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December 2020

Volume 39

Number 06

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TOGETHER. WE ARE MORE.

Continuity of Leadership

By Francesco Briguglio,
President of the Macomb Bar Association

Dear fellow Members of the Macomb Bar Association,

As many of you are already aware, the Macomb Bar Board of Directors received Joseph Golden's resignation on October 26, 2020.

Although the Board of Directors asked Mr. Golden to reconsider his resignation, Mr. Golden remains steadfast in that he will not. He will advise me on an as needed basis so there is complete continuity of leadership. With the help of the Board of Directors and member volunteers, I will continue working on the important projects that Joe started, including but not limited to the growth of our Diversity and Inclusion Committee and adapting to a changed world. We all wish Joe the best of luck in his future endeavors and good health.

Distinguished Public Service Award was posthumously awarded to Hon. Donald Miller. Presented by Frank Briguglio, his wife Candice Miller accepted the award on his behalf at the Annual Meeting in 2019

I humbly assume the responsibilities of President of the Macomb County Bar Association and with the able assistance and support of the board and others, I pledge to advocate and promote excellence in our profession through services, benefit and programs.

I have been a lifelong resident of Macomb County Michigan and have been involved with Macomb Bar since I started practicing law. Macomb County is in my blood and will continue in this future endeavor.

Our first event as President went off without a hitch (Virtual Mastered Meals). See page 16 for more!

Moving forward we will focus on the important changes that are occurring due to the COVID 19 pandemic and how it will change the practice of law permanently. We will also continue to monitor and assist in the implementation of the Michigan Indigent Defense Commission's Standards 5, 6, 7 and 8.

If any of you ever have any questions or concerns, feel free to reach out to me on my cell phone at 586-569-6970 or at frankb@bmpclaw.net

I wish you all health wealth and happiness,

Frank Briguglio
President of the Macomb Bar Association

It's Over

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

This is the last month of 2020. At least the year is over. However, the challenges presented by the COVID 19 pandemic continue for all of us, in every facet of life. It has been said by many in the profession that this pandemic has changed the practice of law forever. Together, the bench, bar and myriad of administrative teams that make the profession work have discovered efficiencies and deficiencies. Bar associations, including this one, have and continue to play a significant role as we advocate for our members and promote excellence through all of our programs and services. Adaptation is essential to success. While our mission remains the same, it is *how* we accomplish it that is adapting and changing.

As we close out 2020 we prepare for 2021, what some in the membership industry are now calling a "hybrid year." While the days of gathering groups for dinners, ceremonies, and education events have been on hold, we have turned to the virtual world for work, education, entertainment and socializing. At the beginning it was novel, and maybe even a little fun to join in electronically. But let's face it, we are all tired of zooming all day with our daily work and so when it comes time to socializing, zooming can literally be a pain in the dupa. So, as we look at the future of bar services, programs and activities, hybrids seem to be the next trend.

A good example of a hybrid activity is our golf outing at TopGolf on December 2, (with a little luck we will still be able to host the event). This event is designed to bring people together physically and virtually at the same time. TopGolf's facility allows up to 6 people in each golf bay. Most of our groups are 4 people that know each other and regularly work together. In these pods of 4 to 6 people we plan to socialize and share with dozens of colleagues through connected video screens. Hybrid also means a mix of in person and virtual activities, and we will continue virtual events to connect and educate and bring you value.

In November, we had our first ever virtual Admission Ceremony of new attorneys. We had 23 new attorneys sworn in, their family and friends watched with members of the bench and bar via zoom and Youtube. So very different. Yet, the humor and emotion that was displayed by sponsors, candidates and Judge Biernat remained the same. True to form Macomb love. It was really a positive and satisfying event. Join me in congratulating and welcoming all the new attorneys, including those listed on page 14 that attended our ceremony.

We also had our very first virtual cooking class in November with Chef Angelo of Vince & Joes. I regret not participating as "chef" myself, but I was able to watch everyone else have a ton of fun. Thank you sponsors Macomb Law Group and Gasiorek Morgan & Greco PC for your contributions to the event. And thank you Past President Joseph Golden for sponsoring the wine!

The bar is busier than ever with a growing Lawyer Referral Service. Growing? YES! How? By being innovative and changing the business model in a pandemic. Using our Community Lawyer online platform and collaborating with LawyerReferralServiceConnect, we are able to assist hundreds of people seeking legal representation each month and we refer them out to our Lawyer Referral Service members. Helping you and helping the community, every day. Interested in learning more? Go to Macombbar.org, roll over EXPLORE YOUR MEMBERSHIP and click on LAWYER REFERRAL SUBSCRIPTION, or contact me!

We are pleased to bring our Family Law members together for a special learning event on December 10 featuring Macomb County Friend of the Court Referee Amanda Kole walking everyone through the new child support formula.

If you have ever thought about getting involved in bar leadership, well, get ready because in January the Board of Directors will begin accepting letters of interest to appear on the spring ballot. Bring your energy and ideas and help your profession be the best it can be.

FOUNDATION NEWS

As most of you know the Macomb County Bar Foundation was founded by the Association in the 1990's as the charitable arm of the "bar". The Foundation is a 501 c s charitable organization with a mission of supporting and providing law related and civic education. The Board of Directors accomplishes the mission through programs such as Law Day, High School Mock Trial Tournament, Legally Speaking television series, law school scholarship program and so much more. The main supporters of the Foundation are Trustees who contribute $150 a year. Other support comes from the 400+ bar association members who voluntarily add $25 to their membership dues. And, as a charitable organization the Foundation conducts a fundraiser each year. The Foundation Board of Directors has been very active in planning alternative programming and fundraising. Unfortunately our annual Foundation Gala Dinner will not happen. In its place we are kicking off the Foundation Raffle. For only $20 you have a chance to win $250 every weeknight and $500 on the 5 Saturday's in January. So, how about starting your year off with a little extra cash and buy a ticket… or 5.

2020 is over. Our best is yet to come. Thank you for being a member of the best voluntary bar association in Michigan!

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Circuit Court Corner

By Macomb County Circuit Court Administration

Macomb Appointment Management System

The Macomb County Friend of the Court has begun Phase 2 of its "Macomb Appointment Management System," or MAMS. The original project was designed to replace the Friend of the Court's former appointment check-in system. Phase 1 of MAMS included mostly internal changes in the way Friend of the Court managed and kept track of litigants and attorneys who came into our facility for appointments and motions. Phase 2 focuses on making the system more interactive with customers, and allowing attorneys and litigants to track their cases on the Monday morning motion call. The highlights of Phase 2 are listed below, with implementation expected to be completed by December 31, 2020:

• Check-in touchscreen kiosks that will allow attorneys to check in for appointments (for themselves and their clients) without having to sign in with the receptionist. This will help alleviate any unnecessary delay for attorneys that may have multiple motions between multiple buildings, on any given motion date.

• Static view only displays have been installed in the lobby of each floor at the Friend of the Court. These displays will provide status updates to litigants and attorneys in the waiting areas on each floor. They will be automatically updated as any changes are made to the system by Friend the Court staff.

• We've also added web views for judges and attorneys. Since the system is web-based, we have included a public-facing docket page, with sensitive information removed, which can be accessed via a web browser, including smart phones.

• Please note: the MAMS system is specific to FOC, and does not replace the Five Points Check-In App and security screening and temperature checks which all individuals accessing the building must sign in on during the current pandemic.

Some Evidence

By Carl J. Marlinga, Circuit Court Judge

Recently, I held a bench trial in my courtroom. I was happy for two reasons. First, I was in trial. From my earliest days as a young lawyer, my happiness level has always zoomed off the charts any time I am in trial. Our process for deciding controversies is such an achievement of civilization that I feel honored to play even a small part in the continuing march of this great tradition. Second, as trials always do, it gave me something to write about for this evidence column.

The trial was one to quiet title to land. Although both plaintiff and defendant called witnesses, the case was ultimately decided on the exhibits and the rules of evidence regarding presumptions. I seize the opportunity to write about presumptions because it seems to me that the word is used a lot, but the way we think about its application is sometimes imprecise. Remember MRE 301 "imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but it does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." In practical terms, one consequence of the rule is that even where a presumption breaks in favor of one party, summary disposition under MCR 3.116(C)(10) is rarely, if ever, appropriate because the court must hear evidence from the opposing party which might rebut and overcome the presumption. Similarly, while a presumption may be sufficient to create a *prima facie* case, the party against whom the presumption is lodged can still prevail at trial because the burden of proof has not shifted.

Plaintiff (call him Jack) and defendant (call her Jill), both single persons, decided to purchase a home together. Both contributed to the purchase of the property, but the deed was placed in Jill's name because Jack was facing a prison sentence of about one to two years. After Jack got out of prison, the couple realized they were not going to be a couple anymore, so they started dividing up the assets that they shared. In return for other concessions, Jill allegedly agreed to let Jack have the house. According to Jack, Jill signed a quit claim deed conveying the property to him. Jack then recorded the deed.

Some months after the deed was recorded Jill contacted a realtor to try to sell the house. According to Jill, it was only then that she found out that title to the house, appeared to be in Jack's name alone. She told the real estate agent that the deed was a fake,

claiming that the document filed with the Register of Deeds was not signed by her. The real estate agent assisted Jill in filing an affidavit of false deed, which was filed with the Register of Deeds.

Shortly after the affidavit of false deed was filed, Jack tried to get an equity loan to fix up the house. It was at that point that he discovered the affidavit of false deed. Jack filed the action to quiet title, and Jill answered – each asserting to be the sole owner of the house, and each also asserting that the other had filed a false instrument.

The trial took one day. Both parties offered testimony to explain how the dispute arose, but I cautioned both attorneys that parol evidence about the disposition of the real property was not going to have much relevance, if any, in determining who owned the house. Further, this was not a divorce case, so I could not impose some creative, equitable division. The heart of the argument would be the authenticity of the instruments. On that issue, plaintiff held all the cards.

The disputed quit claim deed was the key. If Jill signed it, the case was over – absent factors like force or coercion, which were not alleged. (Of course, delivery of the instrument is also a necessary step in conveying title, but since the deed had been filed, delivery could be presumed – unless, of course, the signature was forged. If the signature were forged, then it would be logical to conclude that the entire transaction was fraudulent. It all came down to the authenticity of Jill's signature.

Plaintiff prevailed for three reasons: First, the signature was notarized; second, Jill's refusal to submit exemplars of her signature to a handwriting expert gave rise to a presumption that if she had provided the exemplars, the expert opinion would not have not been favorable to her; and, third the signature when compared by the trier of fact (me) with a known signature of Jill appeared to be the same. The first and second reasons, of course, involve presumptions. The final reason is simply an application of MRE 901 on ways to prove authenticity.

The first reason arises out of statute. MCL 55.307(1) creates a presumption that the matters contained in the certificate of a notary are true. The second section of the statute, MCL 55.307(2) allows a court to invalidate the presumption if a court finds that the notary did not perform his or her function in compliance with the Notary Public Act. This means that if the party opposing the validity of the notary certificate does not come forward with some evidence to challenge the certificate, the notary certificate alone suffices to create a *prima facie* case. (Remember MRE 301 does not allow more than the that. Testimony of the opposing party could still meet and overcome the presumption.) In *McConnell v McConnell,* unpublished opinion of the Court of Appeals, Docket No. 304959, Oct. 30, 2012, [2012 WL 5857297] the Court of Appeals applied and explained MCL 55.307 in affirming the decision of a circuit court holding that a disputed quit claim deed was valid. In *McConnell* the circuit court found that the deed conveying title was valid despite the notary testifying that she notarized the deed without witnessing or verifying the signatures. The court said that the patent noncompliance with the act removed the *presumption* of validity, but it did not mean that the authenticity of the signature could not be established by other evidence. Under MCL 565.604 a deed remains valid if signed and conveyed in good faith, even if there is a defect in the signing, sealing, or attestation of the instrument. In *dicta* the court said that if the notary had performed her duties correctly, the presumption of validity would have applied. The party asserting the validity of the deed, still prevailed, however, even without the presumption, since other evidence convinced the trial court that the signature was authentic.

In the case before me, Jill's attorney argued that the plaintiff could have brought in the notary to testify, and that the plaintiff's failure to call the notary as a witness could be used against him to destroy the presumption. Jack's attorney, however, correctly pointed out that the burden of going forward with evidence lay with the person challenging the notary certificate. Jill's attorney was in an equal position to call the notary as a witness. Since Jill was the one challenging the notary certificate, her failure to call the notary as a witness left the presumption intact.

The second reason for finding in plaintiff's favor involved a different kind of presumption, not governed by MRE 301. Plaintiff and defendant had agreed to a stipulated order whereby a handwriting expert would be given exemplars of Jill's signature to compare with the contested signature on the quit claim

deed. Jill failed to provide the exemplars. Plaintiff moved, and I granted plaintiff's motion, under MCR 2.313(B)(2)(a) to take as established that the expert witness would have opined that the signature on the quit claim deed was indeed Jill's signature. The rule states that the court may enter an order "that the matters regarding which the order was entered or other designated facts may be taken to be **established** for the purposes of the action in accordance with the claim of the party obtaining the order." [Emphasis added.] This court rule, therefore, differs significantly from the rule of evidence in MRE 301. As a sanction, MCR 2.313 allows a court to create a conclusive irrebuttable presumption that a fact has been established. In contrast, an evidentiary presumption under MRE 301 will always permit to opposing party to come forward with testimony or other evidence to try to rebut the presumption. (Look, I know this fine distinction is nerdy, but I like it.)

In the case before me, I still allowed the defendant (Jill) to testify that the disputed signature was not hers because I read the rule very fine to hold that the only operative fact established was that the expert witness *would have testified* that it was her signature. This is one significant step short of saying that the fact established was that it was Jill's signature. Since an expert witness can be disbelieved, just like any other witness, my sanction was limited to simply the finding that the testimony would have been unfavorable to Jill's position.

The third reason for finding in plaintiff's favor was the application of one of my favorite rules, MCR 901. Under MRE 901(b)(3) the trier of fact, with or without the assistance of an expert, can make a comparison between known exemplars and a disputed signature to decide the authenticity of the disputed signature. In this case, Jill's known signature was admittedly on the affidavit of false deed that she filed with the Register of Deeds. As the trier of fact, I could and did conclude that the person who signed the affidavit of false deed was the same person who signed the disputed quit claim deed.

Sunday, December 6, 2020 • 6:00pm

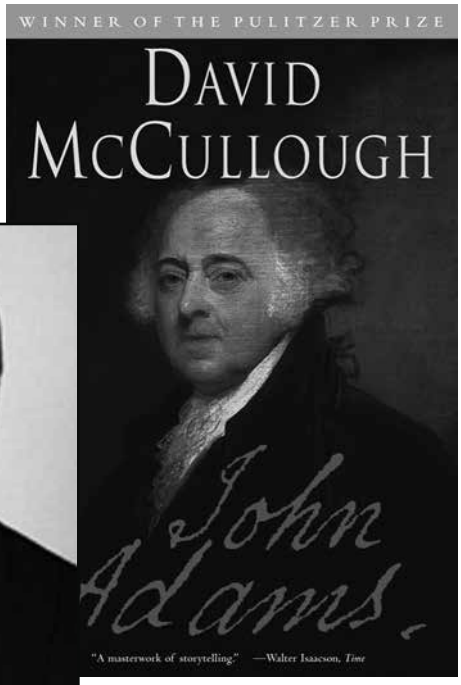
Special Guest: **Judge Carl Marlinga**

Book: "John Adams" By David Mcullough

Zoom Meeting:

Meeting ID: 827 1392 7620

Passcode: 617055



Sunday, January 17, 2021 6:00pm

Special Guest:

Judge Michael Warren

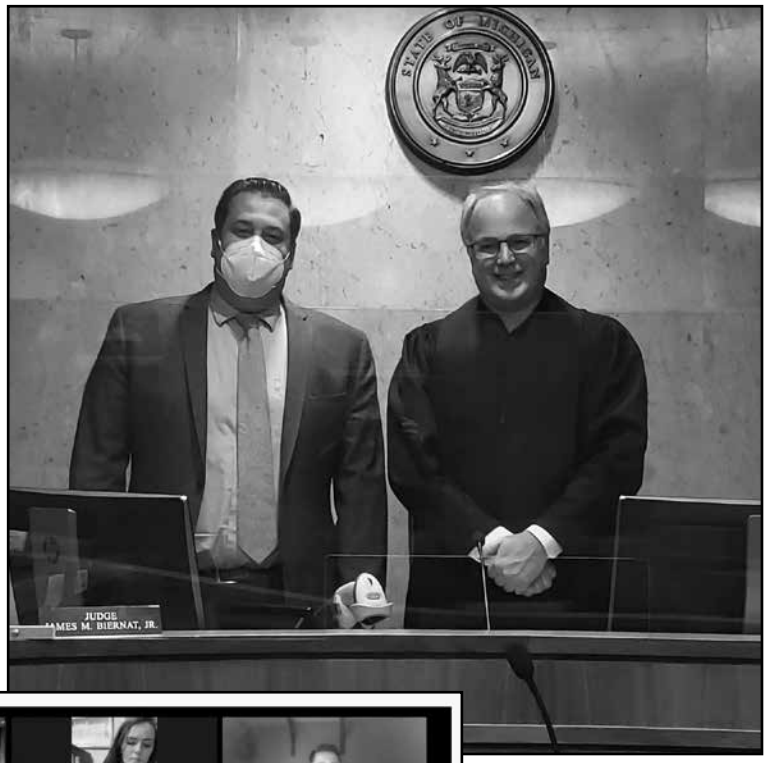
Book: "America's Survival Guide; How to Stop America's Impending Suicide by Reclaiming Our First Principles and History" by Judge Michael Warren

Zoom Meeting: Meeting ID: 838 8449 4871 • Passcode: 437065

Congratulations New Attorneys

New Admission Ceremony November 10, 2020

Alex Graf
Rebecca Harris
Kerry Martin
Alec Jobes
Mai Le
Jordan Ahlers
Alexis Barbacci
Julia Gazulli
Morgan Westwood
Benjamin Vanderwerp
Alex Holtshauser
Stephanie Columbo

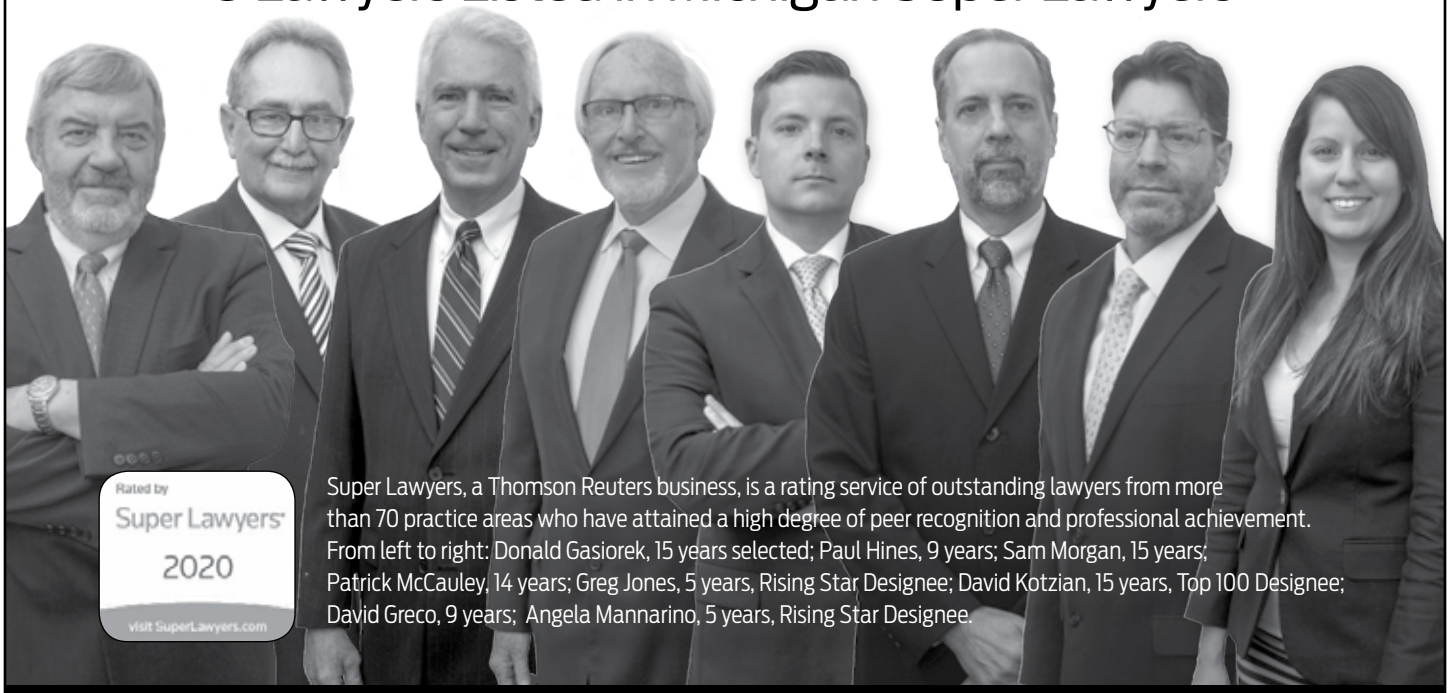


Mitch Tibbs
Maggie Rourke
Fred Bartolomei
Rachel McMann

Sam Jarbo
John Tomaszewski
Steve Mogdis
Michael Jernukian

Kate Jarrett
Klodiya Tawfik
Haris Cogo

8 Lawyers Listed in Michigan Super Lawyers



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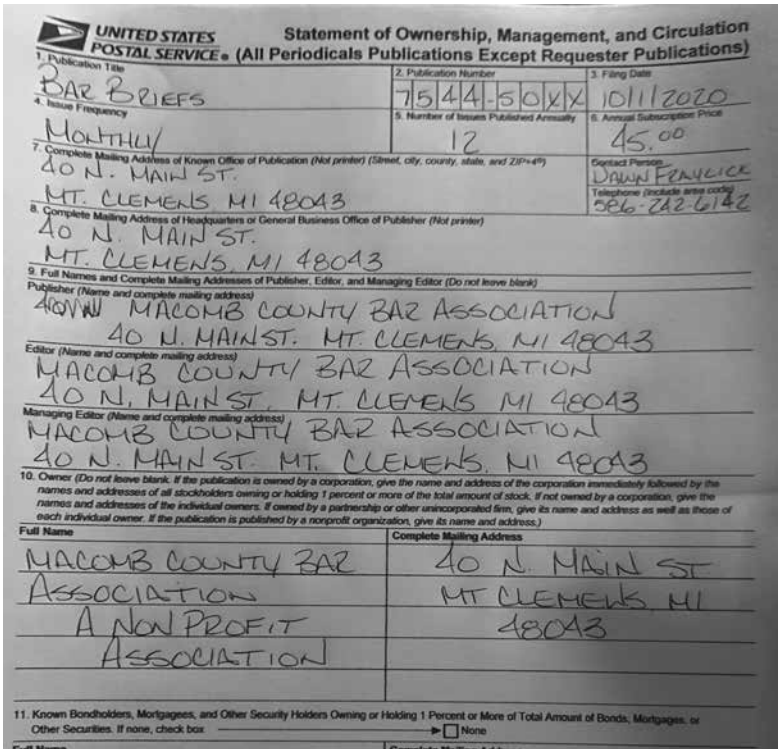

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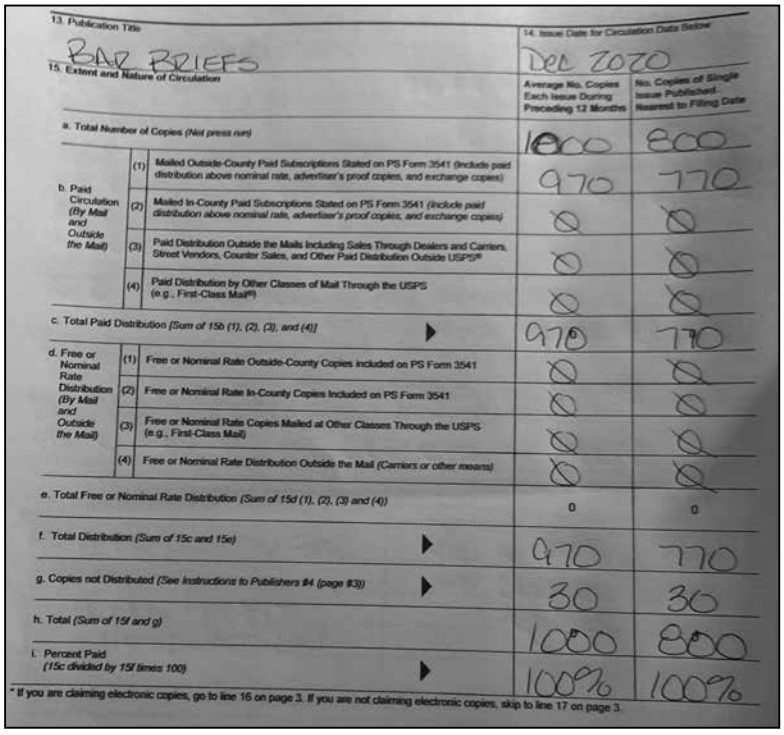

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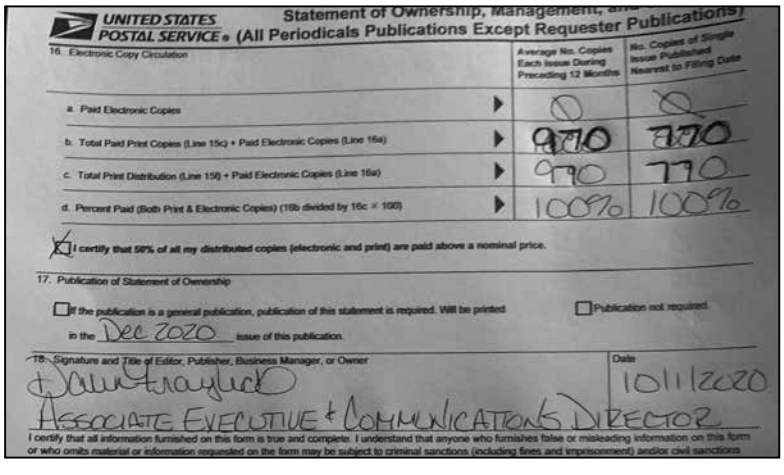

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☒ I certify that 50% of all my distributed copies (electronic and print) are paid above a nominal price.

17. Publication of Statement of Ownership

☐ If the publication is a general publication, publication of this statement is required. Will be printed in the Dec 2020 issue of this publication. ☐ Publication not required.

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