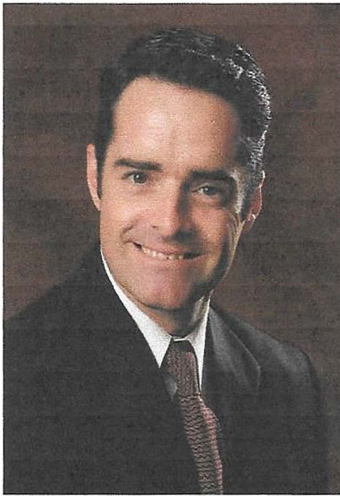


## TIPSTAFF

February, 2016

### THE PRESIDENT'S MESSAGE

By Dennis J. O'Connor



As I write this message, two subjects preoccupy my thoughts; first, the recent death of another distinguished member of our association, and secondly, the level of member participation in our association events.

The recent death of Hon. J. Timothy "Tim" Breen was a sad moment for us all. We all know of the indelible mark that Tim left on our local family court. Despite presiding over a grueling caseload, Tim committed himself to giving each case the necessary time and attention to produce a result that was fair, thoughtful and effective.

There are perhaps no other court proceedings more wrought with emotion and stress than those in family court. Tim balanced an emotional setting with sober thought & a conviction

for attempting to do what was legally appropriate, & in the best interests of the parties appearing before him. Tim served as a role model to all of us as judges, counselors & jurists, but also to countless men, women & especially children, who were impacted daily by his decisions. Personally, I, as a fellow gay attorney, living & working in a community with a small LGBT population, looked to Tim as a symbol that we are all equal, despite the various human traits that make us different. Like Tim, we can all achieve success & happiness when we live in a community that is tolerant, & we, in turn, as individuals, seek to contribute to the betterment of that community by conducting ourselves with integrity & generosity of spirit. Tim did just that, and his presence will be missed.

Judge Breen's funeral service also demonstrated that our membership is strong, loyal & dedicated. The participation in the formal funeral services of recently deceased members has been very impressive & appreciated. Oddly, however, the less formal events of the association's monthly social meetings are yielding far less participation. Despite recent attempts to offer new & unique events, such as, a ghost story dinner & tour of a local brewery, the number of attendees at these events has been low. Let us not forget the significance that these events can have on the cohesion and daily camaraderie of our legal community. By sharing a laugh or two during our "off" hours, we can possibly reduce the stress and friction that may exist during our "on" hours. If you have an idea that you feel might be of interest to the membership, please do not hesitate to share it with Kathy at the bar office. If you have not recently attended an event, come back and give us a try, your participation is valuable.

### WCBA Officers

Dennis J. O'Connor  
President  
doconnor@mfcflp.com  
(518) 792-1174

Karla W. Buettner  
President - Elect  
kwb@bpsrfaw.com  
(518) 792-2117

Maria G. Nowotny  
Vice - President  
marianowotny@albany.twcdc.com  
(518) 792-1880

Jeffrey D. Moyer  
Secretary  
jmoyer@meyerfuller.com  
(518) 668-4653

Michael D. Dezik  
Treasurer  
mdozik@wplawny.com  
(518) 409-8534

Maria G. Nowotny  
Delegate to NYSBA House of Delegates  
(518) 792-1880

Karstino K. Flower  
Immediate Past President  
kflower@cafrylawoffice.com  
(518) 792-1582

### In This Issue

- Letter from the President
- Tributes
- Swearing In of New Judges
- WCBF MIXER
- House of Delegates
- Recognitions
- Memo from Surrogate's Court
- Torts & Civil Practice
- The Colonel by Jim Cooper

# TRIBUTES

The close of 2015 and the outset of 2016 was marked by transition.

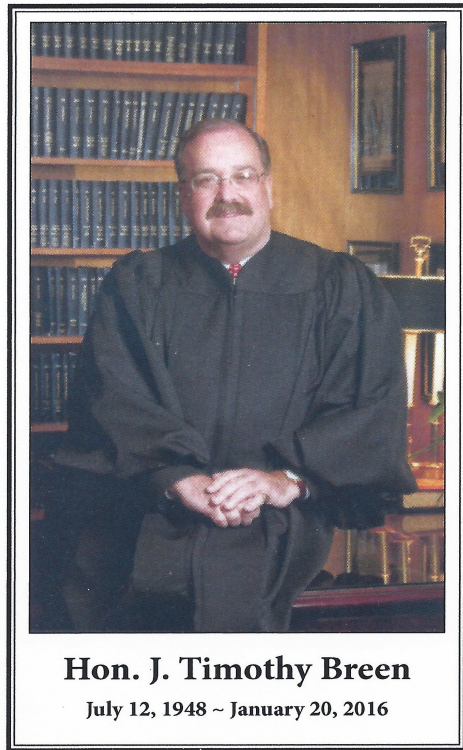
The retirement of two long-serving and highly respected judges, Honorable David B. Krogmann, S.C. J. and Honorable J. Timothy Breen, F.C.J., was followed by the swearing in of two newly elected judges, Supreme Court Judge Martin D. Auffredou and Family Court Judge Paulette M. Kershko. A new part-time town justice, Queensbury Town Justice Eric C. Schwenker, was also sworn in.

Shortly after this “changing of the guard,” the Association experienced the profound loss of outstanding jurist, Judge Breen, as well as, a long time member, George J. Zurlo, Esq., who made innumerable contributions to the Warren County Bar Association and the Warren County Bar Foundation. This section of the Tipstaff recognizes these exemplary individuals.

Honorable J. Timothy Breen, Family Court Judge retired from the bench following a distinguished career spanning in excess of 30 years in Warren County Family Court, first, as a Hearing Examiner (now known as Support Magistrate) and, then, as Family Court Judge from June 1999 through December 2015. The Association and the community at large experienced great sorrow at the passing of Judge Breen on January 20, 2016. Honorable Paulette M. Kershko, Family Court Judge, who previously served as Judge Breen’s Court Attorney presented an eloquent eulogy at his funeral. Judge Kershko graciously allows us to re-print the eulogy which appears below.

Tatiana N. Coffinger, Esq. kindly submitted the touching tribute which appears herein to Judge Krogman upon his retirement in December 2015.

**Eulogy for  
Honorable J. Timothy Breen, FCJ  
by  
Honorable Paulette M. Kershko, FCJ**



**Hon. J. Timothy Breen**

July 12, 1948 ~ January 20, 2016

Thank you all for coming today to honor and celebrate the life of J. Timothy Breen. I knew him as Judge Breen. I was his Court Attorney and his was my mentor and friend.

Martin Luther King, Jr. said in his I Have a Dream Speech

“The ultimate measure of a man is not where he stands in moments of comfort, but where he stands at times of challenge and controversy. The true neighbor will risk his position,

his prestige and even his life for the welfare of others. In dangerous valleys and hazardous pathways, he will lift some bruised and beaten brother to a higher more noble life.”

I was lucky enough to watch Judge Breen do this every day.

Michael. Yours was an incredible love story spanning almost three decades. You gave the Judge balance, purpose and a reason to return home at the end of every day.

Mary Ellen and Joanna: Your baby brother worried about you. He would often say that it will be up to you both to care for one another, after he is gone.

To his Brother and Sister in laws and Extended Family: I know first hand that you have made the holidays, birthdays and wedding celebrations fun for the Judge and he especially loved telling me what a wonderful dance partner his cousin Sen. Betty Little was.

To his Court Family: We know there are so many funny stories, the likes of which people would never believe, and could never be repeated outside the walls of the office. The Judge loved to laugh and we all enjoyed every minute of it.

To his St Mary's Friends: You have always been there for him and today is no different. The Judge took his Senior Class Presidential duties very seriously. He loved planning your Class Reunions and dancing the night away with you at them. Save a dance for him at your 50th.

Law School Friends: The Judge has sworn me to secrecy about the raucous goings on. You were truly unforgettable to him.

Judicial Colleagues and Members of the Bar: Judge Breen was humbled and grateful to learn that his peers were planning a ceremony to recognize his contributions to the law and to the families of Warren County. He has always valued your counsel and would want me to thank you for your prayers.

To his Museum and Not for Profit Friends: You offered the Judge numerous opportunities to support the arts and to make a meaningful contribution to the community that he loved so much.

Judge Breen was a kind and caring person who sent us thoughtful notes, made inquiries about our families and had an unassailable work ethic as the longest sitting Family Court Judge in Warren County History.

But I am not here to speak about the things that you already know about him. Instead, I would like to share some observations.

1-He did not like raisins or chili with beans.

2-He thought that his head was too big.

3-He did not wear socks with loafers.

4-He was annoyed when people left off the J. in his name or referred to him as “Timmy.”

5-He kept his St. Mary’s school report cards from 4th and 5th grade, in his desk, at work.

6-He showed these report cards to children who were having trouble in school, often telling them that “He turned out ok so they would too.”

7-He delayed entrance into law school so he could enlist in the Army Reserves.

8-He was ashamed that he had to borrow \$3,000 from a local grocery store owner to pay his tuition to remain enrolled in law school.

9-He was self conscious riding in a convertible because his hair blew around too much, revealing his bald spot.

10-He could recite, from memory, the quote that he selected for his High School yearbook.

11-Several years ago, the Judge confessed to me that he never knew who wrote that quote or what it meant and told me that he picked it because it just sounded right.

12-He was terrified to be unprepared.

13-His was proud that his favorite Aunt, Maime Breen, was mentioned by name in Elizabeth Bishop’s poem entitled “Arrival at Santos” and he often read the stanzas aloud.

14-He loved meeting Garrison Keillor on a cruise and always liked his signature sign off “Be well, do good work and keep in touch.”

15-He loved architecture, early American furniture, poetry and history.

16-He cherished pizza nights with friends and family.

17- He loved a well made Beefeater Martini.

18-He loved to dance the jitterbug.

19-He will always have Italy!

20-Despite being a lawyer and a Judge, he was good at math. He worked as a bank teller at The Glens Falls National Bank.

21-He appreciated a good hotel breakfast and a pool with chaise lounge in the shade where he could read.

22-He like Maggie Smith’s one liners as the Dowager in the PBS series Downton Abbey.

23-He loved being a friend and a traveler and mixing the two.

24-He loved Saturday morning coffee runs and Sunday afternoon office visits with his dog Bertie.

25-He loved being a Husband and a brother and most definitely, being a Judge.

In 1921, US Sup Ct Justice Benjamin Cardozo delivered a series of lectures at Yale Law School and said: “ The Judge, even when he is free, is still not wholly free. He is not to innovate at his pleasure. He is not a knight-errant, roaming at will, in pursuit of his own ideal of beauty and goodness. He is to draw his inspiration from consecrated principles.”

My dear sweet Judge... you have lived these principles and taught me well. You have consecrated yourself to the Lord, may he now draw near.



## **Retirement Tribute to Hon. David B. Krogmann, J.S.C.**

**Submitted by Tatiana N. Coffinger, Esq.**

On December 31, 2015, Supreme Court Justice David Krogmann officially retired from State service. Born in Jamaica, NY, David was one of three children of August & Effie Krogmann. In 1967, he graduated from Wittenberg University located in Springfield, Ohio where he majored in Political Science. He attended Washington and Lee University School of Law, in Virginia and graduated in January, 1974 following his time in the United States Army from 1969 until 1972. In the Army, he held the position of Counterintelligence Special Agent and Executive Officer for which he received the Army Commendation Medal for Meritorious Service.

Following law school, he moved his family to Glens Falls where he was a partner in the law firm of Bacas & Krogmann for many years. In his private practice, he spent many years as the Town Attorney to the towns of Bolton, Horicon, Lake Luzerne, Stony Creek and Indian Lake. He was also a Deputy County Attorney for Warren County as well as a former Councilman in the City of Glens Falls. In 1982, he became a member of the judiciary; first as Glens Falls City Court Judge, where he served until he was sworn in as a Supreme Court Justice of the Fourth Judicial District on January 1, 2004. Justice Krogmann proudly served in Supreme Court, presiding over thousands of cases both locally and also for a brief period in Manhattan.

Justice Krogmann's legal career can hardly be described in an essay. For all those who practiced before him, the resounding echo would be that they were treated fairly and with respect. At the end of a career that has been so focused on public service and distinguished by his profound judicial temperament, there is more to be said than merely a recitation of a resume". If there had been a retirement dinner, which Justice Krogmann wholeheartedly rejected, I would have given a speech that sounded a little like this:

"A person could learn a lot about David Bruce Krogmann, the man, by watching him perform his duties as a judge. For more than four decades, the citizens of Warren County witnessed a man of honor, who freely gave his time to his profession, to his family and to his community. Although there are countless stories about Judge Krogmann on the bench and off-and many of those stories will become part of the Warren County Bar Association legends and lore, there are particular tales that illustrate his personal character best and are probably the least well known.

Lawyers and police officers always seemed to know that Judge Krogmann would be in his office and willing to help when no one else seemed to be around. It started when he was a Glens Falls City Court Judge but continued without hesitation while he was a Supreme Court Judge. On Christmas Eve 2013, I was putting presents under the tree when my phone beeped with a notification from the Post Star that there had been a homicide in Warren County. My first thought was how tragic an event to unfold on Christmas Eve and my second thought was that Judge Krogmann would somehow be involved. On Christmas morning, Judge Krogmann sent me a text to wish me a Merry Christmas and to tell me that he had arraigned the man charged with killing his estranged wife. Only later did I find out that he had received the call when he arrived at his church for the Christmas Eve service, attended the service, then dropped his family off at home while he proceeded to the Sheriff's Department for the next several hours, returning home in the wee hours to catch a few winks before the festivities of the day began. Law enforcement returned to him in the days following with search warrant applications and to discuss the horrific scenes of that night in almost a therapeutic way. He never thought of turning them away and instead, he wrote letters of commendation to the Sheriff to express his admiration for the officers who dutifully did their job without complaint instead of spending the holiday with their families.

Supreme Court has broad jurisdiction and there are issues that arise that are often beyond comprehension. In law school, I would never have dreamed that I would have many, many conversations about body parts with my boss. But we did. Often. Unfortunately, there were sometimes pictures. Pictures do not make the conversation easier. Thankfully, we had the internet to help with pronunciation of certain parts to help the Judges sound more judicial on the bench when addressing counsel and the jury regarding said body parts. Luckily, these awkward conversations were had in Chambers so the giggles could be had in private. It doesn't matter if you are 10 or 70, there are some topics that are just so uncomfortable to discuss with others, that humor helps. However, when Judge Krogmann entered the courtroom, it was all business and decorum. The parties were entitled to respect and they always received it.

Sometimes the most affected parties were unaware of the respect they received. A few times during Judge Krogmann's tenure as a Supreme Court Judge, he was called upon to authorize the harvesting of organs from State inmates. In those instances, the inmates had attempted suicide and were declared brain dead but because they had signed up to be organ donors, they were on life support pending a determination by the Court. There is a procedure for this. In these matters, Judge Krogmann contacted the next of kin of these men, usually the parents, to advise them of what was occurring. He talked to the parents as a parent would. He asked them about their sons, not about them as convicts, but as people. He gave the parents time to say their peace and every time, those parents thanked him. They thanked the man who was about to authorize the removal of their sons' essential organs and ultimately end their sons' lives. They thanked him for his time and his compassion towards them. Undoubtedly, the parents of convicted criminals are probably not afforded judicial compassion during any of the previous court proceedings they may have witnessed and these interactions with Judge Krogmann may have been the first time a judge had conveyed to them the words: "I am sorry for your loss." What these parents will never know is that Judge Krogmann remembers the anniversaries that these men died each year and he prays for their souls. Every year, he buys memorial lilies at his church for each of these men on Easter weekend. He remembers these men, not for their horrendous and unthinkable crimes, but he remembers them for their final act of contrition - saving the lives of others with their organ donations.

I spent 4,014 days as a law clerk to the Hon. David B. Krogmann. In that time, I learned many useful lessons from Judge Krogmann, including that golf is not a matter of life or death; it is much more important. I learned that laughter can heal and that a well-timed practical joke is the key to staying young. I learned that there was an opportunity to discover something new in the law or the world in general every day. I learned that every man, no matter the age, really just wants to blow stuff up and some men are fortunate enough to have earned the title of "Master Blaster" from the Army - which they never let you forget. I learned that family has many definitions and a strong work family can get you through the rough times with your biological family. I learned that humility is the backbone of a good judge and humanity is the backbone of a great judge.

It was my privilege to serve Justice Krogmann for eleven years. It is with great sadness that I no longer have that honor, but it is with great joy that I get to express these sentiments directly to him and not in an eulogy as often happens to those we love. David B. Krogmann is starting a new chapter in his life that will no doubt continue to be filled with family, friends, fun and, of course, golf. On behalf of the legal community in Warren County and abroad, a heartfelt thanks for all the courtesies, compassion and legal acumen through the years. On behalf of your court family, thank you for all of your support, friendship and love through the years. Best wishes on your retirement, Judge Krogmann."



## TRIBUTE TO GEORGE J. ZURLO, ESQ.

It was with great sadness that we experienced the loss of long-time member, George J. Zurlo, Esq., who passed on January 11, 2016 in Naples, Florida. George was a Glens Falls native who was an illustrious graduate of St. Mary's Academy. At the 1956 Commencement Exercises he received the Monsignor Curtin Assembly, Fourth Degree Knights of Columbus award for Science. He was also voted by his class as "The Boy Who Has Contributed Most to 'The Spirit of St. Mary's'."

Following college, he graduated from St. John's University School of Law in 1963. Throughout his career, George practiced in Warren County, mostly in Glens Falls. Real estate law and trusts and estate law were his passions and his hallmark was practicing with a boundless depth of knowledge and precision in application.

Returning his talents to the community was a defining characteristic of George. He served as president of the Warren County Bar Association from 1988 to 1989. In addition, George served many years as a Director of the Warren County Bar Foundation and was the first to receive the distinction of Director Emeritus. He was generous with his time and support outside the bar, as well. Many hours were selflessly given to organizations seeking to provide advantages to others. Among other charitable endeavors, he actively participated in the E. Leo Spain Scholarship Fund, Rotary International (Paul Harris Fellow) and B.P.O.E. No. 81.

The bar association will disseminate information when received from his family in respect to a memorial to be held in the Glens Falls area.





## SWEARING IN OF OUR NEW JUDGES

**Honorable Martin D. Auffredou** was sworn in as Supreme Court Judge in the Fourth Department by his revered predecessor, retiring Honorable David B. Krogmann while long-time friend, Justice John McGuirk, Orange County Supreme Court Justice, held the bible.

After graduating from SUNY Oswego, Judge Auffredou attended law school at Western New England School of Law in Springfield, Massachusetts. In 1988, he graduated with honors, as a member of the Law Review. Following law school, he became the Confidential Law Clerk to Hon. D. Brock Hornby, Justice of the Supreme Judicial Court of Maine.

Judge Auffredou, thereafter, practiced law at the firm of Bartlett, Pontiff, Stewart & Rhodes, P.C. While at the firm, he represented countless private clients and numerous municipalities and school districts, in New York State Supreme Court and appellate courts, as well as, serving as Counsel to The Lake George Park Commission. He also served as a Law Guardian for a number of years. Most recently the Judge served as Warren County Attorney.





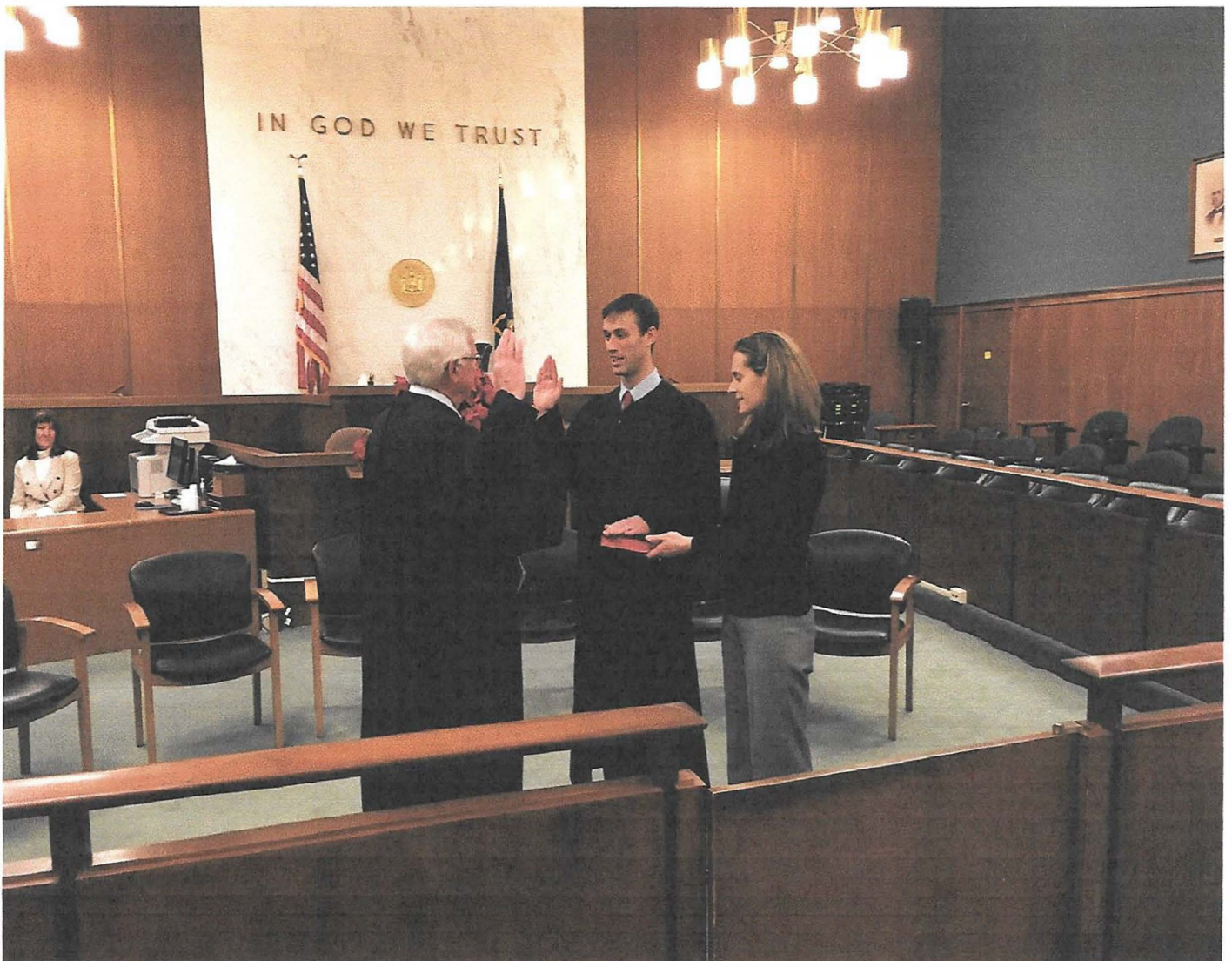
**Honorable Paulette M. Kershko, F.C.J.** was sworn in as Warren County Family Judge, being the first woman elected judge in Warren County.

Following graduation from the University of Albany, Judge Kershko attended Western New England Law School and was a visiting student at Albany Law School. Judge Kershko has extensive and impressive court experience, having served as Principal Law Clerk for the Honorable John Dier, S.C.J. and in ascending levels in the Court Attorney series to Schenectady Family Court Judges, Honorable Kathleen Di Cataldo, F.C.J. and Honorable Joanne Assini, F.C.J., and, immediately prior to her election to the newly created Warren Family Court Judge, to Judge Breen, F.C.J.





**Queensbury Town Court Justice Eric C. Schwenker** was also sworn in by Honorable David B. Krogmann, J.S.C. Justice Schwenker was appointed to the bench following the unfortunate and untimely passing of the late Honorable Robert P. McNally. Justice Schwenker is a graduate of Hamilton College and the University of Buffalo Law School. He previously practiced law as a prosecutor in the Warren County District Attorney's Office, with the firm of Brennan & White, L.L.P., and served as a Court Attorney for the Warren County Supreme Court. He presently is practicing with the firm of McPhillips, Fitzgerald & Cullum, L.L.P.



## WARREN COUNTY BAR FOUNDATION MIXER

The always eagerly anticipated March Mixer of the Warren County Bar Foundation is approaching. The evening of camaraderie and fundraising is one of the year's highlights. The Mixer is being held this year on March 31<sup>st</sup> at Hiland Park Country Club. The Mixer begins at 4:30 pm and is followed by the Bar Association dinner at 7:00 p.m. The honoree this year is Honorable David B. Krogmann.

The Foundation was founded in 1982 to advance legal research and scholarship. Scholarships are awarded annually to residents of Warren, Washington, Saratoga, Essex and Hamilton Counties. Not-for-profit organizations whose endeavors serve to advance the Foundation's goals in our local communities also are recipients of the Foundation's munificence.

The support of Honorable John G. Dier and John C. Mannix, Esq. were instrumental in the early years of the Foundation. A significant bequest from Mrs. Laura Miller in memory of her husband, John Miller, Esq., in the early 1990's propelled the Foundation to its position today. The annual Mixer affords the bar and the community the opportunity to financially support the laudatory work of the Foundation. Among other avenues of support, Sponsorships are available at the Gold (\$500.00 cash donation), Silver (\$250 cash donation) and Bronze (\$125.00 cash donation) levels. Each level offers its own special benefits.

**Gold Sponsorship** is the premier Sponsorship for the Bar Mixer. Your Company Name and/or Logo (and/or your personal Name) will be highlighted in the Program and your Sponsorship will be acknowledged at the Hiland Goff Club during the function.

In addition, you and a guest will be complimentary guests at both the Mixer and the subsequent Bar Dinner sponsored by the Warren County Bar Association.

Any pre-publicity and post-publicity of the event will prominently name you and/or your organization as a Gold Sponsor.

**Silver Sponsorship** is also a premier involvement with the Bar Mixer. You and your Organization will be mentioned prominently in all literature involving the event, with special mention during the Live Auction as well. You will individually be a Guest at the Bar Mixer and subsequent Bar Dinner, sponsored by the Warren County Bar Association.

**Bronze Sponsorships** are a very popular vehicle for name recognition at the Mixer. Bronze Sponsors will be Guests at the Mixer where appropriate acknowledgment will be made throughout the Live Auction and subsequent Bar Dinner. You will be a Guest at the Mixer, and if you wish, you may further attend the Bar Dinner with a member of the Warren County Bar Association.

**Donations may also be made to the silent auction.**



## Notes from the House of Delegates

### Submitted by Maria Nowotny

The third House of Delegates meeting of the current fiscal year was held on January 29, 2016 in New York City as part of the Annual Meeting of the New York State Bar Association.

NYSBA President David P. Miranda presented a tribute to Chief Judge Judith Kay. He recalled many professional and personal moments that created a lasting impact on those she touched. He recalled Judge Kay's favorite description of herself, "Mother Justice," and her fondness for red shoes. In fact, many delegates wore red shoes to the meeting in recognition of the former Chief Justice. Among the many professional accomplishments, David Miranda specifically cited the creation of special courts, such as, drug court, domestic violence court, mental health court, as well as, her strong support of youth court. Throughout the meeting many speakers offered personal recollections and tributes to Judge Kay.

David Miranda's President's Address expressed concern in respect to the ABA's consideration of non-lawyer ownership of a law practices. He cited the long history of NYSBA review of this topic and its consistent position in opposition. Among the concerns of NYSBA, are preserving the independent judgment of attorneys, undivided loyalty to clients and maintaining client confidentiality.

Annual elections were held resulting in unanimous approval of the proposed slate consisting of Sharon Stern Gerstman of Buffalo – President Elect, Ellen G. Makofsky of Garden City – Secretary, Scott M. Karson of Melville – Treasurer. Claire P. Gutekunst, current President-Elect, as per the by-laws will become President. Many probably know that President-Elect Gutekunst grew up in Glens Falls. The District Vice Presidents elected included Matthew Co-seo of Ballston Spa for the Fourth District. Fourth District Delegates elected are Marne L. Onderdonk of Albany, Patricia L.R. Rodriguez of Schenectady, and Jeremiah Wood of Gloversville.

Committee reports presented included:

Working Group on Power of Attorney proposed several revisions to the current form. - The length of the statutory form and the existence of the statutory gift rider as a separate document required to be executed contemporaneously with the Power of Attorney has created confusion for client and has increased the likelihood of improper execution. To further exacerbate these problems, the power of attorney and the statutory gift rider have different execution requirements. Additionally, under the current statute the most minor deviation from the statutory language results in the executed Power of Attorney not being recognized as a statutory Power of Attorney. A modification as minor as striking the language appointing an alternate agent, in those instances in which an alternate is not being appointed, removes the form from classification as a statutory Power of Attorney. The committee proposed a standard of *substantial* compliance with the statutory language rather than *exact compliance* to allow acceptance as a statutory Power of Attorney. Lack of sanctions for failure of financial institutions to accept a duly executed Power of Attorney was also identified as an impediment to the efficacious use of the Power of Attorney. The report was approved and the Group will expeditiously undertake steps to seek implementation, such as proposing legislation.

Committee on Reentry which stressed the need to increase opportunities in the areas of education housing, employment, medical and mental health care for those being released from incarceration. - The report highlighted the need for an increase in diversion programs and the need for all schools serving juveniles in placement to be "registered schools" offering, at a minimum, a GED diploma. Efforts to increase juvenile diversion programs and expansion of the Close to Home Program were also recommended. The Committee's report was approved.

Committee on Diversity and Inclusion's report which was presented by past president Kenneth G. Standard. - The report cited difficulty in amassing data due to members declining to respond to demographic questions. It also addressed the need to make the profession more attractive to minorities.

A new computer app, Law Hub, was introduced by NYSBA staff. The Law Hub was described as a "game changer." All information the attorney uses, such as time, management and case management can appear on one page on the member's computer. The system is cloud-based which means there is no uploading or downloading files and stored information can be accessed on any device anywhere there is Wi-Fi. A free CLE will be offered later in the year providing instruction in the use of Law Hub. The web address is [myLawHub.nysba.org](http://myLawHub.nysba.org).

The next meeting of the House of Delegates will be held on April 2, 2016 at the Bar Center in Albany.





## "OUTSTANDING PROSECUTOR"

Katherine B. Hogan, Warren County District Attorney, was honored at the NYSBA Annual Meeting on January 27, 2016. District Attorney Hogan received the "Outstanding Prosecutor Award" from the Criminal Justice Section. The award recognizes "...a prosecutor who has made special contributions to not only the prosecution community, but to the bar at large, and whose professional conduct evidences a true understanding of a public prosecutor's duty to advance the fair and ethical administration of criminal justice." The State Bar press release referenced the high-profile trials District Attorney Hogan has prosecuted, her creation of the child advocacy center and the role she played in implementation of Warren County Treatment Court.

Our colleague, Tucker Stanclift, Esq., in presenting the award pointed, out that Kate Hogan was the first female elected Warren County District Attorney and that she has served continuously since taking office following the 2001 election. He further underscored that from the outset of her tenure, mentorship has been a priority, both in training her staff, as well as, in training new District Attorneys in our region.

This is not the first award bestowed on Kate. In 2012, she was named District Attorney of the Year by the NYS DA's Association of which she served as President from 2009 – 2010. She also was tapped to serve on Chief Judge Lippman's Task Force and Chief Judge Kaye's Commission on the Jury.





# "MEMBER NOTES"

**Carl Baker, Esq.** received the honor of being inducted as a Fellow of the American College of Trust and Estate Counsel (ACTEC). The organization consists of approximately 2,700 Fellows who have distinguished themselves in wills and trusts preparation; estate planning; probate procedure; and administration of estates of decedents, minors and incompetents. To be elected a Fellow, a minimum of 10 years experience in the foregoing areas is required, marked by attaining an outstanding reputation, exceptional skill and substantial contributions to the field through lecturing, writing and participating in bar activities.

**Jacquelyn Poulos White** became a principal of the law firm of Miller, Mannix, Schachner & Hafner, LLC

**Ryan Pezzulo, Esq.** has joined the law firm of FitzGerald, Morris, Baker, Firth, P.C.

**Thomas W. Peterson, Esq.** has joined the law firm of Miller, Mannix, Schachner Hafner, LLC

---

## MEMO FROM THE WARREN COUNTY SURROGATE'S COURT

Re: NYCRR 207.64 Omission or Redaction of Confidential Personal Information.

Administrative Order of the Chief Administrative Judge of the Courts  
12/23/15

Effective March 1, 2016,

Any document submitted to the Warren County Surrogate's Court for filing shall only contain the **last four digits** of social security numbers, employer identification numbers or individual taxpayer identification numbers.

**MORE IMPORTANTLY** - Any document submitted to the Warren County Surrogate's Court for filing shall only contain the **last four digits** of any financial account number, bank account number, investment account number and/or insurance account number.

This rule is applicable to the Inventory of Assets form. Any Inventory of Assets form containing any of the above confidential Personal Information received by the Court for filing will be returned for redaction.

This **EXCLUDES** SCPA Article 13 Small Estates proceedings - where the full account number is still required.

## **Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department**

### **Exam by non-physician permitted under CPLR § 3121**

#### **Hayes v. Bette & Cring, LLC (Lynch, J., 1/7/16)**

The plaintiff's suit for damages under Labor Law § 240 included a claim of future lost wages and reduced earning capacity. Supreme Court (Reynolds Fitzgerald, J., Broome Co.) denied the defendant's motion to compel plaintiff to submit to an examination by a vocational rehabilitation expert. Exams by a "designated physician" are permitted under CPLR § 3121, but in the Third Department (*Mooney v. Osowiecky*, 1995) a vocational rehabilitation assessment by defendants was not permitted (unless plain-

### **Moral duty v. legal duty**

#### **Daily v. Tops Markets, LLC (Lahtinen, J., 12/17/15)**

Plaintiff's decedent, after consuming alcohol and drugs with several companions, passed out and appeared to have trouble breathing. His companions placed the unconscious decedent in his own car, then drove the vehicle to the defendant's parking lot, after which they reportedly told Tops' employees that someone in the parking lot needed emergency medical attention. The companions then left the market on foot; employees of the market took no action; and the decedent died allegedly of the combined effects of intoxication and hypothermia. Supreme Court (O'Shea, J., Chemung Co.) granted defendant's motion to dismiss and the Third Department affirmed. As decedent was not a Tops customer, and his presence (and that of his companions) on the defendant's property was not related to the market's business, "notwithstanding a moral obligation, Tops was not under an affirmative legal duty to assist decedent".

### **Vicarious liability**

#### **Taylor v. The Point at Saranac Lake, Inc. (Rose, J., 1/14/16)**

Plaintiff's husband was killed and she was hurt when their snowmobile, crossing a public roadway that intersected a trail, was struck by a car. The snowmobile tour was arranged through the defendant resort (where the couple was staying) but operated by a third-party which supplied the snow machines and a tour guide. The summary judgment motion of the defendant owners and operators of the resort was denied by Supreme Court (Ellis, J., Franklin Co.) and affirmed in part by the Third Department. Plaintiff's vicarious liability claim against the resort, premised on an ostensible agency relationship between the resort and the tour guide, survived, with the Appellate Division concluding that the resort's website and promotional materials "create a question of fact as to whether plaintiff could have reasonably believed

**Feilen v. Christman (Lahtinen, J., 1/14/16)**

Plaintiff fell off the roof (which he had just replaced) of the defendant's house, part of which was used for defendant's bed-and-breakfast business. His Labor Law suit against defendant and her company was dismissed by Supreme Court (Mott, J., Ulster Co.) which found the defendant was entitled to the statutory exemption from liability given to "owners of one and two-family dwellings who contract for but do not direct or control the work" of the person hired. Noting that partial use of a home for commercial purposes doesn't automatically destroy the exemption, the Third Department affirmed dismissal, concluding that while the house had a "mixed use", the roof replacement done by the plaintiff was designed to preserve the integrity of the home "and primarily benefitted [Christman's] clearly residential use of the premises".

**Summary judgment to passenger with impaired driver**

**Norris v. Menard (Egan, J., 1/14/16)**

Plaintiff was seriously injured, including an above-the-elbow amputation of his right arm, when the van in which he was a passenger ran off a snow-covered road, slid down an embankment and struck two trees. The defendant driver, who had been in the plaintiff's company for the preceding seven hours at various locations including an ice fishing tournament and a bar, ultimately plead guilty to imprudent speed and driving with ability impaired by drugs. Reversing Supreme Court (Ellis, J., Clinton Co.), the Third Department granted summary judgment on liability to plaintiff, finding that defendant "failed to offer a no negligent explanation for the accident, allege that plaintiff contributed in any way to the accident" or otherwise raise any triable issue of fact on liability.

Submitted by Tim Higgins, Esq. of law firm Lemire, Johnson, &

Higgins, LLC



## THE COLONEL

He was about 94 when he came to my office a long, long time ago. His wife and daughter were with him, the daughter having called to request that I do a POA for him. When he got there I was mindful of the complexities of who was requesting the service and who was my client, so I was careful to make sure that he had good mentation and, that his intentions were driving the request. That process involved a pleasant chat about his life, starting off with the question why he was called, "The Colonel."

It turned out that he was a West Point graduate and had risen to the rank of colonel, not to be confused with lieutenant colonel. A colonel is sometimes referred to as a 'full bird colonel' because the insignia rank is a spread eagle holding arrows in its talons, whereas a lieutenant colonel has a cloverleaf-like cluster of silver to distinguish himself from a major whose insignia is the same, but brass. In the navy, the equivalent rank and insignia to colonel is "captain", the people who are in command of large warships.

I asked him what he did in the War. He related that he was the aide to Lieutenant General W. Bedell Smith who was Eisenhower's Chief of Staff in Supreme Allied Headquarters in London and, therefore, he saw Eisenhower daily and Churchill frequently. I wondered to myself what a colonel does in a room of three and four star general officers and conjectured that he got coffee.

The office conference was at a time of the then state 'official' iteration of how to prevent use of POAs to defraud was by having the creator of the power initial each little box next to the transactions for which he intended to give his a.i.f. authority. Eliminated was the catchall box, "all of the above" which, now of course, is again approved to use.

The Colonel was just about blind and had hand tremors. Regardless, we slogged through the process and got all of the boxes initialed or if not exactly within the little boxes, had near misses close enough to comply. He's gone now.

When I hear lawyers remark that retirement has the allure of not having to deal with clients, I know that they are expressing frustration at the facets of the profession that wear on us all, but each of them surely has many Colonel stories to recall and savor. I have been impatient with clients, fired some and have been fired by some, but as I aged, I came to appreciate the complexity of people and the wonderful opportunity that we have as lawyers to share their lives.

Jim Cooper