

Bar Briefs

November 2021

**2021-2022
State Bar of Michigan President
Dana M. Warnez**



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Bar Briefs

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Membership In Our Committees

*By Francesco Briguglio,
President of Macomb Bar Association*

As an attorney that practices in and around every county in Southeastern Michigan I have the distinct opportunity to see what other bar associations are doing with their membership. A hallmark of a vibrant voluntary bar association is active participation in its committees. Some of our committees are extremely active including the Criminal and Family Law Committees. There are other committees that we are still seeking people to help assist us with.

- Criminal Law Committee— This committee would cover all aspects of criminal law.
- Civil Law Committee— Personal Injury, commercial litigation, real estate litigation and transactional law.
- Family Law Committee— Concerns itself with all aspects of law practiced in the family division including Custody, Parenting Time, Child Support, and Domestic Personal Protection Orders.
- Juvenile Law Committee—Concerns itself with all aspects of Juvenile Law
- Marijuana Law Committee—This is a newly formed committee. We would love to get a practitioner that is involved in licensing, issues involving dispensaries,

and changes to the criminal code.

- Macomb Bar Program and Services Committee— These committees helps the board deal with issues including but not limited to Lawyer Referral Service, CLE, Awards, and our Social Media Policies.



September 23, 2021 Installation Celebration at Stahl's Auotomotive Museum

Serving on a Committee is a great way of dipping your “toes in the water” of participation in the Macomb County Bar Association. As a committee chair you would have a great opportunity to place your “mark” on your area of expertise in the county, get exposure for your practice by promoting yourself as an expert and educate the Bar at large about what is happening in your section. If you do get the opportunity to serve on a

committee you will be able to help, educate and even profile yourself by publishing articles in Bar Briefs for the membership at large to read.

I would like to personally invite you to call me or email me if you are interested in serving on one of these boards. Please contact Rick Troy at the Bar office or even call/text my personal number 586-549-6970.

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You Know It When You Experience It

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

Leadership. What exactly is it?

One would think that the enormous “leadership development” industry could provide us with a commonly accepted definition of what leadership is. But, it’s not that simple. There are people that you can think of right now that are, or have been, in leadership positions that do not meet your own definition of leadership. Flip that coin over and I am sure that you can think of people that you have shared a few steps with along your path of life that absolutely met, or maybe even gave meaning to the word leadership. It might have been a high school teacher, coach or principal that took a lead in molding your character. Or, it might have been someone elected to high office that your belief system resonated with. The point is, it is difficult to define, but you know it when you experience it.

The reality is, we are surrounded by leaders from all walks of life, including you. Without a doubt, your role in the profession of law puts you in a leadership role on a daily basis. People follow you because they respect you and the knowledge that you bring at a time in their lives when they need help the most.

When we flashlight focus on leaders in the profession law, we can easily find incredible stories of giving. Unselfish giving. The kind of leadership that seeks nothing more than a smile that comes with gratitude for a job well done. You should be proud of the leadership that the Macomb Bar has given to your profession over the years. People who demonstrate care about the law and the people that the profession serves. The list of Macomb County judicial and bar leaders that have served your profession over the years at the local, state and even national level is long and illustrious.

Over the past two months we have appropriately taken the time to honor and celebrate bar leaders. On September 23, 2021 we held the annual Installation Celebration that witnessed Francesco Briguglio sworn in as the President of the Macomb Bar followed by the entire Board of Directors. Thank you Judge Tracey Yokich for taking the time to swear Frank in as President and the wonderful words of

inspiration that you provided. And thank you Judge Julie Gatti for taking the time to swear in the Board of Directors and your beautiful words of encouragement.

To the fantastic folks at Stahls Automotive Museum, thank you for going above and beyond to make this such a memorable event. Members, if you haven’t been to Stahls yet, please go and visit this marvelous Macomb County gem.

On October 12 the Macomb Bar, along with the Macomb County Bar Foundation, the Women Lawyers Association of Michigan – Macomb Region, and the Macomb County Probate Bar Association, hosted the Presidential Reception honoring our new State Bar of Michigan President, Dana Warnez. As most of you know, Dana served as the 84th President of the Macomb Bar in 2012-2013. Her service to this bar and the Macomb County Bar Foundation is simply incredible. As the 87th President of the State Bar of Michigan she joins the 71st SBM President, her sister Kimberly M. Cahill, the 80th SBM President Thomas Rombach and the 30th SBM President Christian Matthews. Thank you Chief Judge James Biernat, Jr. for presiding over the event and being the Master of Ceremonies. I also wish to extend thanks and gratitude on behalf of the entire bar to Michigan Supreme Court Justice David Viviano for your keynote address that really brought it all home to Macomb. Our gratitude is also extended to SBM Past President and current American Bar Association President, Reginald Turner for your insightful and motivating keynote address. And to the Blakes family and the employees at Blakes Orchard, thank you for everything that you did to make this event so special!

Visit Macombbar.org to see a list of Macomb County Bar Association Past Presidents that have served you. And while you are on the website, take a look at the list of recipients of the Macomb Bar Awards. While you are there, I encourage you to consider upping your participation in the bar and engage in leadership as a committee member, program innovator or maybe even run for the board of directors.

8 Lawyers Listed in Michigan Super Lawyers



Super Lawyers, a Thomson Reuters business, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. From left to right: Donald Gasiosek, 15 years selected; Paul Hines, 9 years; Sam Morgan, 15 years; Patrick McCauley, 14 years; Greg Jones, 5 years, Rising Star Designee; David Kotzian, 15 years, Top 100 Designee; David Greco, 9 years; Angela Mannarino, 5 years, Rising Star Designee.



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Some Evidence

*By Hon. Carl J. Marlinga,
Macomb County Circuit Court*

This is an addendum to my September, 2021, article which suggested a change in M Crim JI 3.2 defining reasonable doubt. I know that regular readers of the column, and especially those who do not practice criminal law, may be a bit impatient with me for dwelling on this narrow topic -- and one which does not expressly deal with a rule of the Michigan Rules of Evidence. I have made a decision to suck it up and suffer the loss of goodwill that might come about as a result of returning to the same topic again because, in my opinion, calling attention to the inadequacies of the current definition of reasonable doubt in Michigan is one of the most important contributions that any judge or lawyer could make to the profession and the cause of justice.

The feedback I have received on the September article has been unanimous in seconding the concerns I have raised. The attorneys and judges who have commented are few in number, but the wealth of their experience and scholarship is significant. Chief among those who voiced their support is former Wayne County Chief Judge William J. Giovan who popped his head in my courtroom the other day to tell me I was on to something.

I will not reiterate the entire article but the gist of it is the following: (1) The definition of beyond a reasonable doubt is logically flawed and woefully unhelpful to a jury because it is a tautology; namely, "A reasonable doubt is just that -- a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case." That is like saying "a fair price is just that -- a price that is fair". (2) The definition expressly tells jurors that it is okay to convict even if you have a doubt. The job of a juror then is to examine each doubt and determine whether or not it is reasonable. Because jurors are told that they can use "common sense" in the process, there

is implied invitation in the instructions to not think about this too critically or too precisely and to resolve any doubts with a common sense approach -- basically morphing the definition to a preponderance of the evidence standard. (3) Even though a "clear and convincing evidence" test is a lesser standard, most criminal defendants would be better off if their attorneys could tell the jurors that the evidence must be clear and that they must be convinced. These are stronger words and more easily applied than proof beyond a reasonable doubt.

There is case authority for the proposition that the term beyond a reasonable doubt does not need any explanation, and that maybe it is better to let each juror make up his or her own mind on what that term means. *Hamilton v People*, 29 Mich 173 (1874); *People v Allen*, 466 Mich 86, 643 NW2d 227 (2002). I had a conversation with Angelo Donofrio, a talented and well respected young lawyer who pointed out that the act of defining something inherently changes the meaning. His example was the word awe. The standard definition of the word references notions of something that is both amazing and fearful. Yet amazement and fear are not satisfactory synonyms for awe. So, too with reasonable doubt. Any attempted definition shifts the emphasis -- some favoring the prosecution, others favoring the defense. I say this so that the committee on jury instructions understands that I, and other critics, appreciate fully the difficulty of the task.

Emil Semaan, an assistant prosecutor in the appeals division of the Macomb County Prosecutor's Office, made a suggestion to my proposed new definition which matches the analysis of Justice Ginsburg about the definition of reasonable doubt in her concurring opinion in *Victor v Nebraska*, 511 US 1 (1994). Both Justice Ginsburg and Emil would put the empha-

sis on the necessity of a juror to be “convinced”. This is the Federal Pattern Criminal Jury Instruction that Justice Ginsburg endorsed (511 U.S 1, 27):

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty. Federal Judicial Center, Pattern Criminal Jury Instructions, at 17-18 (instruction 21).

Justice Ginsburg then wrote: “This instruction plainly informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty. The “firmly convinced” standard for conviction, repeated for emphasis, is further enhanced by the juxtaposed prescription that the jury must acquit if there is a “real possibility” that the defendant is innocent. This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensively.” (511 U.S. at 27.)

In “Beyond a Reasonable Doubt: Juries Don’t Get It”, Hon. James A. Shapiro and Karl T. Muth, Loyola University Chicago Law Journal, Vol 52, pp 1029-1044, the authors suggested solution to the vagaries of the reasonable doubt definition is to restructure the definition into the form of two questions; namely: “Do you believe the prosecution proved every element of the crime it charged the defendant with committing? [and] Keeping in mind the extraordinary injustice in the possibility of convicting an innocent person, are you convinced to a moral certainty? Id at 1044.

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My distillation of the many articles on this issue is that proposals which stress the word convinced are closer to a satisfactory resolution than those that stress the word certainty. Certainty, like perfection is an absolute. It does not allow for a comparative or superlative form. Moral certainty or absolute certainty are exactly the same as certainty. With all due respect to the drafters of the constitution it is not possible to have “a more perfect union.” In like manner it is not possible to be “more certain.” You either are or you aren’t. Therefore, as much as I admire the scholarship of Judge Shapiro and Professor Muth, I fear that their proposed solution imposes an unrealistic burden on the prosecution since nothing in this life is certain.

I return then to my proposed definition as stated in the September, 2021, Bar Briefs’ article, with a necessary amendment expressly suggested by assistant prosecutor Semaan and earlier impliedly endorsed by Justice Ginsburg. The word “sure” in part C of the definition is functionally the same word as “certain.” Although British judges are happy with the word, it implies a level of absolute proof that is not attainable. Substituting the word convinced cures the problem. Therefore, a better (but maybe not the final) rewrite of my proposed definition is as follows:

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

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

(B) Be aware that the standard is not proof beyond all doubt or proof beyond a shadow of a doubt. Meeting such a standard would require absolute certainty, which is normally not possible in human affairs.

(C) However, to satisfy the standard of proof beyond a reasonable

doubt, evidence is not sufficient if it merely establishes that it is likely, or even very likely, that the defendant committed the crime. In order to find the defendant guilty beyond a reasonable doubt, you must be convinced that the defendant is guilty.

I promise that in my next article, I will get down off my soapbox and return to the rules of evidence. I am already tossing and turning at night with the anticipation of writing about MRE 801(d)(1)(B) and its intersection with MRE 803A.

Endnotes

- 1 Judge Giovan has been sitting as a visiting judge in our building. He is a recognized expert on the rules of evidence. Macomb County is fortunate to have his services.
- 2 We have no choice but to continue to express the standard as proof beyond a reasonable doubt, since that instruction has been held to be constitutionally required. *In re Winship*, 397 US 358 (1970). How the term is defined (and even whether the term is defined), however, is up to the jurisprudence of each state. *Victor v Nebraska*, 511 US 1 (1994)
- 3 This is eerily akin to the uncertainty principle in particle physics which teaches that the very act of measuring something changes its properties.
- 4 This proposed language, to me, appears to lean too heavily in favor of the defense.
- 5 In England and Wales, judges may instruct jurors that they “must be sure the defendant is guilty.” *Regina v Majid*, Court of Appeals, Criminal Division [2009] EWCA CRIM 2563 (12 October 2009).
- 6 Being *convinced* is a subjective state of mind with some implied wiggle room in the process that brought one there. The term avoids the absolutism that infects the concept of *certainty*. I do understand, however, that there are those who would argue that being “convinced” is an absolute just like being “certain.” I perceive a slight but real difference.

87th President of the State Bar of Michigan

Dana M. Warnez

Dana,

As past State Bar presidents, we know more than most the long road that you have travelled to reach this point. We know that ascending to the State Bar presidency is not something that occurs overnight or without a lot of hard work and sacrifice – all of which you have accomplished without seeking to draw the spotlight to yourself or your accomplishments. As bar veterans, we have watched all of the work that you have put in through the years, spending countless hours on so many projects benefitting not only the members of our profession (statewide and locally), but the members of the public through your efforts to promote scholarship and mentorship programs, improve literacy rates, and encourage equality, fairness, opportunity, diversity and kindness for all among our profession and society. And as your friends, we are so very pleased to see you reach this long-time goal. You are a great lawyer, an outstanding leader among our profession – and an even better person. We are happy for you, proud of you, and wish you nothing but the best as you assume the mantle of leadership within our profession.



We cannot help but think of how proud Kim would be. She loved nothing more than introducing you as “my SISTER!” at every opportunity, and she knew (more than any of us, even) that with a keen mind, fierce heart and servant’s soul, it was only a matter of time until you would join her among the ranks of SBM presidents. Your success enhances her legacy, but your accomplishments are your own, as is this well-deserved honor of being chosen to lead our profession.

Congratulations and best wishes!

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Installation Celebration

September 23, 2021



1.

1. Installation Celebration attendees at Stahl's Automotive Museum.

2. Hon. Tracey Yokich swearing in 93rd Macomb County Bar Association President Francesco Briguglio.

3. 2021-2022 Macomb Bar Association Board of Directors: Top Left: Director Bryan Sunisloe, Treasurer Dana Freers, Director Angela Medley, President-Elect Lori Smith, Director James L. Spagnuolo Jr., Director Hon. Tracey Yokich. Bottom Row: Director Jenna Bommaritto, WLAM-Macomb Region Chair Kristina Joseph, President Frank Briguglio, Young Lawyer Section Chair Alecia Golm and Director Laura Polizzi.

4. Tom Lizza, James Spagnuolo, Jr. and Stu Fraser IV enjoying the celebration.

2.





3.



5.



4.



6.

5. Macomb Bar Association Director Angela Medley, Director Laura Polizzi and Young Lawyers Section Treasurer Grace Crivello.

6. Macomb Bar Association President Frank Briguglio and Macomb Bar Association Past President Thomas Rombach.

7. Hon. Carrie Fuca and Lori Smith enjoying the museum.



7.

Our Girl Dana! The 87th President of the State Bar of Michigan

By Lori J. Finazzo and Hon. Tracey A. Yokich

Anyone who knows our girl Dana just has to be impressed with her extraordinary ability to *listen* to people. She is always focused, thoughtful and patient whether they be a butcher, baker or candlestick maker! The next quality you may notice is her boundless enthusiasm and passion as she springs into action. Once Dana sets her mind to a task you can always depend on it getting done. And done well. She is accomplished at enlisting help when she needs it and staying focused on the bottom line. Finally, you can't help but appreciate her quick and engaging smile and sense of humor, which leaves you with the feeling that she is unflappable. This is our girl Dana and she is the 87th President of the State Bar of Michigan!

Dana was raised in a home that valued hard work, education, service to others, and always allowed her to be true to herself. She watched and learned from her father Donald and her mother Florence Schoenherr-Warne. Florence was a trail blazer in the practice of law before the phrase "breaking the glass ceiling" was even coined in 1978 by Marilyn Loden. With the love and support of two successful older sisters, Pam and Kim Cahill (1960-2008), Dana had the freedom to explore all her options. But somehow, it just felt right that she would follow in her sister Kim's footsteps and become a Wolverine. Dana received her Bachelor of Arts from the University of Michigan in 1993. Her mother's alma mater, the University of Detroit School of Law, would be her next stop graduating in 1996.

Armed with a good education and wonderful family support, Dana joined her mother and her sister Kim in the family practice. She found herself taking appointments in most every court in Macomb County. Over the years she narrowed her areas of expertise, but she always focused on finding ways to help those most in need. In addition to building a successful law practice, Dana set course on a path that would also allow her to give back to others in different ways. Her efforts over



the last 25 years have been most remarkable including extensive pro bono work for some of our most vulnerable neighbors, countless hours in service to charities and non-profits, and immeasurable

time devoted to the Macomb County Bar Association and the State Bar of Michigan. Always humble, Dana has gratefully acknowledged that "to give back is just part of the fabric of my family."

As a frequent and cheerful volunteer, Macomb County Bar President (2012-2013) and Macomb County Bar Foundation President (2019-2020), Dana has had an everlasting impact on our organization – from creation of a reading program in the high schools in memory of her sister Kim, to expanding the MCBF scholarship program for law students, and enthusiastically supporting the high school mock trial competition. Anne MacIntyre joyfully noted that "as much as the students loved the reading program, Dana is typically the "biggest kid" of them all - her eyes light up in anticipation of another great reading adventure." From mentoring the next generation of

lawyers to helping her colleagues, Dana always remains focused on serving others.

Her colleagues have always appreciated her giving spirit. Dana has been active with the Macomb County Probate Bar Association, the Young Lawyers Section and served as past Chair of the Women Lawyers Association of Michigan, Macomb Chapter. Macomb County Bar Association President Elect Lori K. Smith has worked closely with Dana on several projects for the bar and community. “Dana is the epitome of selflessness. She places the needs of others over her own. Dana is always there to listen, share some wisdom, or just have a kind shoulder to lean on after a chaotic day. She is a true leader. It is an honor and a privilege to support Dana in her new role. I am even more blessed to call her my friend.” Dana also finds time to sit on the Tri-County Panel of the State Attorney Discipline Board. In this role she has the opportunity to understand “real time” the many challenges SBM members face in their practices, both large and small. Always a team player, Dana knows how critical it is to be informed and to appreciate the needs of the membership before stepping into governance.

Next, Dana took her exceptional talents to the State Bar of Michigan Representative Assembly and in 2012 was sworn in as Chair. Since then, she has earned the respect and admiration of her peers statewide. With countless hours of work (and driving) she played a critical role in the SBM 21st Century Task Force, the SBM Strategic Planning Committee and devoted five years to the SBM Character and Fitness Committee. In becoming the 87th President of the State Bar of Michigan, she joins a very exclusive and distinguished group of women who have served before her: Julia D. Darlow (1986-1987); Hon. Victoria A. Roberts (1996-1997); Nancy J. Diehl 2004-2005; her sister Kimberly M. Cahill (2006-2007); Julie I. Fershtman (2011-2012); Lori A. Buiteweg (2015-2016); and Jennifer M. Grieco (2018-2019).

Dana continues to impress and inspire others where ever she goes. SBM Executive Director Janet Welch believes that Dana is the perfect President for the times. “If you want to feel good about lawyers and the legal profession you need to know Dana. Her State Bar of Michigan Presidency is a refutation of the old saw that good gals finish last. She embodies the proposition that kindness and goodness can be rewarded in the legal profession that lawyers can be unfailingly compassionate, and yet be tough and effective, all at the same time.”

Dana has always been well served by her innate

sense of justice and fairness which compels her to never back away from a good fight. SBM President Ron Keefe (2007-2008) first became acquainted with Dana when he served with her sister Kim on the State Bar Board of Commissioners. “After my term was over, I had the pleasure of working with Dana on various State Bar projects. I found her to be a strong advocate for the members of our bar association - and importantly for the public at large who require but cannot afford the services of our profession. A talented lawyer, Dana is a person of integrity, courtesy and professionalism with a deep sense of commitment. She will be a great State Bar President!”

Dana’s sister Kim was President of the State Bar when now SBM Executive Coordinator Marge Bossenbery joined the staff. “Little did I know that 15 years later, I would have the pleasure of working with Dana. Just like Kim, she always puts her family, service to the legal community and her beloved Macomb County Bar Association, as a top priority in her life.”

While all of Dana’s legal accolades are truly remarkable and impressive, she is so much more. Dana and her partner of over 21 years, Meri Dembrow, reside in Royal Oak. A year and a half ago, they decided to restore a family cottage on Lake St. Clair. Built in 1948 by Dana’s grandfather, Dana and Meri literally took the cottage down to its bones and painstakingly restored it. It is in this special place that Dana wakes up on Sunday mornings to recharge, enjoy her coffee, the New York Times, and appreciate the spectacular beauty of lakefront living.

Dana is the first to acknowledge that what keeps her going is the interaction with people - her clients, her friends and her colleagues. Dana also understands that so much more can be accomplished when we work together, a lesson that she learned at home. Everything about Dana has brought her to this point in her career, stepping into the presidency our bar association at a pivotal time in history. Dana has the enthusiasm, experience and skills to lead a profession that is undergoing a massive changes. With the pandemic, Dana is the leader we need to engage in shaping the future of rendering assistance to our clients remotely, both in and out of court. As she begins her year of service as our SBM President, Dana is also perfectly positioned to be the voice of those traditionally without a voice in the ongoing access to justice struggle. For our girl Dana has been fighting the good fight her entire career!

Congratulations Dana and thank you for your extraordinary efforts over the last 25 years on our behalf!

State Bar of Michigan Presidential Reception Honoring President Dana M. Warnez

Hosted by:

Macomb Bar Association

Macomb County Bar Foundation

Women Lawyers Association of Michigan-
Macomb Region

Macomb County Probate Bar Association





4.



5.



7.



1. American Bar Association President Reginald Turner, State Bar of Michigan President, Dana M. Warnez, Michigan Supreme Court Justice David Viviano and Macomb County Circuit Court Chief Judge Hon. James Biernat, Jr.

2. Florence Schoenherr-Warnez and Dana M. Warnez.

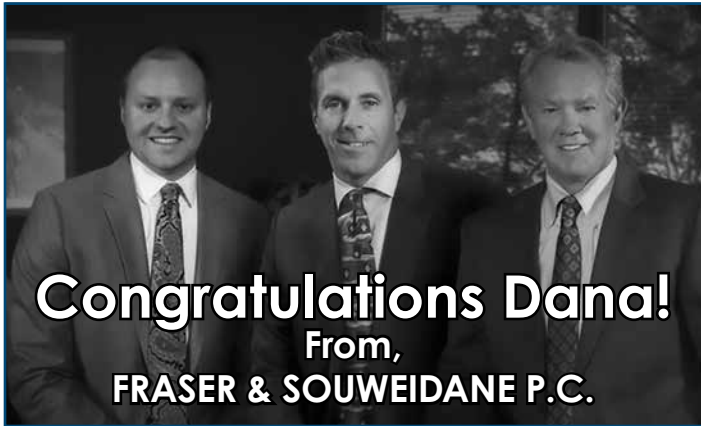
3. The Divas: Sherrie Detzler, Hon. Kathleen Galen, Dana M. Warnez and Lori Smith.

4. Celebrating the 87th President of the State Bar of Michigan, Dana Warnez! With her are past presidents: (L to R) 79th (Brian Einhorn), 68th (Current ABA President, Reggie Turner), 81st (Lori Buiteweg), 77th (Julie Fershtman), & 84th (Jennifer Grieco Burch).

5. Women Lawyers Association of Michigan- Macomb Region Members: Tonya Grillo, Farrah Ramdayal, Jenna Bommaritto, Angela Medley, Dana M. Warnez, Laura Polizzi, Lori Smith, Kristina Joseph and Erin R Solaiman.

6. Macomb County Bar Foundation Board of Directors: Brian Grant, Stephen Becker, Sherrie Detzler, Sean Blume and Paul Spaniolo.

7. Deborah O'Brien, Dana M. Warnez and Hon. Julie Gatti.



Congratulations Dana!
From,
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Thank you for your many years of Bar service!

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from,
Lori Henderson and Chris Sciotti



Congratulations Dana!
Have a great 2021-2022 year!

Your Friend,
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2021-2022 year!

From, your friends at
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**Congratulations
Dana M. Warnez!**

From,
**Macomb Bar Association President
Francesco Briguglio**

**CONGRATULATIONS
DANA!**

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