

# BAR BRIEFS

Official Publication of the Macomb Bar Association

December 2024

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# Bar Briefs

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# Bench Bar Conference

By Dana Freers, President of the Macomb Bar Association

I'd like to begin this month's column by congratulating everyone who ran in the election. If you won your race, congratulations! Hopefully we'll see you at the upcoming Bench Bar Conference! If you didn't win, you've still earned congratulations. Having the courage to put yourself out there and devote so much of your time and effort to reaching for your goals, it's impressive. And no matter the outcome, you should be proud! Some of the experiences and encounters you have while running are simply amazing. That's what motivates you to go for it again next time. A great big kudos to you all!

The Bench Bar Conference is one of the most time honored traditions of the MCBA. We're lucky to have such a camaraderie here in Macomb County and it's nice to be able to get together and collaborate and exchange best practices. This year, we're looking at trying a new format to be able to maximize that collaboration and give general practitioners a chance to attend more events. The plan is to host a different practice area every Wednesday in

February at noon at a local restaurant. We'll have a criminal session, a family/juvenile session, a civil session and a district court session hosted by the MCBA committee chairs. Because many of our members practice in all of these areas, this format would give an opportunity to attend as many as you'd like. With the lunchtime format we're also not asking lawyers or judges to set aside an entire day, just a couple of hours. As an added bonus, we'll get to enjoy some delicious food and support our local businesses.



We don't have the details hammered out yet, just this general format. I'd love to get some feedback from our members. What do you think? Love it? Hate it? Have some suggestions to share? I'd love to hear them! Please reach out to me and let me know what you think.

I'd also like to thank everyone that joined us at our recent 5:01 at Madison's. It was so nice to see everyone, in person, and just get to relax, socialize and enjoy each other's company. Stay tuned for details of another 5:01 coming soon!

## Legally Speaking wins a Philo Festival Award

*Legally Speaking's* show on Food Insecurity and Poverty recently won a Philo Festival of Media Arts Award in the category of "George Stoney Community Activism Award – A program that campaigns for some form of social change."

Hosted by Lakeshore's CEO, Ashley Lowe, *Legally Speaking* has aired for over 30 years and is currently co-produced by Lakeshore Legal Aid, Sterling Heights Television and the Macomb County Bar Foundation. The show is broadcast on Sterling Heights public television and online. To access past episodes of *Legally Speaking*, see Lakeshore Legal Aid's YouTube page.



Robert Sergott (Sterling Heights TV) and Beth Richardson (Lakeshore Legal Aid) receive award.



# Cross-Motions for Child Custody

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



Such contentious situations often precipitate cross-motions for child custody, with both parents attempting to gain legal ground for the control of their children. Cross-motions means that each parent, rather than simply responding to the other parent's child custody motion, files their own motion, raising their own child custody issues.

Cross-motions for child custody delve into the intricacies and strategy of high-conflict parenting. This is the land where each parent files their own separate and competing motion for control over their children. Other than moving out-of-state, custody battles are among the most significant legal maneuvers in family courts across the state.

In addition to filing their own custody motions, it is important that each parent also respond to the other parent's child custody motion. This gives the parent the opportunity to address each of the allegations set forth in the other parent's motion, as well as the -separate- opportunity to raise their own specific issues before the family court.

When cross-motions occur, each parent usually has long-standing complaints about various matters concerning the other parent and the children. Often, that parent may have been considering filing their own motion for quite a while, and the other parent's filing simply triggers them into taking action.

The Friend of the Court will likely be well familiar with this set of parents because most child custody cases that feature cross-motions are deemed "high-conflict." Hiring legal counsel is often advisable at this stage.

Along with its Friend of the Court team (the family counselor and/or the Referee), the family court will usually coordinate the hearing(s) for the cross-motions in a manner that will preserve judicial resources. Both motions will likely be heard at the same motion call.

The decision maker (judge or referee) must initially decide whether a parent's child custody motion satisfies an evidentiary threshold that just cause exists to change custody or that a "change of circumstance" has occurred. If the threshold is satisfied, then the case proceeds to an evidentiary hearing. If not, then the custody motion gets denied at the initial motion call.

After the initial arguments and parenting complaints are laid out, an evidentiary hearing is scheduled where each party can call witnesses and present evidence in support of their child custody motion.

## A Recent Custody Case: *Parent v Mouse*

The Michigan Court of Appeals addressed a prolonged and contentious child custody dispute featuring cross-motions for child custody between the parents in *Parent v Mouse*, unpublished per

curiam opinion of the Court of Appeals, issued December 7, 2023 (Docket No. 364910), a case from the Genesee County Family Court. The dispute began shortly after the birth of their child in 2014, with both parents accusing each other of misconduct, including parental alienation, physical and emotional abuse, and making false allegations against the other parent.

Despite a joint custody order in 2018, the parents' ongoing animosity and inability to co-parent led to numerous court interventions regarding various aspects of their child's life. The trial court, noting the severe harm to the child due to the parents' conflict, eventually held an evidentiary hearing in January 2023 to address the parents' cross-motions for sole custody.

After acknowledging a change in circumstances since the 2018 custody order, the trial court surprisingly dismissed both motions, stating that "mutually created, intentional conflict is not a basis for a new custody hearing." The court argued it could not remove the child from the care of both parents and would no longer participate in the situation. Essentially, the Genesee County Family Court judge washed his hands of the parents' child custody mess.

In an unpublished (non-binding) per curiam opinion, the Michigan Court of Appeals found the trial court's conclusion inconsistent with its own factual findings and against the great weight of the evidence. The appellate court emphasized that proper cause to revisit the previous custody order was properly established as a threshold matter in the competing motions. Contentious issues addressed by the lower court included parental alienation, allegations of abuse, and the harmful effects of the parents' mutual antagonism on the child.

Accordingly, the Court of Appeals vacated the trial court's order, citing errors in its failure to recognize proper cause, and remanded the case for further proceedings, urging reconsideration of the child's best interests. The appellate court criticized the lower court for not wanting to make the hard decision of selecting one party as the custodial parent. Family court judges are often tasked with this difficult task.

The *Parent* custody opinion is an unpublished decision. This means that it does not have a binding effect on county family courts. As a statement of the law, the unpublished opinion is for guidance only.

*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.



# Securing Your Law Firm in a Cyber-Threatened World

By Cheyenne Harden, CEO, Cyber Protect, LLC



In today's interconnected world, cyber threats loom large, and law firms are no exception. With the increasing sophistication of cyberattacks, even small firms can become prime targets for malicious actors. This guide will explore the evolving threat landscape, key strategies to protect your law firm, and best practices to safeguard sensitive client data.

## The Evolving Threat Landscape

### Supply Chain Attacks:

- These attacks exploit vulnerabilities in third-party software or services to gain unauthorized access.
- The SolarWinds and Kaseya breaches serve as stark reminders of the devastating consequences of such attacks.

### The Perils of Traditional Antivirus:

- While traditional antivirus solutions offer some protection, they are often insufficient to combat modern cyber threats.
- Advanced threats like ransomware, living-off-the-land attacks, and memory-based attacks can bypass traditional defenses.

## 10 Key Strategies to Protect Your Law Firm

### 1. Layered Security:

- Implement a layered security approach, combining firewalls, intrusion detection systems, and robust zero-trust endpoint security solutions.

### 2. Regular Patching:

- Keep software up-to-date with the latest security patches to prevent exploitation of known vulnerabilities.

### 3. Strong Password Practices:

- Enforce passphrases with a unique phrase for each account
- Use a password manager.
- Enable MFA on each account.

### 4. Employee Training:

- Educate employees about phishing attacks, social engineering, and other common cyber threats.

### 5. Data Backup and Recovery:

- Implement a comprehensive backup and recovery plan to protect your data in case of a cyberattack.

### 6. Incident Response Plan:

- Develop a well-defined incident response plan to minimize the impact of a security breach.

### 7. Third-Party Risk Management:

- Assess the security practices of your third-party vendors and suppliers.

### 8. Web and Spam Filtering

- Filter web access at the company level and the browser level.
- Invest in a robust spam filtering solution to reduce the risk of phishing.

### 9. Monitor SaaS (Software as a Service) Applications

- Set up monitoring and alerting for SaaS applications in the cloud.

### 10. Data Encryption

- Make sure data is encrypted in transit and at rest in your network.

## Unique Risks for Law Firms

### Client Data Sensitivity:

- Law firms handle highly sensitive information, making them attractive targets for cybercriminals.

### Regulatory Compliance:

- Non-compliance with data privacy regulations like HIPAA and CCPA can result in hefty fines and reputational damage.

### Insider Threats:

- Disgruntled employees or accidental data leaks can pose significant risks.

## Advanced Cybersecurity Measures

### Endpoint Detection and Response (EDR):

- Best Practices for Law Firms

### Regular Security Audits:

- Conduct regular security audits to identify vulnerabilities and assess the effectiveness of your security measures.

### Employee Training and Awareness:

- Train employees on cybersecurity best practices, including phishing awareness and data handling procedures.

### Data Encryption:

- Encrypt sensitive data both at rest and in transit to protect it from unauthorized access.

### Multi-Factor Authentication (MFA):

- Implement MFA to add an extra layer of security to user accounts.

## The Role of Managed Security Service Providers (MSSPs)

### Expert Support:

- MSSPs can provide 24/7 monitoring, threat detection, and incident response services.

### Cost-Effective Security:

- Outsourcing security functions to an MSSP can be more cost-effective than building an in-house security team.

### Scalability:

- MSSPs can scale their services to meet the evolving needs of your firm.

## Conclusion

By understanding the evolving threat landscape and implementing robust cybersecurity measures, law firms can significantly reduce their risk of cyberattacks. A proactive approach, combined with the expertise of cybersecurity professionals like the ones from Cyber Protect, can help safeguard your firm's sensitive data and reputation.



# The Enduring Technology Debates in Our Courtrooms Part Two: Who is Afraid of AI?

By Bill Barnwell, Barnwell Law, PLLC



In my last column, we looked at the now-longstanding but still evolving debate about Zoom in courtrooms. Today, we will look far beyond Zoom and ask ourselves what place AI has in the practice of law. As always, there exists polar opposites in these debates and shades of gray. I often joke that I belong to one of the few professions that still heavily utilizes fax machines. While some long for the good old days before technological innovations existed, others exist on the other end of the spectrum who believe change can't come dramatically or swiftly enough.

Some speculate that during the lifespans of many reading this article that there will eventually no longer be any need for human judges or juries in criminal cases. Why? Because AI will do it all, they argue. The other end of the spectrum argues that this is nonsense, and that AI poses a risk for everything including legal research. Who is right and who is wrong? As always, the answer is likely somewhere in the middle.

Prior to November 2022, I had never given much thought to "AI." But by December 2022, suddenly the phrase "AI" was everywhere. On November 30, 2022 Chat GPT launched and much of the public was instantly hooked. Users found that Chat GPT could do everything from quickly answer complex questions about highly detailed subjects, produce instant poetry, artwork, and much else.

Several months ago, while tossing and turning late at night, I decided to subscribe to a Chat GPT-4o. Initially it was just for the sake of producing random amusing images, such as anthropomorphic squirrels playing laser tag, as just one example. But eventually I found Chat GPT to be very helpful when discussing an array of personal issues such as fitness goals and strategies of coping with grief. Regardless of what I was using it for, I found it not to be perfect, but certainly very helpful.

Eventually I decided to run case scenarios by Chat GPT. I did this in the form of "Hypos" and protected confidential client information in the process.<sup>1</sup> But what I found while gearing up for trials was that Chat GPT did an incredibly good job of analyzing and synthesizing case issues. Thus, I advise trial counsel to utilize these tools to better help understand what their best and worst arguments would be in front of a jury and what vulnerabilities exist in their arguments.

A Prosecutor, for instance, can analyze what potential weaknesses exist in their case and what issues defense counsel would be most likely to exploit. Conversely, defense counsel can analyze through AI what their best paths are to Reasonable Doubt and how their arguments would likely land before an objective, properly selected jury.

Likewise, Plaintiff counsel and defense counsel in civil cases can look for strengths and weaknesses in their respective cases. Plaintiff counsel can use AI to help determine the chance of success in their various claims, their best arguments for settlement, and if taken to trial, their chances of recovery before a jury. Defense counsel can use AI to best argue the application of legal defenses to Plaintiff claims.

All trial practitioners should utilize AI to explore the emotional impact of arguments before a jury. While Chat GPT makes sure to advise people that it does not have actual feelings, it does a very good job of knowing and analyzing human behavior and what is and is not likely to resonate with jurors.

In the past year, legal research has also jumped on the AI bandwagon. Many are familiar with embarrassing stories of attorneys who have been admonished for citing false sources that they found through Chat GPT, in what is commonly called AI "hallucinations." But now leading legal research companies such as Westlaw have specific AI platforms for legal research. These tools continue to cut down in time on legal research. While some bugs continue to be worked out here and there, and just like any other forms of legal research, attorneys should always check their work to ensure a citation not only exists but is related to their own case issues, AI is here to stay in legal research.

Is there a concern of AI taking everybody's jobs in the court system? This is extremely unlikely. For one thing, a person's criminal constitutional right to a jury is assumed to be by humans who reside in the district where the crime allegedly occurred. Not by artificial intelligence. And while judges are human and all humans are imperfect, there's very likely little practical risk of courtrooms being run by chat bots.

To be sure, with any emerging technology, there will result in some displacement of jobs, and perhaps even some attorney jobs. But just as LegalZoom didn't decimate the

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practice of human estate planning attorneys, I don't suspect AI is going to cause a wholesale revision of how law is practiced.

At the end of the day, human beings are social creatures. While there will be some extreme cases of humans who form parasocial bonds with AI chatbots, this is usually a form of mental illness and not what the average person wants, even in our device-obsessed world. Humans at their core desire real relationships with real people.

Likewise, people need a real human being lawyer. An actual person with shared humanity who can hand them tissue as they dry their tears when they discuss their fears of being accused of a crime. An actual person to discuss the pain and hurt of losing a loved one due to a medical malpractice procedure, or to discuss with their probate lawyer the impact of losing a parent and making sure their loved-one's estate is properly managed. They will want an actual person to vent to, to see or talk to in real time and space, and to thank or celebrate when something goes right.

AI will be a valuable tool for lawyers to more efficiently handle their clients cases, but the very humaneness of lawyers, the good and ironically even the imperfect, will be why people will always want and need real people to deal with their very real situations. So while the machines won't be replacing us any time soon, they can still be a great tool to help reach the goals of these real clients and their very real situations.

*'In the event of potential future hacking of Chat GPT platforms, I err on the side of caution to ensure that privileged information is protected.*

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# Weeding Out The Thc Levels In Urine THC/Creatinine Concentration Ratios: A Better Approach

*By the Honorable John M. Chmura*

Most defendants who are prohibited from using marijuana, either as part of a probationary sentence or condition of bail, are subject to urine testing.<sup>1</sup> Specifically, what's being determined is a concentration level of THC in urine most often expressed as nanograms<sup>2</sup> per milliliter (ng/ml). This level is then compared to subsequent levels to determine continued marijuana use or abstinence. As THC can remain in the body, in certain circumstances, for up to 30 days after the first day of abstinence, if the THC levels do not decrease over time, it is assumed that the defendant is continuing to smoke marijuana. If they decrease, the assumption is that the defendant is abstaining.

Comparing these concentration levels is a poor indicator for determining actual marijuana usage. Due to the numerous variables which come into play in calculating these concentration levels such as the dosage of THC ingested, frequency of prior use, timing of urine collection relative to last exposure to marijuana, and rate of release of stored cannabinoids (as well as other factors), concentration levels of THC are not reliable indicators of actual bodily THC levels. Additionally, this approach is vulnerable to dilution. This occurs when the defendant drinks an excessive amount of liquid prior to providing a urine sample thus artificially increasing the amount of urine produced and consequently lowering the concentration of THC in the sample. All of this means that comparing THC levels in urine samples tells us very little about actual marijuana usage.

So, what to do? The answer is to, instead of comparing THC concentration levels against themselves, compare them against something more stable and predictable. This turns out to be creatinine concentrations.

What is creatinine?<sup>3</sup> Creatinine is a byproduct produced by muscles when they use energy.<sup>4</sup> This substance has no physiological usefulness and so is eliminated in urine as waste. What makes it useful in helping determine THC levels is that it is released by the body into urine at a relatively constant rate throughout the day in healthy individuals. Thus its concentration level in urine can be used as a kind of measuring stick against which THC concentration levels can

be compared.<sup>5</sup> This process is called "creatinine normalization." Under creatinine normalization, we correct for all the variables described above that go into determining THC concentrations by comparing those concentrations to the concentrations of creatinine in a given same sample of urine. Then, we look at a number of those comparisons over time coming from a series of urine samples and, from that, determine whether the defendant is continuing to use marijuana.

An example will be illustrative. Let's say that a defendant submits a urine sample with a THC concentration of 20 ng/ml and a creatinine concentration of 94 mg/dl.<sup>6</sup> Then we'll assume he submits a second sample of respective THC and creatinine concentrations of 45 and 53. We want to compare the samples. We do this by comparing THC concentration to creatinine concentration ratios. So, for the first sample, we divide 20 by 94 and get a ratio of 0.212.<sup>7</sup> Doing the same for the second sample, we obtain a THC/creatinine concentration ratio of 0.84. We can easily see that the second ratio is about four times greater than the first. Because forensic scientists generally agree that an increase of more than 50% in THC/creatinine ratios indicates a new episode of drug exposure, we can conclude with a reasonable degree of certainty that this defendant has, at the very least, continued his same level of marijuana use between the time he submitted the two samples.

Let's look at a second example. Here, the THC concentration level in the first sample is 804 and creatinine concentration level is 67.4.<sup>8</sup> For the second sample, the respective numbers are 2052 and 262.6. The first ratio is 11.93 and second is 7.81. Because the second ratio is lower than the first, abstinence from marijuana use is suggested. This is noteworthy because the THC concentration levels actually increased between the time the samples were obtained (804 to 2052). Yet, because that increase was less than the increase in the creatinine concentrations for the same period (and because we know that, unlike THC, creatinine is released into urine at a known, constant rate), we can infer that there was no marijuana usage during this period.

It's important to understand that these THC/

creatinine concentration ratios, by themselves, tell us nothing. Their power lies in what they tell us after stringing them together as samples are taken over a period of two weeks or more. By observing multiple THC/creatinine concentration ratios, one can glean a fairly clear picture of what a defendant is doing in terms of marijuana use. Generally, if a defendant is abstaining from marijuana use, one should see the THC/creatinine concentration ratios decrease by roughly half every 5-7 days. If the decrease is steady, but less than that, one can infer that the defendant is probably not using marijuana but that, for physiological reasons, is metabolizing THC at a slower rate compared to the average person. If the ratios are constant or increase (particularly by more than 50%), then sustained marijuana use is indicated. If one observes a steady decrease in the ratios followed by a sudden increase, episodic marijuana use most likely is the cause. The point is that much can be learned by observing these ratios over time. They can give a much clearer picture of what a defendant is doing in terms of marijuana use than the highly variable results of simple urine tests.

Finally, it is my experience that most vendors are able to provide THC/creatinine concentration ratios. Some may have to ship urine samples to other laboratories to have this kind of testing done while others can do it in-house. However, my experience is also that judges and probation officers must, at times, specifically request this kind of testing to be done.

Not all testing companies do this as a matter of course.

In conclusion, defense attorneys, probation officers, and judges, in most instances, should insist on this approach to determining marijuana use. As described herein, it provides a more reliable and complete picture as to what a defendant is doing in terms of marijuana use or abstinence.

<sup>1</sup>The specific chemical tested for is carboxy-THC, a THC metabolite. THC (Delta -9-tetrahydrocannabinol) is the primary psychoactive chemical in marijuana. This article will refer to this chemical as simply "THC."

<sup>2</sup>A "nanogram" is one billionth of a gram.

<sup>3</sup>Creatinine is not to be confused with creatine. Creatine is an amino acid found in the body's muscles used to provide energy for exercising. It also can be taken orally to help increase muscle mass.

<sup>4</sup>Creatine phosphate transfers energy to muscles via a chemical reaction. One of the byproducts produced from this reaction is creatinine.

<sup>5</sup>There's nothing new in this. Toxicologists have been using creatinine concentrations to measure the amount of various substances in the body for decades.

<sup>6</sup>Typically, creatinine concentration levels are expressed in units of milligrams per deciliter. A "deciliter" is one tenths of a liter.

<sup>7</sup>The units work out to nanogram per milligram (ng/mg) after multiplying .212 by 100. So, in this case, we have 21.2 nanograms of THC per milligram of creatinine. However, for purposes of this article, we can ignore this unit analysis.

<sup>8</sup>I will ignore the units. For purposes of this article, the units are not important. What matters is comparing the THC/creatinine ratios over time.



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# Judge Linda Davis Portrait Unveiling

41-B District Court | November 7, 2024



Judge Linda Davis was a member of the bench for almost 20 years before she retired. She has since been leading FAN (Face Addiction Now), a non-profit which she co-founded.





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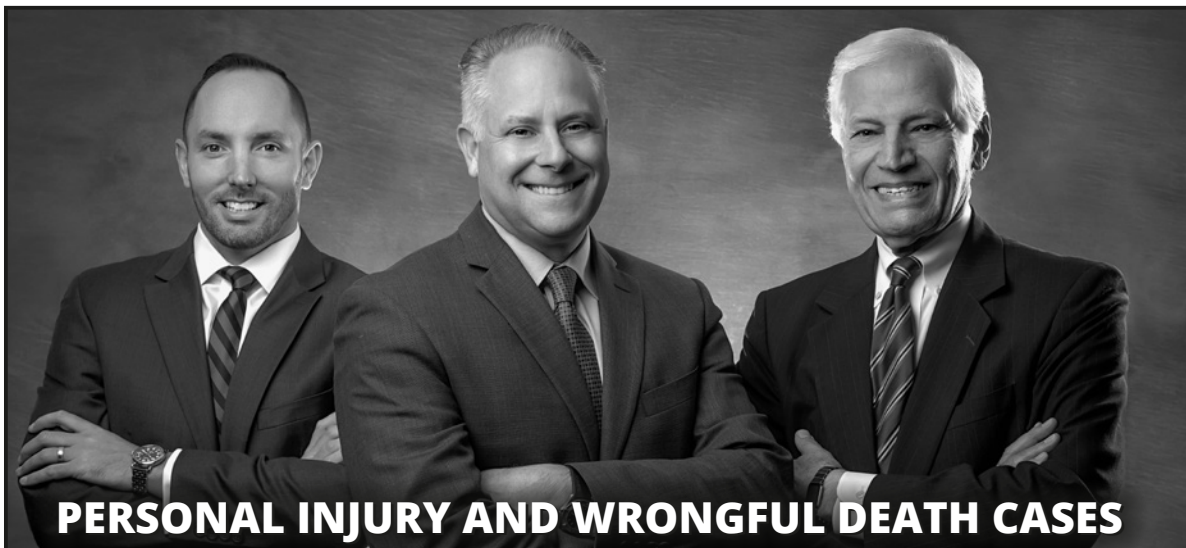
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**M | B**  
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REGISTRATION TYPE:  
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**IMPACT OF FACIAL  
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**(ZOOM)**

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- 22 years as a defense attorney
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- Neutral Case Evaluator - Wayne County
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## When The Tough Cases Demand Results



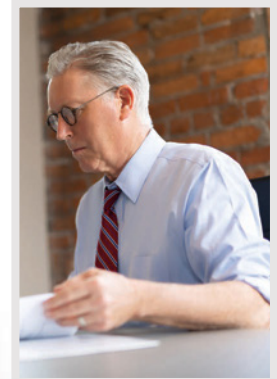
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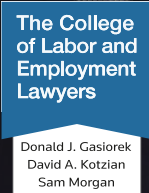


**Greg Jones**

2023 Michigan Super Lawyers  
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<sup>1</sup>2023 Michigan Super Lawyers Honorees

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*Save the Date!*

MACOMB COUNTY BAR ASSOCIATION

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COOK-OFF**

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MACOMB**

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prizes and  
glory!**

**Get a team  
together!**

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