BAR BRIEFS

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2023 Diversity and Inclusion Dinner

D&I Commitee Chair Esse Tuke and President Lori Smith at Fillipas on February 16th.

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With Great Gratitude…

By Lori K. Smith, President of the Macomb Bar Association

It has been a hectic but productive few weeks. Our Bench Bar conference was held on February 28th and the Macomb Bar Foundation's Mock Trial competition was held the following weekend.

Both events were successful but also provided insights as to improvements that can be made for future years.

Bench Bar

The Macomb Bar has not hosted a Bench Bar conference since 2017 (or 2019 according to Hon. Judge Biernat's research) but in either instance – it has been far too long. I remember attending the conference as a young lawyer and found the information and insights that I acquired invaluable.

It was enlightening to see our Judges in a non-courtroom setting as it alleviated some of the apprehension of appearing before them in the Courtroom.

As I am sure that you have heard in my ramblings this year, one of the things that I had hoped to accomplish is to present opportunities for all of us to reconnect. The return of the Bench Bar very much aligns with that goal, and I truly hope that it is not another 4-6 years before another one is scheduled.

I want to extend my gratitude and appreciation to all of those in attendance. Thank you to the Judges, Court Administrators, and court staff who rearranged their dockets to be there. Thank you to all of the members who revamped their schedules to attend, and who posed some challenging questions for consideration. I believe that the dialogue that occurred that day will lead to improvements in the future.

I would be remiss not to thank Magistrate Ryan Zemke for all of his work with the planning of the event and acting as morning moderator, and Donald Wheaton, Tanya Grillo, and Brian Grant for being such amazing moderators for the afternoon session.

Mock Trial

I would also like to thank all of those who answered the call to volunteer for the Michigan High School Mock Trial Competition. Although, the Mock Trial competition is a Bar Foundation event, it is one that I have been involved with since the Foundation began hosting the event.

This year's competition had an interesting start with a 1-hour delay due to the snowstorm, and then 4 teams dropping out of the competition the morning of the event.

The Mock trial volunteers took it all in stride and were unbelievably patient and understanding as we worked to revise the schedule for the competition. The Volunteers are appreciated not only by the Bar Foundation and those involved with the program, but by the students who participated in the event.

Finally, I would like to congratulate Regina High School and University of Detroit Jesuit who advanced from the Macomb Regional competition and competed at the State competition on March 18, 2023.

…one of the things that I had hoped to accomplish is to present opportunities for all of us to reconnect. The return of the Bench Bar very much aligns with that goal.

Mission Driven – The Macomb County Bar Foundation

By Rick R. Troy, Executive Director of the Macomb Bar Association and Macomb Bar Foundation

When was the last time you were a spectator lost in wonderment as the talent before you made your body react with a lump in your throat or made you pump you fists? Was it a concert? A football game that went down to a Hail Mary play in the final seconds? Maybe it was a bottom of the seventh/ninth battle between pitcher and batter. Entertainment where the talent in front of you evoke feelings of joy, sadness or amazement is special. Let's face it, there are very few organized bar related events that bring out this type of reaction.

There are plenty of association industry jokes about rubber chicken and green bean speeches, but I'm here to tell you that the Macomb County Bar Foundation's High School Mock Trial Tournament truly is an exciting competition. The volunteers that help make it all happen will attest to the hard work that the future lawyers of tomorrow put into their craft and, wow do they deliver! It's worth your time to see these young adults perform. Every volunteer, Trustee and supporter of the Foundation should take pride in the success of this program.

One of the many special extras that we provide in the Macomb Regional is the presentation of medals to the teams that win a berth to the state championships. As you can see from the March 4, 2023 tournament, they love it!

The Macomb County Bar Foundation was born out of the Macomb Bar County Association. Over time the Foundation carved out a mission to provide and support law related and civic education. With the help of literally hundreds of volunteers and donors, the leadership of the Foundation continues to succeed in its mission.

Another recent Foundation accomplishment is the launch of an elementary reading program. Spearheaded by Foundation Treasurer Sherriee Detzler and actively supported by several volunteers, Macomb County classrooms at Michigan Collegiate Elementary, Violet Elementary, Miami Elementary and Belleview Elementary have benefited from lawyers reading *The U.S. Constitution from A to Z* book in class.

Later this month the Foundation will assemble winners of the Foundation Law Day essay and artist contest. This program is for 1st through 8th graders and our volunteers typically read through a thousand essays and review hundreds of posters. This year the theme is, "Cornerstones of Democracy: Civics, Civility, Collaboration". I look forward to sharing the success of the 2023 program with you in the near future.

The Foundation does not limit it's pursuit of mission to children. As a matter of fact, Foundation programs reach people of all ages. At the collegiate level, the Foundation's Law School Scholarship program provides three $3000.00 scholarships for 2L and 3L students attending a Michigan based law school. Since the inception of the program more than $155,000.00 has been granted in scholarship awards. We publish a list of recipients on MacombBar.org.

Beyond scholastic oriented programs, the Foundation's Legally Speaking television show continues to educate the public on legal issues. Still airing on some government channels such as Sterling

2023 Regional Mock Trial Winners

University of Detroit Jesuit

Regina High School

Heights TV, the shows are also available streaming on demand. In recent years the Foundation has partnered with Lakeshore Legal Aid to produce the shows. Lakeshore CEO Ashley Lowe is an excellent host that, like her predecessor, Charlie Langton, has been recognized with industry awards, most recently a Philo award, for the work her team has produced.

The Foundation has always had a place within its mission to assist in times of community crisis and need. From incubating the success of The Resolution Center and Care House two decades ago, to taking the 2019 Feed the Need project to become an annual in-house full blown program. Feed the Need volunteers work throughout the year to execute a Christmas time meal for those in need with hundreds of meals delivered to partnered shelters throughout the county after the event.

Other Foundation programs have included historical Mock Trials, Constitution Day events and High School reading program funded by the Kimberly M. Cahill Memorial fund. If you wish to get involved as a volunteer or you have an idea for a program that fits the mission, please contact me or any Foundation board member.

The Foundation is currently in its Trustee renewal period and new Trustees are welcome. Trustees contribute $150 a year and are eligible for election to the board of directors. I implore you bring your talents and contributions to help the Foundation continue its success.

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Relying on AI-Generated Text and Images?

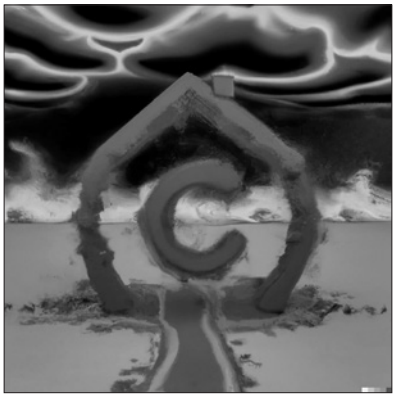
You May Be Building Your Copyright House on Sand

By Brian D. Wassom, Partner

A February 21, 2023, decision by the U.S. Copyright Office has given all creators and companies reason to think twice before jumping on the generative AI bandwagon.

Over the past six months, the world has been fascinated by the explosion of "generative" artificial intelligence programs — in other words, AI programs that generate content in response to human requests. The most popular of these applications include ChatGPT — the surprisingly conversational chatbot that Microsoft recently incorporated into its Bing search engine — and image-creating software such as DALL-E 2 and Midjourney, which turn a few words of input into visual artwork of remarkable quality.

But it was an artist's use of the latter program — Midjourney — that prompted a recent ruling from the U.S. Copyright Office that calls into question the utility of AI-generated images for anyone concerned about protecting their intellectual property. Visual artist Kristina Kashtanova sought, and initially received, a copyright registration for her graphic novel Zarya of the Dawn. But when the office learned that the imagery in the book was generated by Midjourney, it decided to revoke the registration. Well-established, and recently re-affirmed, law establishes that copyright only exists to protect the original, creative expression of human authors — not of animals or machines.



Created with DALL-E 2

Kashtanova appealed the revocation, arguing that Midjourney had merely been an "assistive tool" in the realization of her own creative vision. And the office did ultimately conclude that the end product contained some of her original expression. For example, she wrote the text balloons spoken by the characters, and she decided how to arrange the images in the book. Copyright law recognizes these as sufficiently creative to merit protection, so the office decided to maintain Kashtanova's registration as to these elements.

But the imagery itself was not copyrightable human expression, in the office's view, and will be removed from the scope of the registration. Kashtanova argued that, because she chose the "prompt" words she supplied to Midjourney, she was the legal author of the resulting image, and the AI was merely a tool she used to create it.

After a detailed review and explanation of how Midjourney, and other generative AI programs work, the office disagreed. "Generation involves Midjourney starting with a field of visual noise, like television static, used as a starting point to generate the initial image grids and then using an algorithm to refine that static into human-recognizable images" by drawing from the program's training data, it wrote. "The initial prompt by a user generates four different images based on Midjourney's training data. While additional prompts applied to one of these initial images can influence the subsequent images, the process is not controlled by the user because it is not possible to predict what Midjourney will create ahead of time." The fact that Kashtanova used Photoshop to touch up a few of the images did not change this result, because the alterations were so minor as to not add any new, original expression. As a result, the images were "works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author," and are therefore ineligible for copyright protection.

The takeaway from this decision for any creator or business that intends to own copyright in the text or imagery that it uses should be clear. Relying on AI-generated content could leave your copyright portfolio looking like a donut: with some valuable content around the edges but a giant hole in the center. Worse yet, if your content is not protected by copyright, that means it is public domain, and free for anyone to copy and use. That may have little impact if the work in question is a few lines of ad copy or a stock image to accompany an article. It becomes a much greater problem if the AI-generated content becomes the centerpiece of a commercial product, like Casanova's book. In that case, you could end up investing great sums of capital, time and goodwill into work product you do not own and cannot prevent others from copying.

And that's not the only potential copyright problem with generative AI. Recall that AI programs apply algorithms to their training data in order to create output. Yet much of that data is itself copyrighted content from other creators that has been scraped off the internet. That is why there are several lawsuits currently pending alleging that Midjourney and other AI programs are committing copyright infringement on a massive scale. In the worst-case scenario, those who use these programs could end up with content they don't own and that infringes someone else's rights.

Obviously, these are emerging and rapidly developing areas of law. Other courts and agencies could reach different results under different circumstances, and the technology will always continue to adapt. In the meantime, however, creators and businesses should resist jumping on bandwagons, and should instead think deliberatively about the creative tools they use.

Fortunately, Warner's Intellectual Property Practice Group is on top of these cutting-edge intellectual property issues. Our lawyers are certified in AI and have litigated ground-breaking issues of copyright, originality and digital expression. Contact us today for educated guidance in navigating these turbulent digital waters.

*Advocating in a wide range of commercial and intellectual property matters, **Brian Wassom** litigates disputes and counsels clients in matters of commercial branding, publicity rights, creative expression and privacy.*

Introducing 16th Circuit Court Deputy Administrator Jean Cloud

By Amanda Hudson, Ohio Northern University Pettit College of Law

Most attorneys have hopes and dreams that they seek to achieve in the future, but very few are able to look back at the past to see that they've already achieved them—like Jean Cloud. No matter what area of law you practice, Jeannie's list of accomplishments is second to none. Her impressive career, and her many accolades, showcase her passion for the law and demonstrate the rewards that can come from hard work. Most lawyers would look back at her career and be content with her successes, but for Jean Cloud, there is more to be done.

Jeannie's rise to greatness began at Boston University where she received her bachelor's degree before moving on to Detroit College of Law. After graduating cum laude and passing the bar, Jeannie began her legal career in private practice where she worked on family law, insurance defense, and personal injury cases. Jeannie ultimately left the private sector for a career in public service. In 2000, she took on her role as an Assistant Prosecutor at the Macomb County Prosecutor's Office. While there, Jeannie prosecuted thousands of cases, conducted numerous jury trials, and achieved justice for countless crime victims. She had multiple assignments during her time at the Prosecutor's Office, including in the District Court Division, Circuit Court Division, Juvenile Division, and Paternity division.

Most notably though, Jeannie was the Chief of the Child Protection Unit, Chief of the Auto Theft Unit, and eventually, the Chief Trial Attorney in charge of all other Assistant Prosecutors. She is well known in both the legal career field and to the public for her leadership roles in prosecuting many of Macomb County's high-profile defendants including Eugene Williams, Deon Taylor, Kenisha Faison, Dan Daniels, Gregory Lowe, James Franks, Jeremiah Boshell, Ronald Dimambro, and most recently, Jonathan Jones.

Perhaps one of Jeannie's most notable and significant roles at the Prosecutor's Office was her appointment by the 16th Judicial Circuit Court bench to Interim Prosecuting Attorney in May 2020. With that appointment, Jeannie instantly became the top law enforcement officer in Macomb County at an office that was essentially in shambles, and at the very onset of the COVID pandemic and crisis. But Jeannie's leadership was undoubtedly successful. Not only did she effectively lead her employees through the pandemic, but she was also able to rebuild the necessary trust and confidence in the Prosecutor's Office that had once been lost.

Despite her already successful career and her obvious talent as a prosecutor, Jeannie's path ultimately changed course in August of 2022 when she accepted her current position as Deputy Court Administrator for the 16th Judicial Circuit Court. As the Deputy Court Administrator, Jeannie is tasked with performing a variety of high level administrative and supervisory functions in the operation of the Circuit Court division. As one of the top liaisons for the Administrator's Office, Jeannie works closely with the Circuit Court bench to ensure that our justice system runs as swiftly and smoothly as possible. In addition to her primary duties though, Jeannie has also set some personal goals for her to achieve as Deputy Court Administrator.

For instance, one of her goals is to implement a cohesive communication system between government entities in Macomb County, such as the Clerk's Office, MDOC Probation, Public Defender's Office, Prosecutor's Office, the District Courts, and local law enforcement agencies. Given her prior experience in both administrative and non-administrative public service roles, there is little doubt that Jeannie will once again succeed in her ambitions.

Jeannie's success in the legal field has certainly been assured by her hard work and dedication, but the love and support she receives from her family every day gives her the motivation to keep going. Outside of work, Jeannie enjoys spending time with her husband, Bruce, and her son, Colin. During the summer months, she and her family enjoy traveling to the lake up north, and in the winter, Jeannie loves to go skiing and visit her extended family.

As a very successful and experienced attorney, Jeannie certainly has a wealth of knowledge, wisdom, and advice to share with attorneys and law students, especially those who are just starting off on their legal career paths. She encourages every young lawyer and law student to get involved in the legal organizations in their community, such as the Macomb Bar Association, Macomb Young Lawyers Association, Women Lawyers Association of Michigan, and any and all other legal organizations that might peak your interest.

Getting involved in the legal field and networking with other lawyers and students is perhaps the most important part of building a successful legal career, as it could lead you to an employment opportunity that you might not otherwise find. In any event, the reputation you earn and the connections you make with your fellow students, attorneys, and judges will last a lifetime.

***Amanda Hudson** is a third-year law student at Ohio Northern University Pettit College of Law. Amanda was born and raised in Shelby Township, Michigan and has worked for the Macomb County Prosecutor's Office since the summer of 2021. Amanda is graduating in May of 2023 and plans to start at Femminineo Law in the Fall.*

What Happens When The Trial Court Rejects An Objection To Referee Recommendation?

Prepared By Liisa R. Speaker, Speaker Law Firm

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We have seen many examples of trial courts refusing to hold a de novo hearing after a parent files an objection to a referee recommendation. In many of those instances (so far 4 out of 4 times from our office alone) the Court of Appeals has reversed the trial court's decision and required the court to conduct a de novo hearing. Based on these repeated experiences, let's explore why trial courts are getting it wrong.

This white paper will examine the court rules and statutes governing de novo hearings. Then it will explore several cases where a parent's request for a de novo hearing was denied - and then reversed on appeal. So, file your client's objection on time and just know that if the judge is inclined to deny the hearing your client is entitled to, there is still light at the end of the tunnel. Moreover, with the recent published decision on this topic - *Butters v Butters* - you might even have a shot of persuading the trial court to grant reconsideration if it has improperly denied your client a de novo hearing.

The court rule and statutes governing de novo hearings after a referee recommendation

Trial courts may refer custody and parenting time to a Friend of the Court referee to hold an evidentiary hearing and provide a recommended order, including statements of fact and conclusions of law. MCL 552.507(2). However, the referee's determinations are not the end of the inquiry.

According to statute,

> (4) The court *shall hold a de novo hearing* on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party.
>
> (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court **if the following conditions are met**:
>
> (a) The parties **have been given a full opportunity to present and preserve important evidence** at the referee hearing.
>
> (b) **For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court** as was presented to the referee and to supplement that evidence with evidence that could not have been presented to the referee.

MCL 552.507(4)-(5) (emphasis added). Thus, the Friend of the Court Act entitles the parties to a hearing de novo, not simply a review of the record. *Cochrane v. Brown*, 234 Mich App 129, 132; 592 NW2d 123 (1999).

Further, pursuant to MCR 3.215(E)(4):

> A party may obtain a judicial hearing on any matter that has been the subject of a referee hearing and that resulted in a statement of findings and a recommended order by filing a written objection and notice of hearing within 21 days after the referee's recommendation for an order is served.

(emphasis added). That judicial hearing must be held within 21 days after the written objection is filed, or after an extension for good cause. MCR 3.215(F)(1).

To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:

> (a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;
>
> (b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;
>
> (c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;
>
> (d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

MCR 3.215(F)(2) (emphasis added).

The failure to provide this judicial hearing is "clear legal error" and requires the trial court's decision to be reversed or vacated, and then remanded for a de novo hearing. Butters v Butters, _ _Mich App _ _ (Docket 359665, July 28, 2022). Moreover, the trial court is not allowed to simply defer to the referee's fact findings of fact:

> The trial court may not rely on the referee's findings of fact when those findings are unsupported by the evidence placed before the court. The trial judge remains in duty bound to exercise his own judgment on properly received evidence.

MacIntyre v MacIntyre, 264 Mich App 690, 697; 692 NW2d 411 (2005) (internal quotations omitted). "The trial court may consider a friend of the court's report but must reach its own conclusions." Truitt v. Truitt, 172 Mich App 38, 42, 431 NW2d 454, 456 (1988).

Butters v Butters – de novo hearing denied due to formatting of objection

Appeal in a nutshell: Mother timely objected to the Referee Recommended Order. However, the Trial Court cancelled the hearing on that objection and issued a written order denying it based primarily on (1) the objection's failure to comply with court rules related to formatting and (2) the fact that Mother had raised the stated objections before the Referee. She was denied an opportunity for de novo review of the Referee's errors. The Court of Appeals vacated the Trial Court's decision and remanded for the Trial Court to conduct a de novo hearing.*

The Father's custody motion was referred to the Friend of the Court for a referee hearing. After an evidentiary hearing before the Referee, the Referee submitted a Recommendation and Order Regarding Custody, Parenting Time and Child Support. In determining the established custodial environment, the Referee acknowledged, "It is undeniable that for the children's entire life, they have primarily lived with their Mother, and she had been their primary caregiver. ... That, however, dramatically changed in early January of this year" when the Mother experienced a mental health breakdown and was temporarily at a treatment facility. The Referee determined, "Since that time, she has engaged in conduct that has called into question her ability to provide guidance, discipline, and the necessities of life," ultimately finding an established custodial environment existed only with the Father. In reaching that finding, the Referee seemed to rely on his determination that the Mother "has demonstrated an inability to follow Court Orders having been found in Contempt five times" and his determination that the Mother had attempted to frustrate the Father's parenting time. The Referee then applied a preponderance of the evidence standard to the best interests analysis.

*Butters is still pending on appeal as Father filed a motion for reconsideration in the Court of Appeals. Nonetheless, the published decision is still binding on trial courts around the State of Michigan. MCR 7.215(C)(2).

The Referee recommended that the Father be awarded sole legal custody, and that the Mother's parenting time "shall be supervised by Plaintiff's father until further Order of the Court and Plaintiff shall file a Bond with this Court in the amount of $15,000 to assure future compliance with Court Orders."

Mother timely filed an Objection requested a De Novo Hearing – pursuant to MCR 3.215(E)(4). That objection very thoroughly went through the 48-page Referee Recommendation, noting the many factual and legal errors made by the Referee and challenged the best interest factors, and the parenting time bond. As filed, the objection was 19 pages long. Admittedly, the formatting of that objection does not appear to be double-spaced and uses smaller than standard margins. Nonetheless, it was accepted and filed by the court clerk.

The hearing on the Mother's objections was scheduled for October 15, 2021. However, the Register of Actions for that hearing states, "NOT HELD – TO BE REVIEWED." On December 7, 2021, over 60 days after the Motion for De Novo Review was filed, the Trial Court entered a written Order without a hearing. That Order affirmed the Referee's Recommendation, stating that the Mother's objection did not comply with the formatting requirements of MCR 1.109(D)(1) and MCR 2.119(A)(2). The Trial Court found the "Plaintiff's deficiencies outlined in the above paragraphs of this Opinion and Order, are a clear attempt to subvert the 20-page limit. MCR 2.119(A)(2)(a) ... If Plaintiff had followed the formatting rules, the Objection filed would total approximately 36 pages – almost double the page limit permitted."

The Trial Court, thus, denied the Mother's objection "for failure to comply with the court rules outlined above." The Trial Court then affirmed the Referee's rulings. However, rather than providing any substantive review of the Referee's findings of fact and conclusions of law, the Trial Court stated, "[Mother's] arguments all could have been and were presented before [the Referee]. ....There is no evidence presented by [Mother] in her objection that the Referee did not consider the matter on the merits." Trial Court concluded, "Finding no argument presented by [Mother] to be persuasive, and no finding of fact or conclusion of law incorrect by [the Referee], the [Mother's] request is denied."

The Mother appealed and the Court of Appeals vacated the Trial Court's decision. The Court held that formatting violations were not a proper basis for denying plaintiff's objection and request for a de novo hearing. While the court clerk may reject document that fails to conform to MCR 1.109(D)(1) and (2), the clerk did not do so here. Instead, the Mother's objections were accepted and filed, and a hearing was scheduled. The Court of Appeals noted that there is no authority that "allows a court to deny a motion or objection to a referee's recommendation and order on the basis of formatting without some kind of notice to the parties." The Court further held as follows:

> [B]ecause plaintiff filed timely objections to the referee's recommended opinion and order and asked for a judicial hearing, she was entitled to a live hearing at which she could present evidence, subject to the trial court's reasonable restrictions. See MCR 3.215(F)(2). The trial was permitted to render its decision on the basis of the referee's record, but it was required by statute and court rule to allow the parties to appear and present evidence, subject to certain restrictions. MCL 552.507(5); MCL 552.507(6); MCR 3.215(F)(2); see also Dumm, 276 Mich App at 465. Failure to provide such a hearing constituted clear legal error. Therefore, we vacate the trial court's order of December 7, 2021, and remand to the trial court to hold a de novo hearing under MCL 552.507 and MCR 3.215(F)(2).
>
> Butters, slip op at 5.

Wlodyka v Wlodyka - de novo hearing denied due to timing of objection

Appeal in a nutshell: A Friend of the Court Evaluator (not an Attorney Referee) recommended a change of physical and legal custody from joint to solely with Mother. The Father mistakenly failed to timely object to the recommendation, and the Trial Court adopted it as an order of the Court, without holding any hearing or making any independent findings. The Father immediately sought relief from judgment on the basis that he had mistakenly not objected, the procedures for a Referee order becoming an order of the court were not followed, and the Friend of the Court Evaluator was not even acting as a Referee. The Trial Court declined to grant any relief. The Court of Appeals peremptorily vacated the Trial Court's decision and remanded for an evidentiary hearing.

Both parents filed motions to change custody and the Trial Court referred the case to the Friend of the Court for an evaluation. The FOC evaluator made a recommendation. The Mother filed a motion to adopt the Evaluator's recommendation. The Father mistakenly did not object to the Evaluator's recommendation within 21 days, believing that because it was not a Referee recommendation it could not become a court order simply due to a lack of objection. Before his response to the motion to adopt the recommendation as an interim order was even due, the Trial Court entered an order adopting the recommendation as a permanent court order. The next day, the Father was informed that an order had been entered based on his failure to object. The very next day the Father filed a motion to rescind the order pursuant to MCR 2.612. He noted that the Mother's motion to adopt the recommendation as an interim order had been set for a hearing on October 8, and it was clear he was objecting to that interim order as he had been discussing the scheduling of the hearing with the Court's staff attorney. He further noted that the Evaluator's recommendation was not based on any testimony and there had been no hearing. He sought relief from the order based on mistake, inadvertence, or excusable neglect, as well as other reasons. He argued that there is no rule that allows a non-Referee Friend of the Court staff member to issue a recommendation that becomes an order of the court. Along with his motion, he filed a timely response to Defendant-Mother's motion to adopt the Evaluator's recommendation as an interim order, and an objection to the Friend of the Court Evaluator's recommendation.

The Trial Court dispensed with oral argument and denied the Father's motion because he did not timely file objections. The Trial Court reminded the Father that in its order referring the case to the Friend of the Court, it indicated that the Friend of the Court's recommendation would become an order of the court unless it was objected to within 21 days.

On the Father's application to the Court of Appeals, the Court peremptorily vacated the Trial Court's decision. The Court of Appeals expounded on its decision:

> The trial court committed legal error when it entered the September 29, 2020 order, which was consistent with the Friend of the Court's report and recommendation, on the basis that neither party had objected to the recommendation. The Child Custody Act imposes on the trial court a duty to ensure that the resolution of any custody dispute is in the best interests of the children. Harvey v Harvey, 470 Mich 186, 192; 680 NW2d 835 (2004). No statute or court rule provides any circumstances under which a trial court may be excused from this legislatively mandated duty when the Friend of the Court, upon order of the court, has conducted an investigation and provided a report and recommendation under MCL 552.505(1)(g). Even though the parties may have been warned that failure to object to the Friend of the Court's report and recommendation may result in the recommendation becoming the court's order, by entering an order consistent with that recommendation when neither party objected, the trial court without authority relieved itself of its legislatively mandated duties. Nothing in this order is intended to preclude the trial court from assigning the parties' motions to a referee.
>
> Wlodyka v Wlodyka, unpublished order of Court of Appeals, issued March 15, 2021 (Docket 356214).

Roat v Roat – mother denied an opportunity to object to referee recommendation

Appeal in a Nutshell: After holding an evidentiary hearing, the Trial Court partially ruled on custody issues and then referred the case to the Friend of the Court to decide the remaining custody issues. As the Friend of the Court evaluator was in the courtroom during parts of the Trial Court's hearing, the Evaluator issued its recommendation the next day, which was immediately adopted by the Trial Court without giving the Mother any opportunity to object. The Court of Appeals vacated the Trial Court's custody and parenting time decision and remanded for further proceedings.

The Father filed a motion to change custody. The Trial Court held an evidentiary hearing and found that neither parent had an established custodial environment, there was proper cause or change of circumstances to re-examine custody, and that a change in custody to Father was in the children's best interests. On the last day of the evidentiary hearing, the

Trial Court referred the case to the FOC for a recommendation on custody and parenting time. The next day, the FOC issued a report indicating that it had reviewed the trial court's ruling on each of the best-interest factors, and recommended that the Father receive sole legal and primary physical custody. The FOC also recommended a parenting time schedule with the Mother, who lived out-of-state. That same day, the Trial Court entered an order adopting the FOC's recommendation.

A Trial Court may refer domestic relations matters to a referee, which triggers a series of events:

- A domestic relations referee "must be a member in good standing of the State Bar of Michigan" unless he or she was already serving in that capacity on May 1, 1993. MCR 3.215
- A notice of hearing must be sent out within 14 days of receiving the motion. MCR 3.215(C).
- The referee must then hold a hearing in which he or she applies the Michigan Rules of Evidence and take testimony. MCR 3.215(D).
- A transcript of that hearing must be kept. MCR 3.215(D)(4).
- At that hearing, the referee must notify the parties of their right to have his or her decisions reviewed by the judge assigned to the case. MCR 3.215(D)(2).
- The referee must then prepare a written report containing a summary of testimony and a statement of findings within 21 days, with notice of the parties' right to object. MCR 3.215(E).
- Thereafter, the parties must be given an opportunity to object to the recommendation. MCR 3.215(E)(4).
- If they do, a judicial hearing must be held within 21 days after the objection is filed. MCR 3.215(F)(1).

The Court of Appeals held that the Mother was not provided a meaningful opportunity to object. "The trial court's same-day adoption of the FOC's recommendation denied the parties any meaningful opportunity to object before the trial court entered the order regarding custody and parenting time.

In doing so, the trial court failed to comply with the court rules.

Roat v Roat, unpublished per curiam opinion of Court of Appeals, issued March 17, 2020 (Docket 350299).

Gable v Merrill – trial court denied objection because mother did not participate in referee hearing

Appeal in a nutshell: Father filed a motion to change custody, which was referred to the FOC for a hearing. Mother showed up late to the Referee hearing, arriving 39 minutes after the start time of the hearing, and 1 minute into the Referee issuing its verbal recommendation. The Referee would not allow the Mother to speak or present any evidence. The mother objected to the Referee Recommendation, but the Trial Court refused to hold a de novo hearing because Mother had not presented any evidence at the Referee hearing. The Court of Appeals remanded to the Trial Court for a de novo hearing.

At the scheduled time of the referee hearing, only the Father was present. The Referee waited a few minutes, but then commenced the referee hearing, which consisted solely of the Father's testimony. The Mother, who was in pro per, showed up just as the Referee was beginning to issue his verbal recommendation. The referee held, "Based on the limited testimony that I had here today, the Court will grant father's request then and have the parties share joint legal custody, with primary physical custody being with father." The Mother asked if she was allowed to talk at all, but the Referee said "No, ma'am."

Following the Referee Hearing, the Mother retained trial counsel. She then filed an objection to the referee's recommended order and requested a de novo hearing. The Mother objected to the referee's order because he refused to allow her an opportunity to be heard, despite her requests to do so, because she was confused about another court hearing (where she was a witness) scheduled for the same day in a different courtroom. The Mother accepted responsibility for her error in believing the hearing began thirty minutes later than it did, but objected that it was improper for the referee to punish her tardiness by denying her an opportunity to be heard.

During the de novo hearing, the Trial Court refused to let the Mother present any evidence. It held that because the Mother arrived one minute after the Referee began giving his opinion, the Trial Court considered the Mother a no-show for the referee hearing; and, according to the Trial Court, parents who fail to appear at the referee hearing are not allowed the opportunity to present evidence during the de novo hearing. While the Trial Court identified and corrected several errors made by the referee, it ultimately upheld the referee's decision to drastically change the children's physical custody by flipping the parenting-time arrangement - without ever hearing any testimony or other evidence from the Mother, the children's lifelong primary caregiver.

The Court of Appeals remanded for the Trial Court to conduct a de novo hearing. MCL 552.507(5) places conditions on the Trial Court's conduct of a de novo hearing – (1) the parties must have been given a "full opportunity to present and preserve evidence at the referee hearing," and, (2) if there is an objection, the parties must given a new opportunity to offer the same evidence that was presented to the referee. The Court of Appeals held that "[t]hese two conditions were not met because plaintiff did not have the full opportunity to present and preserve evidence at the referee hearing and because she was not afforded the opportunity to present evidence at the de novo hearing, notwithstanding her objections." The Court noted that "it appears that the trial court's decision to not allow plaintiff to introduce evidence was at least partially for the purpose of punishing plaintiff's tardiness." While the Trial Court "undoubtedly possessed authority to sanction plaintiff for her tardiness, but to change the children's physical custody without allowing plaintiff to offer evidence at the de novo hearing does not conform to the purpose of either Act, which is to promote and protect the children's best interests."

Gable v Merrill, unpublished opinion of Court of Appeals, issued September 19, 2019 (Docket 347814).

Other cases where the appellate courts have overturned trial court's refusal to hold a de novo hearing

The cases discussed above are ones where the Speaker Law Firm represented the Appellant. However, there are more cases where the Court of Appeals has reversed the Trial Court's refusal to hold a de novo hearing after an objection to a referee recommendation. Some of these reversals are noted below, and do not include the trial rejecting an objection due to lack of specificity, parenting- time arrangement - without ever hearing any testimony or other evidence from the Mother, the children's lifelong primary caregiver.

- Cochrane v Brown, 234 Mich App 129 (1999) – vacated and remanded
- Phipps v Fader, unpublished COA opinion, issued Nov. 18, 2003 (Docket 249380) – reversed and remanded
- Mapes v Eaton, unpublished COA opinion, issued March 21, 2006 (Docket 266144) – vacated and remanded
- Smith-McCormick v Payne, unpublished COA opinion, issued June 30, 2011 (Docket 302019) – vacated and remanded
- Atkinson v Knapp, unpublished COA opinion, issued Dec. 17, 2013 (Docket 316510) – reversed and remanded
- Kloosterman v Gorman, unpublished COA opinion, issued Dec. 16, 2014 (Docket 317698) – reversed and remanded
- Hamden v Marrow, unpublished COA opinion, issued July 17, 2018 (Docket 342659) – vacated and remanded
- Waterbury v Waterbury, unpublished COA opinion, issued June 16, 2022 (Docket 357300) - vacated and remanded

Concluding thoughts

Too often, Trial Courts around this State deny objections to referee recommendations without holding a de novo hearing. In our experience as family law appellate attorneys, we are seeing those decisions being reversed by the Court of Appeals. This is for good reason. The Trial Court should not be allowing a change of custody decision based on a truncated record, or without following the statutes or court rules that were designed to protect children from unnecessary disruptions to their custodial environments. If your client is faced with this situation, do not give up hope. Instead, explore what opportunities there may be for your client to persuade the trial court to conduct that de novo hearing, or to ask a higher court to require it.

60 Years after *Gideon* – the Landscape of Michigan Indigent Defense

By Tanya A. Grillo, Chair - Criminal Law Committee

The Sixth Amendment guarantees the rights of criminal defendants, including the right to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury, and the right to know who your accusers are and the nature of the charges and evidence against you. On March 18, 1963, the United States Supreme Court held in *Gideon v. Wainwright* that the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment. This landmark ruling guaranteed all defendant facing imprisonment a right to an attorney, not just those being charged with capital offenses. Sixty years later, how far have we come?

Michigan History – Where did the MIDC come from?

For decades, state bar officials including Chief Justice G. Mennen Williams and later Chief Justice Dorothy Comstock Riley called for equal justice and appropriate funding for indigent defense. Michigan knew it had a problem, but how bad was it? As a result of years of reduced attorney fees and inadequate trial services, the Michigan Coalition for Justice (MCJ) filed a class action lawsuit against Governor Granholm, for failing to provide adequate indigent defense services in 2007. In *Duncan v. State of Michigan*, MCJ argued that the "that the failure of the state to ensure an adequate constitutional right to counsel is so stark in Berrien, Genesee, and Muskegon Counties that it has asked the court to compel the state to make available to indigent defense attorneys the resources and oversight needed to provide constitutionally-adequate legal representation." [1]

Considering the *Duncan* case, a joint resolution was passed in the legislature where Michigan requested a study be completed by the National Legal Aid & Defender Association (NLADA) to examine its indigent defense systems and provide recommendations.

In 2008, (NLADA) authored a scathing 130-page report, A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis, which evaluated the trial-level indigent defense systems in Michigan. After a year-long study which evaluated 10 Michigan counties– Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee, and Wayne - NLADA concluded that "the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts."[2] Moreover, the report indicated that Michigan ranked 44th out of all 50 states in per capita indigent defense spending.

Governor Rick Snyder is elected Governor in 2010, and he created the Indigent Defense Advisory Commission in October 2011 to investigate the issues identified in the 2008 NLADA report and recommend reforms. The Indigent Defense Advisory Commission submitted a report and highlighted additional findings:

1. It is the State of Michigan's responsibility to ensure adequate defense representation for its residents who are able to afford an attorney.
2. The state has delegate at the constitutional responsibility to the counties in this county-based system has resulted in an "uncoordinated, 83-county patchwork quilt" of public defense systems.
3. Michigan's current public defense system often makes errors, and it's worse, results in the innocent been convicted, while the guilty are left free.
4. Money is currently spent at the county level with no data or transparency to show if those taxpayer dollars are being spent effectively or efficiently. This problem exposes Michigan taxpayers to millions of dollars an unnecessary expense, wasteful spending, and government inefficiencies.
5. There are no statewide standards to either define or insure constitutional the adequate defense counsel for residents, unable to afford an attorney.[3]

After several years, much discussion and negotiation, PA 93 of 2013 was signed into law in July of 2013 and the Michigan Indigent Defense Commission was created. [4] It's mission is "[t]o ensure that indigent defense services in Michigan are delivered in a manner that is fair, cost-effective and constitutional." The MIDC is mandated "to develop and implement minimum standards for those providing indigent defense services and to collect data, support compliance, administer grants, and encourage best practices to accomplish our mission." MCL 780.981; MCL 780.983; MCL 780.985; MCL 780.989; MCL 780.991; MCL 780.993; MCL 780.995; MCL 780.997; MCL780.999; MCL780.1001; MCL 780.1002.

In 2017, the MIDC proposed its first set of minimum standards which included Standard 1: Training and education of defense attorneys; Standard 2: The initial client interview; Standard 3: Access and use of experts and investigators; and Standard 4: Counsel at first appearance and other critical stages. LARA approved these minimum standards in May 2017, triggering the first 180-day deadline for counties and municipalities to draft and submit compliance plans and cost analysis for every indigent defense system in Michigan. The first year of MIDC funding, FY19, the state awarded $86,759,934.75 to indigent defense systems in all 83 counties. In each year since, we have seen more changes and evolving which had increased the costs. FY20 $117,424,880.77; FY21 $126,743,000.64; FY22 $176,495,252.43.

Attorney Michael Steinberg, who has been a board member for the Criminal Defense Attorneys of Michigan since 2002 and a practicing attorney for 33 years, provides a grim take on the landscape of indigent defense before the MIDC. "Our [indigent defense] delivery of services was very inept. We had to motion for experts and investigators. If we got one, it was at marginal money. There was a hodgepodge of resources for the accused. Lawyer did not go to trial [a] nd remained poorly educated on skill sets and trends in the law."

Today's Landscape and the Future

While the state of indigent defense in Michigan has come a long way since 2008, we still have work to do!

Indigent defense systems across Michigan have been amping up and making big changes since 2013. When the MIDC began, Michigan had 10 public defender offices. As of today, there are 32 with more on the horizon.

The Macomb County Office of the Public Defender (MCOPD)was established in 2020 and is headed by Thomas Tomko which oversees the roster attorney rotation for all felony appointments in Macomb County and the FY23 plan calls for the office to take up to 25% of felonies once they are at full staffing. The MCOPD also oversees the county's 2nd Class district courts (42-1 District Court, 42-2 District Court) and 41-A Shelby Twp., while independent Managed Assigned Counsel Coordinators (MACCS) are contracted for the management of the 3rd class district courts which is required under Standard 5: Independence from the Judiciary.

37th District Court – Ricky Cervenak
38th District Court – Matt Licata
39th District Court – Mark Metry
40th District Court – Michael Kavanagh
41A District Court– Michelle Lundquist
41B District Court – Chase Robl

The MCOPD is continually making efforts to improve the process. Tomko indicates that steps are being taken to improve the fee structure for attorneys and create a functional process for attorney fee requests and review of these requests. In addition, MCOPD is considering methods of conducting attorney performance reviews and to determine proper attorney caseloads. This is in anticipation of Standards 6 (Caseloads) and Standard 7 (Qualifications and Review). "Collaboration is being sought for creation of uniform forms for use by attorneys to facilitate performance review, for attorneys to submit bills, for attorneys to request an expert/investigator, and for expert/investigator to submit bills." And Fiscal Year 24 will be spent concentration of bringing a holistic approach to the office which will include a full time Investigator and Social Worker in the office to assist both the public defenders and roster attorneys with representation.

In 2021, Oakland County created an Indigent Defense Service Office (IDSO) and Pete Menna was appointed as its first Chief Attorney and oversees the implementation of the county's criminal defense appointment system for the 6th Circuit court and all 52nd District Court divisions. In 2023, Oakland County is creating its first ever Public Defender's Office. The county's goal is to create an office of in-house attorneys who will be able to quickly target specific problem areas within its system in ways that are simply not possible when utilizing only independent contractors. The Public Defender's Office will also act as a partner to the roster attorneys when they need assistance on their cases. Like Macomb, the 3rd class- District Courts are operated by MACCS.

43-1- Hazel Park – Eric Wilson	46 – Tanya Grillo
43-2 – Ferndale – Kari Miller	47 - John Angott and Kari Miller
43-3 – Madison Heights – Eric Wilson	48 – Stephanie Anderbach
44 – John Angott	50 – Paulette Loftin
45 – John Angott and Kari Miller	51 – Paulette Loftin

So, what does change cost? Menna, stated it best. "Changing entrenched practices is difficult, even when such change comes at little to no cost." But costs are real and with budgets increasing by double in less than 4 years, we must be mindful of the costs to taxpayers. Menna further stated "[t]he significant changes brought on by the MIDC Standards, and the desire of local indigent defense systems to radically transform, are expensive, plain and simple. These changes would not be possible without a dedicated funding mechanism, and the promise that all municipalities in the State will have the same access to that funding. Not only does the MIDC enforce heightened standards for indigent defense representation, which is a great thing on its own, the MIDC also provides the funding that is so critical to the real-world implementation of these changes."

As we mark the 60th anniversary of *Gideon,* bond reform is a hot topic and one in which Steinberg believes needs attention from the state legislature. "Bond is still inconsistent amongst courts. Cash bonds for low level offenses is an insult to the Constitution."

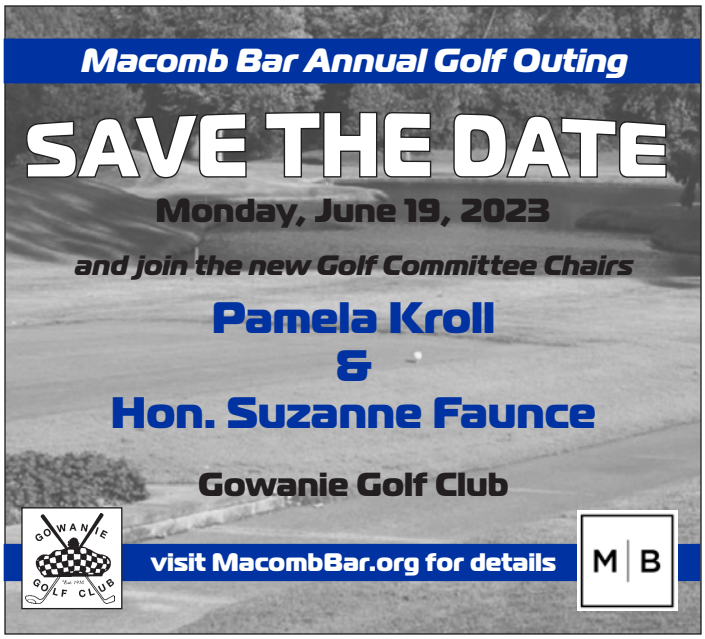
Kristen Stanley, the Executive Director of the MIDC, believes more change that is long overdue will happen soon. "Our state has decades to make up for since its obligation to support its indigent citizens was confirmed in 1963 and I personally believe the work of the MIDC has only just begun." The reality is that the MIDC is only 10 years old and anything worth working for takes time – especially when government is at play. What does the future look like? "There are still unmet mandates in the MIDC Act as it is currently written, including full approval and eventual implementation of the minimum standards on attorney caseloads, qualifications, and vertical representation," says Stanley. In addition, [t]here is also a strong push within the state to expand the MIDC's work into other areas of the legal system including the juvenile legal system."

1 A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis, page 13, 2008, National Legal Aid & Defender Association

2 A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis, Executive Summary, page i, 2008, National Legal Aid & Defender Association

3 www.house.mi.gov/sessiondocs/2011-2012/testimony/Committee14-9-13-2012-4.pdf

4 www.michigan.gov/-/media/Project/Websites/formergovernors/Folder10/Indigent_Defense_Advisory_Comm_Rpt.pdf?rev=df1a41f11aff4cae8c51e0d2a08266d3)



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