

Bar Briefs

September 2020



Change in Michigan Workplace Law

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

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Bar Briefs



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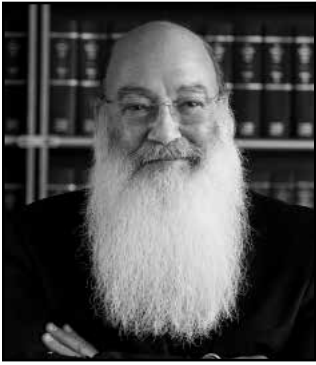
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Change in Michigan Workplace Law

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

As I begin my presidency, I find myself dealing with issues related to the Macomb Circuit Court and area district Courts. These are venues foreign to me, as my practice is primarily in federal court. Further, I am seeing practice issues in both the criminal and family law areas, specialties quite different from the labor and employment areas with which I am familiar.

Consequently, I have not had the opportunity to interact with a large part of our county’s judiciary and most of our membership. I promise to alleviate those shortcomings as we plan a series of smaller members only activities.

In the interim, for those of you who are not familiar with my political efforts, I make the following disclosure: For the past 30 years I have been pursuing a material change in Michigan Workplace Law - Abolishing At-Will employment as a legal standard and affording every Michigan worker the opportunity to earn job security. Such security would provide for continued employment absent just cause for termination. Such security would provide for continued employment absent just cause for termination. To that end, I co-wrote a proposed Michigan Statue which echoed those protections and more (below for your review)

Currently, I am circulating this proposed legislation among Democratic Representatives in the Michigan House. Should the Michigan Legislature change colors this fall, I assume this type of worker protection would garner some attention. The Legislature could decide that the time may be right to change a rule of workplace which has governed the employer - employee relationship since the late 19th century!

So why am I raising my political advocacy in the President’s Note? I see it as a responsibility, instead

of waiting for member(s) to see me quoted in some publication supporting workers rights. Some may consider by advocacy as conflicting with my office. I realize that my public positions may not always correspond with the opinions of other members. I intend to make clear that in my commenting on any employer-employee issue. I speak only for myself and do not reflect the opinion of this organization or any of its members.

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MICHIGAN JUST CAUSE FOR TERMINATION ACT

AN ACT to define a civil right; to prohibit certain practices, policies, and customs in the exercise of that right; to provide remedies and penalties; to provide for fees; and to repeal certain acts and parts of acts.

ARTICLE 1

**101 Short Title

Sec. 101. This Act shall be known and may be cited as the “Michigan Just Cause for Termination Act”.

**102 Recognition and Declaration of Civil Right

Sec.102. The opportunity to maintain employment and not be terminated from employment without just cause is recognized and declared to be a civil right.

**103 Definitions

Sec.103. As used in this Article:

- (a) “Employer” means a person who has one or more individuals for each working day in each of 20 or more calendar weeks in the two year period next preceding a termination, and includes an agent of that person.
- (b) “Fringe benefit” means vacation leave, sick leave, medical insurance plan, disability insurance plan, pension benefit plan, or benefit of economic value, to the extent the leave, plan, or benefit is paid for by the employer.
- (c) “Just cause” means a reasonable basis related to an individual for termination of the individual’s employment in view of relevant factors and circumstances, which may include the individual’s duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or basis for separating the individual as part of a good faith reduction in force.
- (d) “Good faith” means honesty in fact.
- (e) “Pay” as a noun means hourly wages or periodic salary, including tips, regularly paid and nondiscretionary commissions and bonuses, and regularly paid overtime, but not fringe benefits.
- (f) ”Person” means an individual, corporation, business trust, estate, trust, partnership association, joint venture, this State, a municipal corporation, any other governmental subdivision, agency or instrumentality, and any other legal or commercial entity.

(g) “Termination” means:

(i) A dismissal, including that resulting from the elimination of a position, of an individual by an employer;

(ii) A layoff or suspension of an individual by an employer for more than two consecutive months; or

(iii) The quitting of employment or a retirement by an individual induced by an act or omission of the employer, after notice to the employer of the act or omission without appropriate relief by the employer, so intolerable that under the circumstances a reasonable individual would quit or retire.

ARTICLE 2

**201 Scope

Sec. 201. (a) This Act applies only to a termination that occurs after the effective date of this Act.

(b) This Act does not apply to a termination at the expiration of an express oral or written agreement for a specified duration.

(c) Except as provided for in subsection (e), this Act displaces and extinguishes all common law rights and claims of a terminated individual against the employer, its officers, directors, and employees, which are based on the termination or on acts taken or statements made that are reasonably necessary to initiate or effect the termination if the individual’s termination requires just cause under section 301 (a).

(d) An individual whose termination is not subject to section 301 (a) retains all common law rights and claims.

(e) This Act does not displace or extinguish rights or claims of a terminated individual against an employer arising under state or federal statutes or administrative rules or regulations having the force of law, or local ordinances valid under state law, a collective bargaining agreement between an employer and a labor organization or an express oral or written agreement relating to employment which does not violate this Act. Those rights and claims may not be asserted under this Act, except as otherwise provided in this Act. The existence or adjudication of those rights or claims does not limit the individual’s rights or claims under this

ARTICLE 3

** .301 PROHIBITED PRACTICES

Sec. 30t (a) Unless otherwise provided in an agreement for a specified duration under section 201(b) an employer shall not terminate the employment of an individual without just cause.

(b) Subsection (a) applies only to an individual who has been employed by the same employer for a total period of one year or more and has worked for the employer for at least 520 hours during the 26 weeks next preceding the termination. A layoff or other break in service is not counted in determining whether an individual's period of employment totals one year, but the individual is considered to be employed during paid vacations and other authorized leaves. If an individual is rehired after a break in service exceeding one year, not counting absences due to labor disputes or authorized leaves, the individual is considered to be newly hired. The 26-week period for purposes of this subsection does not include any week during which the individual was absent because of layoffs of one year or less, paid vacations, authorized leaves, or labor disputes,

(c) This section shall not be construed to prohibit the establishment or implementation of a bona fide retirement policy or system that is not a subterfuge to evade the purposes of this section.

(O) This section does not apply to the employment of an individual by his or her parent, spouse, or child.

ARTICLE 4

** .401 AGREEMENTS BETWEEN EMPLOYER AND AN INDIVIDUAL.

Sec.401. (a) A right of an individual under this Act may not be waived by agreement except as provided in this section.

(a)

An employer may provide substantive and procedural rights in addition to those provided

in this Act, either to one or more specific individuals by express oral or written agreement or to individuals generally by a written personnel policy or statement, and may provide that those rights are enforceable under the procedures of this Act.

(d) An employing person and an individual not otherwise subject to this Act may become subject to its provisions to the extent provided by express written agreement, in which case the employing person is deemed to be

the employer,

(e) An agreement between an employer and an individual subject to this Act imposes a duty of good faith in its formation, performance, and enforcement.

(f) By express written agreement an employer and an individual may settle at any time a claim arising under this Act.

(h) By express written agreement after a dispute or claim arises under this Act, an employer and individual may agree to any form of alternative dispute resolution.

(i) The substantive provisions of this Act apply to such agreements in addition to the remedies provided in Article

ARTICLE 5

** .501 REMEDIES.

Sec. 501. (a) An individual alleging a violation of this act may bring a civil action for damages.

(b) An action commenced pursuant to section (a) may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.

(c) An action must be commenced within three years of the date of the alleged violation.

(d) As used in section (a) "damages" means back pay with interest and future pay, reduced by interim pay from employment elsewhere or amounts that could have been received with reasonable diligence, together with the value of lost fringe benefits, reduced by the value of interim fringe benefits received.

(e) A court, in rendering a judgment in an action brought pursuant to this article, may award all, or a portion, of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate.

ARTICLE 6

** .601 POSTING.

Sec.601. An employer shall post a copy of this Act in a prominent place in the work area. An employer who violates this section is subject to a civil penalty not exceeding \$ 10,000. The Attorney General may bring a civil action, on behalf of the State, to impose and collect any civil penalty arising under this section.

ARTICLE 7

** .701 RETALIATION PROHIBITED AND CIVIL ACTION CREATED.

Sec. 701. An employer or other employing person may not directly or indirectly take adverse action in retaliation against an individual for filing a complaint, giving testimony, or otherwise lawfully participating in proceedings under this Act, whether or not the individual is an employee

under this Act. An individual alleging a violation of this section may bring a civil action for damages as defined in Section 5. A separate civil action may be brought to enforce this liability.

ARTICLE 8

** .801 SEVERABILITY CLAUSE.

Sec. 801. If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

ARTICLE 9

** .901 EFFECTIVE DATE.

Sec.901. This Act takes effect ***

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Membership, Leadership and Issues Impacting Bar Associations

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

Thank you in advance for indulging me this bit of personal outlook.

It's been seven months since the world as we know it changed.

Seven has always been my lucky number. All three of my daughters were born on a day with a 7 in it. I coached a game for 17 years that was based on 7 innings of play.

And now, seven months into this pandemic and my first born has married her best friend.

So, maybe, just maybe in this seventh month we will begin to conquer this virus and return to a sense of normalcy.

Thank you for renewing your membership in the Macomb Bar. Now, more than ever there is a need for collaboration and community. We are a local bar association and our strength is YOU, the local attorney. Macomb attorneys are, to use an overworked term, essential to the fabric of the community. Every business, charitable organization, church, government, school and group needs you and you are always there for them.

Two years ago we offered a new membership category, the Sustaining Member. Macomb Bar Sustaining members pay a little more each year to help the bar maintain and upgrade its technologies, while at the same time contribute to the Macomb County Bar Foundation's excellent work in providing and supporting law related and civic education. Thank you to our 2020-2021 Sustaining Members, see page 5. *(Please note that additional Sustaining Members may have presented*

themselves after we went to print)

As we embark on a new year, I encourage you to get involved in your bar and or your foundation. Join a committee, approach leadership with your ideas, consider leading a committee or running for the board of directors. Even though we are local, we are in tune and in touch with State and National issues that impact the

practice of law. There are many big picture and governance issues out there that you could make an impact on.

For example, today, perhaps more so than ever before, bar association members are asking their bars to make a public statement on issues that may or may not solely revolve around law. Should, and to what extent

should local bar associations make public statements on issues. This issue is one that bar boards have grappled with for many years. Yet, how do we deal with this issue in the age of instant communication. "When Should A Bar Association Take a Position," authored by Marilyn Caviccia, was published in the ABA's Bar Leader magazine in 2014. The arguments presented then are relevant today. Recently, your Board of Directors faced this question head on and the result is hosted on your website, MacombBar.org.

And then there is this issue.

State Bar Group Calls for 'Mandatory' COVID-19 Vaccinations, Regardless of Objections
"Some Americans may push back on the COVID-19 vaccination for religious, philosophical or personal reasons," says the report released on Thursday by the



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NYSBA, but, it says, “for the sake of public health, mandatory vaccinations for COVID-19 should be required in the United States as soon as it is available.”
Published in Law.com, May 2020.

Another issue that bar associations face. From Bar Leader, Vol. 45, No. 6, authored by Dan Kittay; “**A Permanent Shift? Looking Toward Post-Pandemic Future, Bars Mull Remote Work, Online Meetings, Physical Space.**” Indeed, the Macomb Bar has been and continues to mull these issues over with a plan to enlarge space for physical distancing

An article titled, “**Redefining Community: Lawyers Connect With Each Other, Bars, to Fight COVID-19 Isolation**”, written by Marilyn Cavicchia captures the essence of what has been happening during Macomb Bar members meetings, family law meetings and criminal think tank meetings these past months.

And, an April 2020 post by Joy Folkedal on BoardSource; “**Why We Need Exceptional Board Governance More Than Ever**”, speaks to the need for good governance of organizations, especially in these times. The author refers to twelve principles of good governance that inspire boards to operate at the

highest level and make the best use of their collective capacity. She reminds board leaders how they “can use these principles to show up for our organizations and leverage our boards for their great contributions”.

Now, more than ever your organization needs you, as a member, as a sustaining member, as an active member. Have questions on how you can participate? Contact an Association or Foundation board member or me at RTroy@macombbar.org.

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Circuit Court Corner

By Macomb County Circuit Court Administration

COVID-19 Safety Protocols at the Courts

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All surfaces in the court buildings are being cleaned regularly and in accordance with applicable guidelines. Acrylic shields have been installed in certain areas where social distancing is impracticable. No one is allowed to enter the buildings without face masks, and face masks will be provided for those who arrive without them. Hand sanitizer and disinfectant wipes



-- they must check in individually. And please be sure they don't try to bring family or friends with them; they will be denied entry. Family, friends, and members of the public who wish to view the court proceedings may do so in real time by visiting: <https://circuitcourt.macombgov.org/livecourtproceedings>.

Everyone will be scanned with a touchless thermometer and questioned about possible symptoms or exposure on arrival at the court buildings. Anyone who has been recently exposed to COVID-19, has been diagnosed with the disease, or is experiencing symptoms associated with COVID-19, will be denied entry. Under no circumstances should you arrive at the court buildings if you fall in any of these categories. Instead, please contact the appropriate judge's chambers and make alternate arrangements.

are available in each courtroom. We also have placed signage and stickers around the buildings and on seats to facilitate social distancing. Additional personal protective equipment, such as face shields and gloves, is available upon request.

In short, every effort is being made to ensure that our court buildings are as safe as possible for everyone. We continue to limit in-person court proceedings where feasible, and conduct matters remotely for the most part. Thank you for understanding, and please rest assured that we are proactively taking steps to mitigate risk during this unprecedented time.

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Some Evidence

By Carl J. Marlinga, Circuit Court Judge

It is likely that nobody noticed, but my articles went missing for the past few months. The COVID-19 pandemic has made day to day operations in the courthouse more difficult and time consuming. Since a lot of motions are now submitted without oral argument (“on papers” as they say in federal court) I have had to do a lot of written orders. It seems that my job takes precedence over writing these articles.

I was also happily busy for a while working on the “Remote Jury Pilot Workgroup” which studied the feasibility of conducting trials remotely on Zoom. For those of you interested in that topic you can view the final report at:

<https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/RJTTrialStandardsRecommendations.pdf>

The key take-aways from the report are that: (1) a court should obtain the consent of all parties before any remote trial proceedings occur, and (2) the use of any remote viewing in a criminal trial must be accompanied by a knowing and voluntary waiver by the accused of his or her right to an in-person trial. It was and is my personal recommendation that a remote trial should never be attempted in a criminal case because I do not believe that any criminal defendant has sufficient knowledge of

what he or she is giving up to be able to make a knowing waiver.

With respect to evidence, the report creates one standard and two recommendations (at page 14). Here they are:

“Standard 20 – Evidence as Exhibits

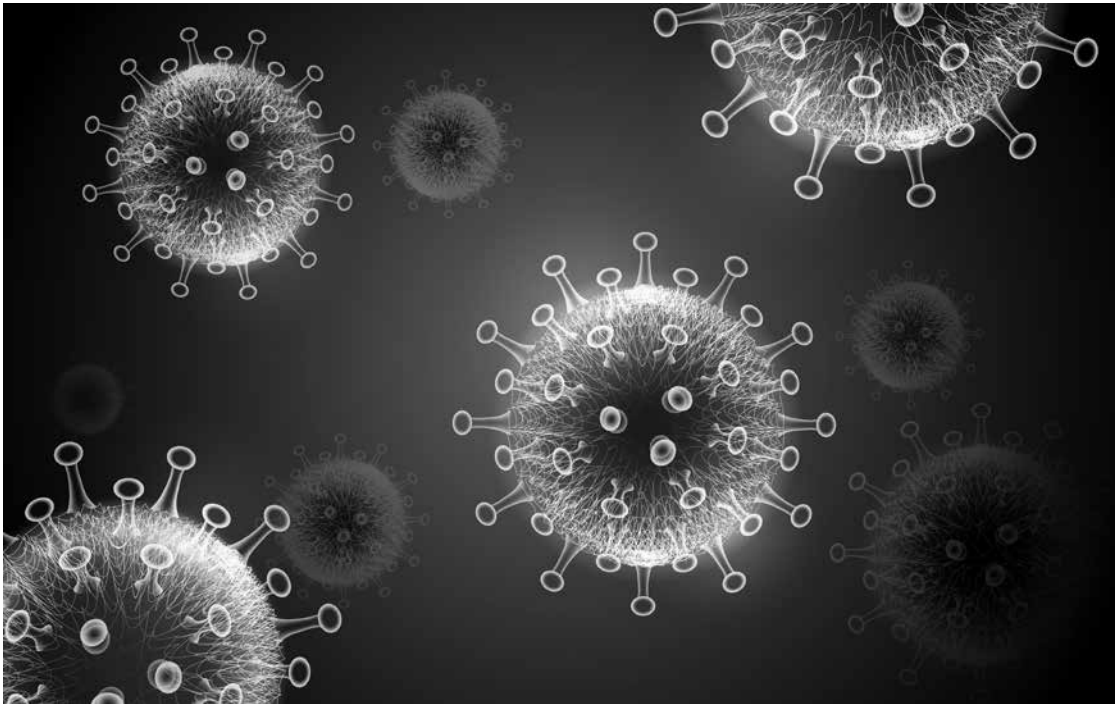
Materials that are intended to be used as evidence at or during a trial shall not be filed with the clerk of the court, but shall be submitted to the judge for introduction into evidence as exhibits. [Footnote references MCR 2.518.]

Recommendation 20.1 – Submitting Proposed Exhibits Before Trial

Allow exhibits to be submitted ahead of time via email to the court and parties, so

they can be marked and logged before the trial. However, if there is a need to share during the proceedings, it can be done through the Zoom chat feature or other available technologies that allow for sharing documents. If the evidence is a physical object and is not transferrable by file transfer, such as a weapon, and the parties do not agree that a photograph of the evidence suffices, then pursuant to MRE 612 the court may order it made available for inspection at a designated location, day, and time.

Recommendation 20.2 – Displaying Proposed



Exhibits to Witnesses

Determine how proposed exhibits will be displayed to witnesses to lay the foundation for admission without allowing the jurors to view the exhibits until they are admitted, since they should not be displayed to the jurors or to the general public on a livestream before the court admits them. One way this may be done is laying the foundation with a witness outside the presence of the jury, and sending the proposed exhibit to the witness via email or private Zoom chat. Physical exhibits (objects other than photos or documents) will require a much different process, and can be done by creating a 360 degree view of the physical exhibits (photo or video) for presentation at trial to witnesses and jurors. When exhibits need to be shared in the trial the attorney or party can do this by a “screen share,” but there would need to be advance training on this.”

These standards and recommendations just scratch the surface of the technical issues that may arise in submitting and admitting exhibits. In my courtroom I have the advantage of having a tech-savvy secretary who can assist the attorneys in this task, but that kind of assistance will not be commonly available in other courtrooms throughout the state. Attorneys engaging in Zoom trials will have to force themselves to become proficient in Zoom technology or they will have to be wise enough to hire support staff to do the job.

In order to be considerate of the time of jurors and other parties, it will be incumbent on judges and attorneys to devote adequate time prior to trial to mark and receive exhibits. In the mock trial that our committee conducted (presided over by Judge Mark Switalski who “volunteered” for the job) the task of admitting exhibits in the course of the trial was surprisingly smooth; but gut instinct tells me that the ease with which this was accomplished in our practice mock trial cannot be expected in real life.

With respect to the factors to be applied in admitting exhibits, nothing changes from standard practice. I harken back to prior articles (Bar Briefs, December, 2019, for example) to emphasize once again the very low threshold necessary for authentication. MRE 901 says simply, “The requirement of authentication as a condition precedent to admissibility of evidence is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” In making such a finding a judge is permitted to use common sense based on all available information, including hearsay. Specifi-

cally MRE 104 directs a court: “In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.” I have found that lawyers tend to go overboard in trying to lay a foundation, and, likewise, opposing counsel often engage in frivolous objections with respect to authentication.

MRE 901(b) lists a number of examples of how easy it is to authenticate exhibits. Those examples should be memorized by every trial lawyer. It is also helpful to point out to the judge that the list is non-exhaustive. The rule expressly says, “By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:...” [Emphasis added.]

Remember also that MRE 902 provides for self-authentication of a goodly number of documents and published reports.

There should also be no worries about copies, or copies of copies, being displayed on a video screen. Modern technology makes the old “best evidence” rule obsolete except in exceptionally rare contexts. MRE 1003 says, “A duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. Therefore, any objection based on the argument that the jury needs to see the actual exhibit, rather than a screen shot, is without merit, and frankly, silly.

I would hope that everyone has the opportunity to conduct a Zoom trial or hearing at some point. The advance preparation necessary to make such a proceeding flow smoothly will undoubtedly carry over to streamline our practices when we no longer need the Zoom alternative. Better yet, I am sure that we will find ways to incorporate Zoom into most trials and hearings to save time and expense for witnesses whose physical presence in court can be safely waived by all parties.

Endnotes

¹ The admission of two-way, interactive video over defendant’s objection was held to be unconstitutional by the Michigan Supreme Court in *People v Jemison*, Docket No. 157812, ___ Mich___, 2020 WL 3421925, June 22, 2020, citing *Crawford v Washington*, 541 US 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

² For example, an attorney asking questions on voir dire about the admissibility of a photograph will often ask who took the picture – as if that question were at all relevant. The only issue to be decided is whether the pic accurately depicts the thing or scene being photographed.



Introducing the 2020-2021 Young Lawyers Section Chair, Laura Polizzi

By Alecia Golm, Chair Elect of the Young Lawyers Section

With the introductory of the new 2020-2021 Macomb County Bar Association Board and leaders, I would like to formally announce and introduce the YLS Chair (President), Laura E. Polizzi.

Laura about her involvement in various organizations and committees, and her vision for the 2020-2021 year, her law practice, and any advice she may have regarding for young lawyers entering our profession.

Most of our members and non-members alike are familiar with Laura already. Laura is delightful and intelligent, and a zealous advocate in the court room. Laura started making a name in Macomb County, while her and I were still in law school together, with her internships and program involvement. I am so thankful that I have been able to take this journey with Laura from law school to professional practice to see the amazing accomplishments and success she has achieved.

For those of you who are not familiar with Laura or would like to know more about her, I conducted an interview with her for this edition of the Bar Briefs to really introduce her to our members. I wanted to highlight Laura’s biography and note her practice and achievements. I also talked to

Quick Biography



Laura Polizzi focuses her practice primarily on complex domestic litigation (divorce, custody, paternity, child support, parenting time), but also offers considerable expertise in an array of business, real estate, and criminal matters, as well as other litigation. Laura also represents several local businesses with both their contractual and litigation needs.

Laura was honored by the Super Lawyers as a 2018, 2019, and 2020 Michigan Rising Star! She is now, as we have introduced,

the Chair of the MCBA Young Lawyers Section for 2020-2021. She is also the Present of the Women’s Lawyers Association of Michigan (WLAM) Macomb Region for 2020-2021. Laura has been selected as a

representative for the 16th Circuit Court in the State Bar of Michigan Representative Assembly and serves on the local character and fitness committee. Laura is also a faculty member for (SOAR) at Macomb Community College. Last but not least, Laura is fluent in Spanish, as well as conversational in Italian.

Q & A with Laura Polizzi

As your last year in YLS, what are you looking forward to this year? What is your vision for our 2020-2021 year and how do you want to make an impact with your last term?

This year presents the new challenge of COVID-19 and social distancing. We haven't let that slow us down. YLS is planning on having two socials in August, one in-person at Madison's and another virtually to reach all levels of our members. We are also having an outdoor event in the fall at a cider mill and really trying to bring members together in a safe, distanced way.

The goal of YLS is to get young lawyers active and participating in the Bar Association and MCBA events. I plan on reaching out individually to new attorneys and encouraging them to get involved in the MCBA and YLS and come to our events and see what we're about. My goal is to increase our YLS membership and provide resources to these young lawyers for continued involvement in our Bar Association.

I hear you're also the President of WLAM's Macomb Region for 2020-2021. What do you have up your sleeve for the WLAM 2020-2021 year?

I am the President of the WLAM Macomb Region this year! So far, WLAM is hosting a Golf Outing on October 2nd at Sycamore Hills Golf Club. We will also host our annual Christmas luncheon and Spring Charity Event. Keep a look out for more details on these and other potential upcoming events!

What drives you to get involved with these committees, boards, and organizations?

I am the first lawyer in my family and I didn't know anyone involved in the legal community prior to attending law school. Involvement in the Macomb Bar has allowed me to get to know attorneys from all walks of the professional on a personal level. These attorneys have become my mentors and friends. Macomb County is certainly the friendliest county to practice in and I believe that makes our lawyers the best to work with.

How do you like private practice and partnering up with a fellow attorney and friend?

I have been in private practice now for 5 years. It's been great to see my business really grow over the years. Two years ago, I partnered with Angela Medley and we have had a great time practicing law together. The legal community knows that Angela is an excellent attorney, but she is an even better business partner and friend. A more recent highlight has been working virtually and transitioning our office to the new normal with COVID-19 and we really haven't skipped a beat.

What area(s) of law would you say you really specialize in and enjoy practicing?

My primary practice is family law; however, I also take business, real estate, and other litigation matters. My favorite clients are the several local businesses we represent. I really enjoy the creativity that is required to cater to the individual needs of each business.

Last question. What advice do you have for young lawyers coming into our profession and starting their journey?

Be bold. Do not feel intimidated by an opposing counsel that has been practicing longer than you. Welcome the opportunity to work and learn with them. It is called the "practice of law" for a reason, as everyone continues to learn. Do not feel intimidated to speak to a Judge either. They are really nice people who want to have friendships with attorneys in the legal community too. Get involved with everything you can and never stop learning.



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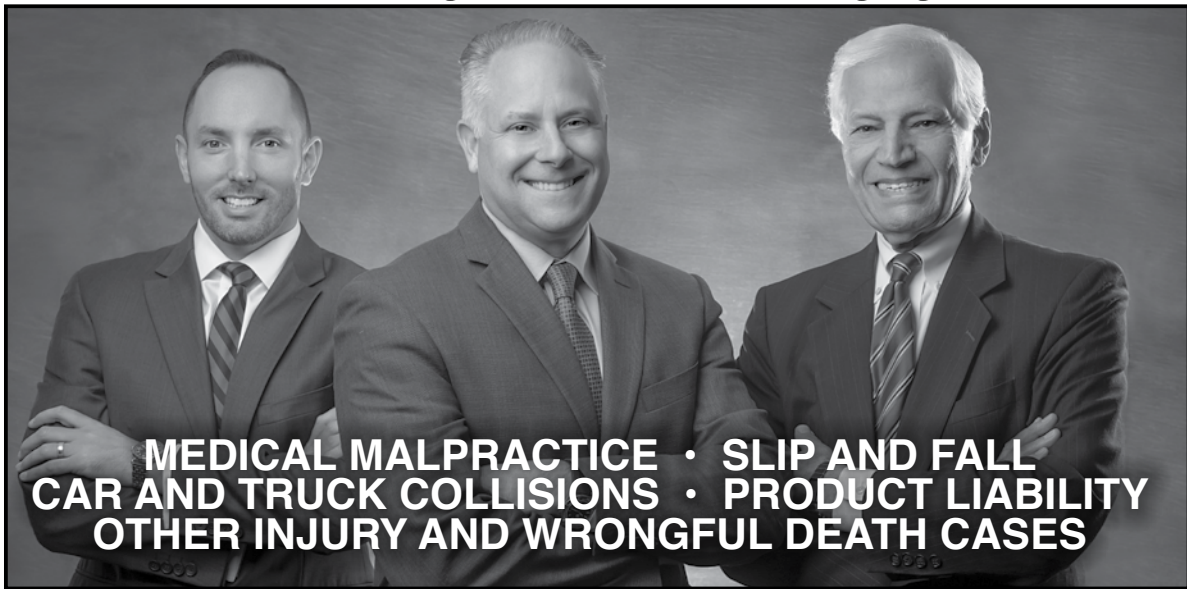
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