another pressure tactic that warrants push-back is threats and practices to hike a defendant's bond if they hold an exam. This is more often than not retaliatory and spiteful. Those on the bench should not sua sponte be adjusting bonds for no other reason than a client electing to exercise a statutory right, and Prosecution arguments to raise bond after an exam must be rooted in something other than a defendant demanding a hearing that they are entitled to by law. While the Court learns more about the evidence during an exam, it is disingenuous to acknowledge a low standard of bindover, but then use that same low standard (even where reasonable doubt may be evidence) to impose more onerous or costly bonds.

Nonetheless, tactics of holding uncharged conduct over a defendant's head, bond considerations, or plea considerations should of course be considered on a case by case basis. There are times when waivers are clearly in the interests of clients, and they should be advised as such. Yet I will argue that too many exams are being waived that should not be waived. Even on clear-cut probable cause cases, while exams are not discovery fishing expeditions, they frequently are very helpful for trial preparation or give defense counsel cards to play in negotiations that they otherwise wouldn't have had.

In sum, defense counsel will usually not regret holding exams despite the immense pressure to talk their clients into waiving, when it is appropriate to hold the exam. In the end, every case deserves individualized attention. A more discerning approach will lead to better advocacy, more filtration of weaker cases, and greater preparation for a defendant's eventual right to trial.



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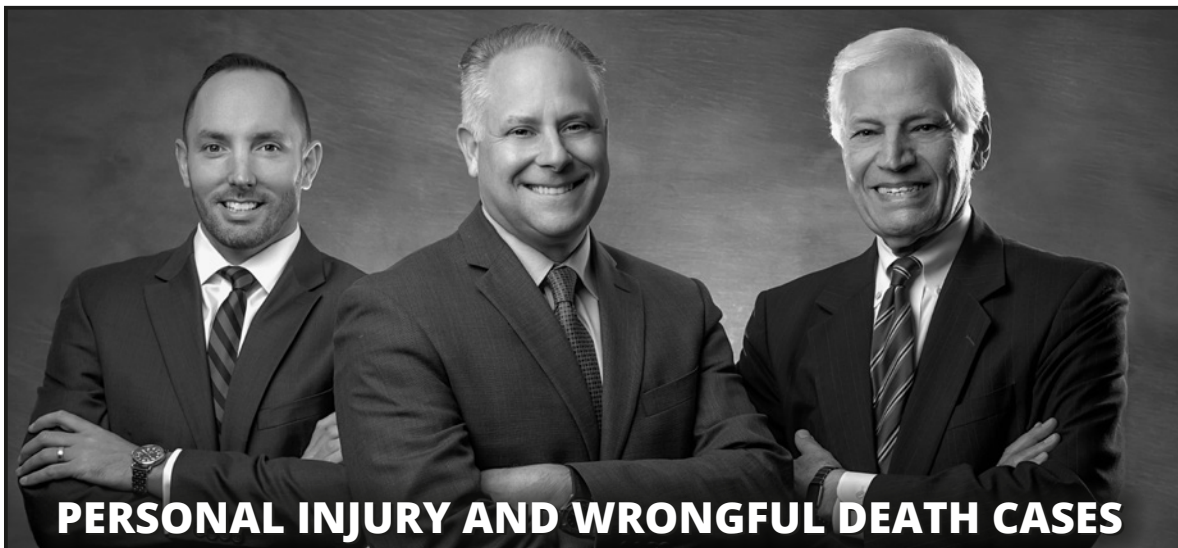
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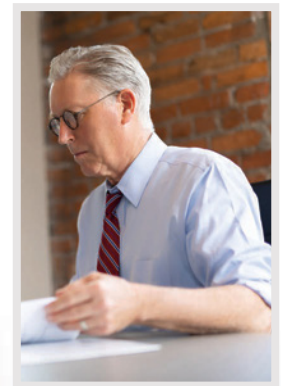
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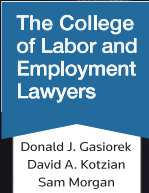


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