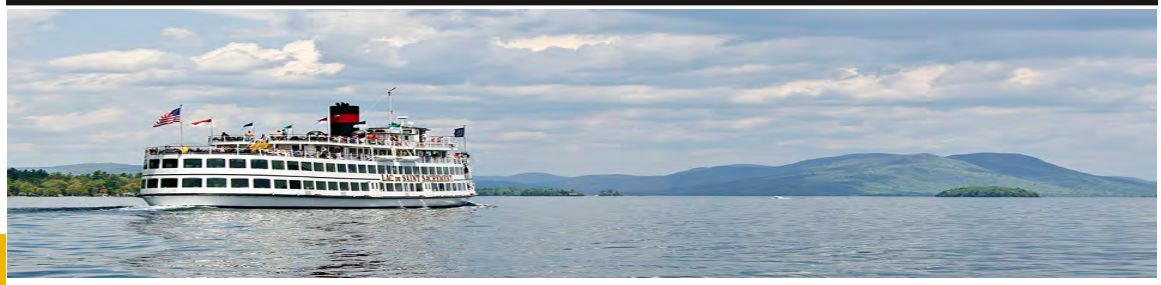
TIPSTAFF



INSIDE THIS ISSUE:

WARREN COUNTY BAR ASSOCIATION, INC.
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ESTABLISHED 1913

Michele Battle
Executive Director

PRESIDENTS MESSAGE Maria G. Nowotny, Esq.

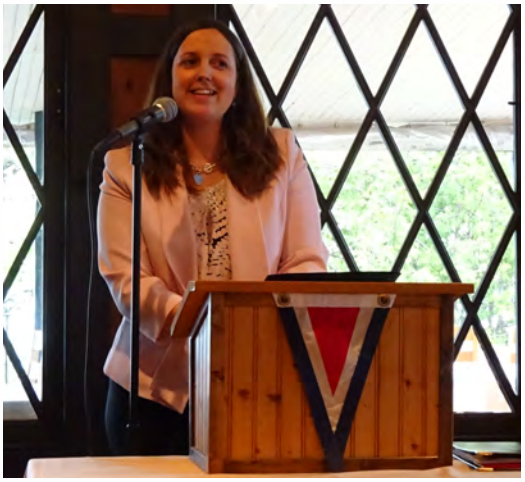
It truly is an honor to serve as president of the Warren County Bar Association. It is also a bit intimidating knowing I follow a line of exemplary presidents who have established a very high standard. I promise to strive to fulfill this challenge.

Our association always has been marked by a high degree of collegiality and cordiality. Practicing law in Warren County is professionally rewarding and a pleasure, as a result. This translates into the efficient practice of the law which ultimately benefits our clients.

In addition to collegiality and cordiality, a valuable benefit of membership is access to Continuing Legal Education (CLE) courses locally and at nominal, if any, cost. To position our Association to continue and expand these offerings, I propose the Warren County Bar Association become an accredited CLE provider. A considerable amount of work is required and the process, in likelihood, will take three years. The association will have to receive Office of Court Administration (OCA) approval for each of our CLE offerings. Eight CLEs will have to be offered in the three years preceding application for accreditation with five being conducted in the eighteen months immediately preceding application. Our accomplished membership is an excellent resource to provide both committee members to organize the CLEs, including interfacing with the OCA, as well as presenters. Members interested in participating in either capacity are invited to contact me or Michelle Battle, Executive Director. (Contact information appears in the side column.)

Ideas and suggestions are always welcomed and sought. Again, please contact me or Michele Battle with your thoughts. We are working towards an exciting year!

Karla Williams Buettner, Immediate Past President
Outgoing Message



Thank you.

How many of us have stood next to our children when they have been given a gift or a compliment and muttered the words "What do you say"?

How many of us have ourselves felt abashed when someone compliments us, and all we can think to say is a meek "Thank you."?

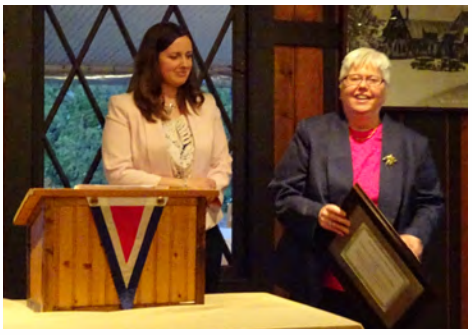
How many of us have our days made when that one difficult client finally recognizes all you have done and says "Thank you."?

In today's world, we unfortunately see a lack of thanks and gratitude for hard work and dedication. We see a dearth of folks willing to acknowledge that they need help, and to thank those who provide it.

So in my final message as President, I say to you, with a humble heart, Thank you.

Thank you for indulging me in all of the updated communication changes regarding on-line reservations, Facebook posts and tweets. Thank you for embracing our CLE programs and making them successful. Thank you for coming to our dinners, breakfasts and lunches and enjoying the camaraderie that defines our Bar Association. Thank you for approaching me with your concerns and your desires to make our Bar Association even better. Thank you to the Board members, who work diligently and vociferously behind the scenes. Most importantly, thank you for allowing me the privilege of serving as your President for the past year.

Under Maria and the new Board, I am confident that the Bar Association will continue to grow in both numbers and benefits to the membership. While I look forward to stepping into the background, I will always be thankful to you for the opportunity to lead, with service, this auspicious Association.



Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department, By Timothy J. Higgins is a partner at Lemire, Johnson & Higgins, LLC

Head injury/post-concussive symptoms a "seriou injury"

Rodman v. Deangeles
(Clark, J., 2/16/17)

Defendant conceded liability and went to trial solely on the issue of whether plaintiff sustained a "serious injury" as defined in New York Insurance Law § 5102(d). The jury found plaintiff's evidence; a severe head wound, concussion and post-concussive symptoms including dizziness, chronic headaches, vision dysfunction, and impaired balance, memory and concentration; sufficient to show both a permanent consequential limitation and significant limitation of use of his brain. However, Supreme Court (Rumsey, J., Cortland Co.) granted defendant's motion to set aside the plaintiff's verdict and dismissed the complaint. The Third Department reversed and reinstated the verdict, crediting the testimony of plaintiff's medical experts, one of whom opined that a concussion "is an alteration in the normal brain function due to trauma". Considering that plaintiff's symptoms, although largely subjective, persisted a full four years after the accident, the jury had "a valid line of reasoning and permissible inferences" that supported its conclusion.

Discoverability of defendant's insurance file materials

Curci v. Foley
(Lynch, J., 4/20/17)

Plaintiff was injured while using a log splitter on defendant's (his father-in-law) property. In defendant's Answer to the Complaint, he denied ownership of the log splitter; which apparently contradicted a telephone statement provided by defendant to his insurer (information known to plaintiff because he was in possession of a transcript of the statement). Supreme Court (Mott, J., Ulster Co.) granted plaintiff's cross-motion to compel disclosure of an audio recording of the statement (given five days after the subject accident). The Third Department reversed, concluding that defendant sufficiently showed the statement was entitled to conditional immunity as "material prepared for litigation" and that plaintiff failed to establish undue hardship if the recording is not produced. However, the Appellate Division also directed the trial court to conduct a hearing to determine if the defendant waived the confidentiality of the statement by giving the transcript to plaintiff.

Discoverability of defendant's insurance file materials

Hewitt v. Palmer Vet. Clinic, PC
(Devine, J., 12/29/16)

While at the defendant veterinary clinic with her cat, plaintiff was attacked and injured by a dog. Nine days later, plaintiff's counsel informed the clinic of a pending claim and urged it to notify its liability insurance carrier. Suit was filed about four months later, and plaintiff sought disclosure of documents in the defendant insurance adjuster's file prepared prior to the service of the summons and complaint. The clinic refused (relying on the "prepared for litigation" privilege) and Supreme Court (Ellis, J., Clinton Co.) denied plaintiff's motion to compel discovery. Reversing, the Third Department found the defendant didn't make a sufficient showing of what insurance company documents were encompassed by the demand or how any such materials "were prepared solely for litigation purposes". Supreme Court was also directed to perform an in camera review of the challenged documents for a ruling on whether they are entitled to immunity from disclosure.

Medical malpractice

Majid v. Cheon-Lee
(Peters, J., 12/22/16)

Plaintiff claimed the defendant surgeon caused an injury to her left ureter (the tube between the kidney and bladder), causing her kidney dysfunction and eventually the loss of the kidney. At trial, plaintiff's expert witness opined that the ureter was mistakenly cut during surgery; testimony which was directly contradicted by the testimony of a treating urologist and by a pathology report showing the ureter was collapsed but not severed. After plaintiff rested, Supreme Court (Kramer, J., Schenectady Co.) granted defendant's motion for a directed verdict. Reversing that judgment and ordering a new trial, the Third Department found no basis for Supreme Court's dismissal of the plaintiff's second and third theories of liability; namely, that the defendant surgeon failed to recognize and treat the ureter impairment when performing the surgery and during the postoperative period.

Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department, By Timothy J. Higgins is a partner at Lemire, Johnson & Higgins, LLC

Medical malpractice

Calcagno v. Ortho. Assoc. of Dutchess County, PC
(Garry, J., 3/2/17)

Plaintiff's counsel filed a complaint alleging medical malpractice by the defendants in treatment of the plaintiff's fractured ankle but upon filing did not submit the Certificate of Merit required by CPLR § 3012-a; nor was the certificate filed within the permissible 90-day extension afforded by CPLR § 3012-a(a)(2). In March 2015, some 19 months after suit was filed, with the Certificate still outstanding, Supreme Court (Cahill, J., Ulster Co.) granted defendants' motion to dismiss the complaint (declining to grant plaintiff's cross-motion to permit late service of the Certificate). Affirming, the Third Department found plaintiff's Certificate inadequate, as it was based on an affidavit by plaintiff's physical therapist, who was "incompetent to attest to the standard of care applicable to physicians and surgeons".

Reversal in slip-and-fall death claim

Acton v. 1906 Rest. Corp.
(McCarthy, J., 2/23/17)

Supreme Court (Meddaugh, J., Sullivan Co.) granted summary judgment to the defendant restaurant upon concluding that the plaintiff's inability to explain the cause of decedent's (his wife) unwitnessed fall would require a jury to impermissibly speculate as to proximate cause. The fatal fall occurred down an interior staircase; in the dining area where an unlocked and unmarked door opened over the stairs which led to the basement. The restaurant owner acknowledged that the stairs were original (installed in 1906); were worn; and did not have non-slip adhesive tops. The Third Department reversed and reinstated the complaint, noting that "proximate cause can be based on logical inferences from circumstantial evidence" and that "simple logic" implies that a door swinging over a staircase may create a hazardous condition.

Court of Appeals: proximate cause

Hain v. Jamison
(12/22/16)

Plaintiff's wife, walking in the northbound lane of a rural road in the late evening, was struck and killed by a vehicle driven by one of the Jamison defendants. Plaintiff contended the decedent was assisting a calf that was loose in the roadway; and that the defendant Drumm Family Farm had negligently failed to maintain its fence and restrain or retrieve the animal. The defendant Farm's motion for summary judgment; claiming the only proximate causes of the death were the vehicle operator's negligence and the decedent's "intervening and unforeseeable act of exiting her vehicle and entering the roadway" to assist the calf; was denied by Supreme Court. But the Appellate Division (4th Dept.) reversed and dismissed the plaintiff's complaint. The Court of Appeals reversed, noting that "where the risk of harm created by a defendant's conduct corresponds to that which actually results"…in the absence of an "extraordinary intervening act"…it cannot be concluded as a matter of law that a defendant's negligence "merely furnished the occasion for the harm". A question of fact requiring resolution by a jury exists when a defendant's negligence puts a plaintiff "in a position susceptible to further harm".

Court of Appeals: CPLR Article 16 liability relief

Artibee v. Home Place Corp.
(2/14/17)

Plaintiff was injured when a large branch broke off defendant's tree, fell through her Jeep and struck her in the head. The tree bordered a New York State highway, and plaintiff separately (in the Court of Claims) sued the State for failing to monitor and maintain the tree and warn drivers of the hazard. At trial in Supreme Court, the defendant property owner was allowed to show evidence of negligence by the State, but was precluded from having the jury consider apportionment of liability (for noneconomic losses) between it and the State. After that determination was reversed in the Appellate Division, the Court of Appeals (with two dissenters) reversed, concluding that since "no claimant can obtain jurisdiction over the State in Supreme Court…defendant was not entitled to a jury charge on apportionment in this action".

STATE OF NEW YORK SUPREME COURT CHAMBERS
ROBERT J. MULLER, JUSTICE OF THE SUPREME COURT

Lee Enterprises, Inc. v. The City of Glens Falls, 63270
[New York Law Journal April 18, 2017]

Case Summary: Counsel Fees

The Court awarded petitioners' counsel fees following their successful litigation concerning a FOIL denial. The Court found that a senior partner used this case to teach two associates about FOIL, and then sought to hold respondents responsible for the fees incurred in connection therewith. The Court determined that awarding fees for the identical services provided by the associates would be inequitable, as would awarding fees for the time spent by them in learning about FOIL. Claim of $45,049.30 was reduced to $9,846.15. Petitioners also sought $1,376.30 in administrative fees incurred, which fees include, inter alia, $931.40 in "Lexis Advance Fees" and a $40.00 "NYS Library Fee.". It has been explicitly held "that computer research is merely a substitute for an attorney's time that is compensable under an application for attorneys' fees and is not a separately taxable cost and these costs were denied.

TO SEE FULL OPINION PLEASE CLICK HERE

Pauline A. Shumek Gregory v. The Vascular Group, PLLC, Nishan Dadian M.D. and Glens Falls Hospital

Case Summary: Medical Malpractice

This is a wrongful death and medical malpractice action in which defendants summary judgment pursuant to CPLR 3211 or, alternatively, dismissal of the complaint pursuant to CPLR 3212. The first two causes of action in the complaint were for wrongful death and conscious pain and suffering. The Court found that defendants failed to make a prima facie showing of their entitlement to summary judgment as a matter of law and that such failure required denial of the motion, regardless of the sufficiency of the opposing papers. Decision included discussion in a very recent decision (Pullman v. Silverman, 28 NY3d 1060, 1066 [2016]) which focused on the need for the movant's expert to address the assertions in a plaintiff's bill of particulars.

TO SEE FULL OPINION PLEASE CLICK HERE

Lumberjack Pass Amusements, LLC. v. Royal Hospitality, LLC d/b/a Comfort Suites, George Stark and Marilyn Stark

Case Summary: Arbitration

This is a motion directed to an arbitrator's award in which petitioner contends that the arbitrator exceeded his lawful authority by declining to find respondents' several breaches of the agreement material and effectively re writing the terms of the agreement concerning an easement. Petitioner also contended that the arbitrator erred in admitting certain emails into evidence during the hearing. The Court declined to disturb the arbitrator's award observing that vacatur is only appropriate where it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power. Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact. The evidentiary contention was also without merit as arbitrators are not bound by principles of substantive law and rules of evidence; instead, they may do justice as they see it, applying their own sense of law and equity to the facts as they find them to be and making an award reflecting the spirit rather than the letter of the agreement.

TO SEE FULL OPINION PLEASE CLICK HERE

LAW DAY 2017

The Warren County Bar Association held another successful round of Law Day events in 2017, with the theme being "The 14th Amendment; Transforming American Democracy". The annual Law Day breakfast was held on Friday, May 5, 2017 at the Hiland Park Country Club. During the breakfast, the WCBA recognized the 2017 Liberty Bell Award winner - Elizabeth Miller, owner of Miller Mechanical, for her outstanding, continued contributions to our community.

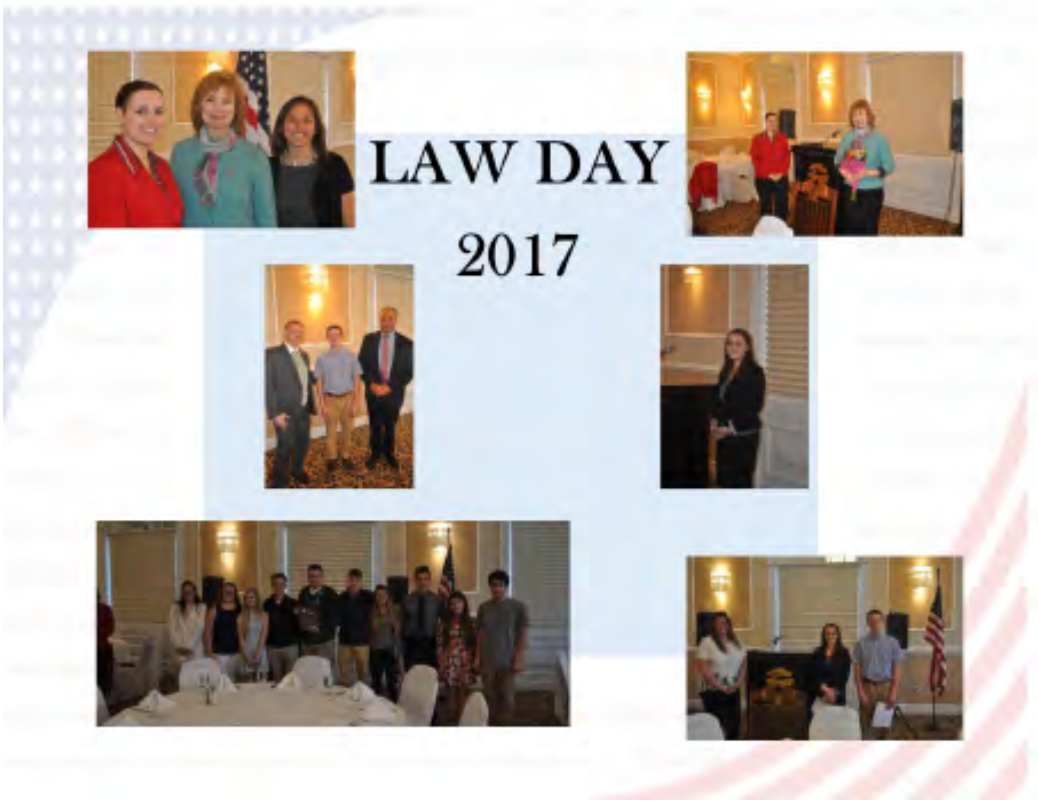
We also recognized Lauren Piccoli, senior from Lake George HS, and Neil Hogan from Glens Falls HS as this year's Law Day essay contest winners. In addition, we congratulated the Salem High School Mock Trial team for winning the mock trial competition.

Numerous local attorneys participated in the annual Law Day schools program under the leadership of Timothy Bartlett.

Finally, the annual Law Day run, organized by Timothy S. Shuler, Elisabeth B. Mahoney, Bruce O. Lipinski, and Eileen M. Haynes, was held on Thursday, May 4, 2017, and raised over $1,000.00 for the Open Door Mission.

Thank you to everyone who participated in this year's Law Day activities!

Respectfully submitted,
Claudia K. Braymer
Law Day Committee Chair



Family Law Section
Three New Administrative Orders

NEW YORK STATE BAR ASSOCIATION

Please be advised that three new Administrative Orders have been recently issued. They are as follows

1) Administrative Order 100/17 amends 22 NYCRR 202.50(b) to add a new section 202.50(b)(3) requiring every uncontested and contested Judgment of Divorce to contain certain decretal paragraphs, including one concerning venue where post judgment applications for modification or enforcement in Supreme Court should be brought.

2) Administrative Order 99/17, amends 22 NYCRR 202 to add a new section 202.16-b addressing the submission of written applications in matrimonial actions, including page limitations.

3) Administrative Order 102/17 modifies the uncontested divorce packet forms to reflect increases as of March 1, 2017 in the self support reserve ($16,282) and the poverty level income for a single person ($12,060).

The above are posted on the NYSSA Family Law Section website, in the Community library and can also befound at NYCourts.gov

Regards,

Mitchell Y. Cohen, Esq.
Chair of the NYSSA Family Law Section
Johnson & Cohen, LLP
mitchellc@johnsoncohenlaw.com
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fax (914) 922 9500
www.johnsoncohenlaw.com

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and upon consultation with and approval by the Administrative Board of the Courts, effective July I, 2017, I hereby amend Part 202 of the Uniform Rules for the New York State Trial Courts by adding a new section 202.16-b to the uniform civil rules for the supreme court and the county court (22 NYCRR § 202.16-b), addressing the submission of written applications in contested matrimonial actions, to read as follows:

§202.16-b Submission of Written Applications in Contested Matrimonial Actions.

(1) Applicability. This section shall be applicable to all contested matrimonial actions and proceedings in Supreme Court authorized by subdivision (2) of Part B of section 236 of the Domestic Relations Law.

(2) Unless otherwise expressly provided by any provision of the CPLR or other statute, and in addition to the requirements of 22 NYCRR §202.16 (k) where applicable, the following rules and limitations are required for the submission of papers on pendente lite applications for alimony, maintenance, counsel fees, child support, exclusive occupancy, custody and visitation unless said requirements are waived by the judge for good cause shown:

(i) Applications that are deemed an emergency must comply with 22 NYCRR§202.7 and provide for notice, where applicable, in accordance with same. These emergency applications shall receive a preference by the clerk for processing and the court for signature. Designating an application as an emergency without good cause may be punishable by the issuance of sanctions pursuant to Part 130 of the Rules of the Chief Administrative Judge. Any application designated as an emergency without good cause shall be processed and considered in the ordinary course of local court procedures.

(ii) Where practicable. all orders to show cause. motions or cross-motions for relief should be made in one order to show cause or motion or cross-motion.

(iii) All orders to show cause and motions or cross motions shall be submitted on one-sided copy except as otherwise provided in 22 NYCRR §202.5(a), or electronically where authorized, with one-inch margins on eight and one half by eleven (8.5 x 11) inch paper with all additional exhibits tabbed. They shall be in Times New Roman font 12 and double spaced. They must be of sufficient quality ink to allow for the reading and proper scanning of the documents. Self-represented litigants may submit handwritten awlications provided that the handwriting is legible and otherwise in conformity with these rules.

(iv) The supporting affidavit or affidavit in opposition or attorney affirmation in support or opposition or memorandum o f law shall not exceed twenty (20) pages. Any expert affidavit required shall not exceed eight (8) additional pages. Any attorney affirmation in support or opposition or memorandum o f law shall contain only discussion and argument on issues of law except for facts known only to the attorney. Any reply affidavits or affirmations to the extent permitted shall not exceed ten (10) pages. Sur-reply affidavits can only be submitted with prior court permission.

(v) Except for affidavits o f net worth (pursuant to 22 NYCRR §202.16 (b)). retainer agreements (pursuant to Rule 1400.3 of the Joint Rules of the Appellate Division). maintenance guidelines worksheets and/or child support worksheets, or counsel fee billing statements or affirmations or affidavits related to counsel fees (pursuant to Domestic Relations Law §237 and 22 NYCRR §202.16(k)). all o f which may include attachments thereto. all exhibits annexed to any motion, cross motion, order to show cause. opposition or reply may not be greater than three (3) inches thick without prior permission o f the court. All exhibits must contain exhibit tabs.

(vi) If the application or responsive papers exceed the page or size limitation provided in this section, counsel or the self-represented litigant must certify in good faith the need to exceed such limitation, and the court may reject or require revision o f the application if the court deems the reasons insufficient.

(3) Nothing contained herein shall prevent a judge or justice of the court or of a judicial district within which the court sits from establishing local part rules to the contrary or in addition to these rules.

Chief Administrative Judge of the Courts

Dated: May 22, 2017

AO/99/17

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and upon consultation with and approval by the Administrative Board of the Courts, effective August 1, 2017, I hereby amend section 202.50(b) of the uniform civil rules for the supreme court and the county court (22 NYCRR § 202.50[b]) by inserting a new section 202.50(b)(3) as follows:

202.50. Proposed Judgments in Matrimonial Actions; Forms

***

(b) Approved Forms.

***

(3) Additional Requirement with Respect to Uncontested and Contested Judgments of Divorce. In addition to satisfying the requirements of paragraphs (1) and (2) of this subdivision, every judgment of divorce, whether uncontested or contested, shall include language substantially in accordance with the following decretal paragraphs which shall supersede any inconsistent decretal paragraphs currently required for such forms:

ORDERED AND ADJUDGED that the Settlement Agreement entered into between the parties on the day of , []an original OR [] a transcript of which is on file with this Court and incorporated herein by reference, shall survive and shall not be merged into this judgment,* and the parties are hereby directed to comply with all legally enforceable terms and conditions of said agreement as if such terms and conditions were set forth in their entirety herein; and it is further

* In contested actions, this paragraph may read either [shall survive and shall not be merged into this judgment] or [shall not survive and shall be merged into this judgment].

ORDERED AND ADJUDGED, that the Supreme Court shall retain jurisdiction to hear any applications to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this judgment, provided the court retains jurisdiction of the matter concurrently with the Family Court for the purpose of specifically enforcing, such of the provisions of that (separation agreement) (stipulation agreement) as are capable of specific enforcement. to the extent permitted by law, and of modifying such judgment with respect to maintenance, support, custody or visitation to the extent permitted by law, or both; and it is further

ORDERED AND ADJUDGED, that any ap plications brought in Supreme Court to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this judgment shall be brought in a County

wherein one of the parties resides; provided that if there are minor children of the marriage, such applications shall be brought in a county wherein one of the parties or the child or children reside, except. in the discretion of the judge, for good cause. Good cause applications shall be made by motion or order to show cause. Where the address of either party and any child or children is unknown and not a matter of public record, or is subject to an existing confidentiality order pursuant to DRL §254 or FCA §154-b, such applications may be brought in the county where the iudgment was entered;

and it is further

Chief Administrative Judge of the Courts

Dated: May 22, 2017

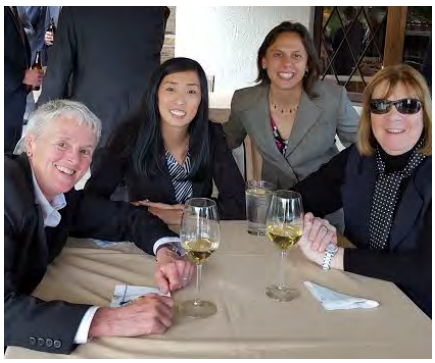
AO/100/17

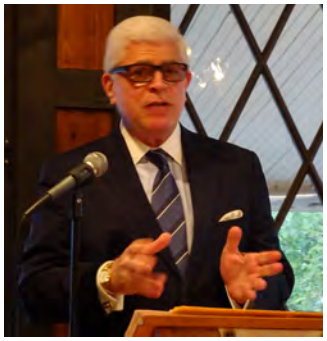
ANNUAL DINNER 2017

The Annual Dinner was a wonderful way to finish off a great year. Thanks to everyone who made this year a success for our association.

New officers for the WCBA were elected as follows: Maria G. Nowotny, President; Daniel J. Mannix, President-Elect; Jill E. O'Sullivan, Vice President; Jeffrey R. Meyer, Secretary; Claudia K. Braymer, Treasurer; Eric Schwenker, Delegate to the New York State House of Delegates; and Karla Williams Buettner, Immediate Past President. The 2017-2018 Directors consists of: Marcy I. Flores, Jessica H. Vinson, Joshua D. Lindy, Jacquelyn P. White, Brian C. Borie, and Jeff Ferguson.

The Warren County Bar Foundation Inc, ("WCBF") elected officers and Board of Directors for 2017-2018 as follows: Hon. Robert J. Muller, President; Amy C. Bartlett, Vice President; Edward P. Fitzgerald, Secretary; and John C. Mannix, Treasurer. The Directors are Dennis J. Tarantino, Paula Nadeau Berube, Jill E. O'Sullivan, Michael D. Dezik, Rose T. Place, Mary-Ellen Stockwell, Jacquelyn Poulos White, Daniel J. Mannix, and Peter Fitzgerald, Director Emeritus.





WARREN COUNTY BAR ASSOCIATION

OFFICERS: 2017- 2018

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DANIEL J. MANNIX
President-Elect

JILL E. O'SULLIVAN
Vice President

JEFFREY R. MEYER
Secretary

CLAUDIA K. BRAYMER
Treasurer

ERIC C.SCHWENKER
Delegate to the New York State House of Delegates

KARLA WILLIAMS BUETTNER
Imm. Past President

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