WLAC Women Lawyers of Alameda County

A voice for Women in the Law since 1980

FROM THE PRESIDENT

by Brenda Aguilar-Guerrero

I hope you are planning to attend this year's Judges' Dinner and Silent Auction. Our Board has been working hard to make sure it is a memorable event and it provides lots of networking opportunities. To that end, don't be surprised if you get a phone call if you haven't purchased a ticket. We don't want anyone to miss out! We expect this year's event to sell out, so don't be late in purchasing your tickets.

Our keynote speaker, Karen Dunn, has been recognized for her work by the National Law Journal, the Washington Post, Law 360, and as Litigator of the Week by The American Lawyer and Global Competition Review. This year, she was named one of the National Law Journal's Outstanding Women Lawyers. Prior to becoming a partner at Boies, Schiller & Flexner LLP, Ms. Dunn served in all three branches of government. She worked in the White House as Associate Counsel to President Barack Obama, in the Eastern District of Virginia as an Assistant United States Attorney, in the Senate as communications director and a senior advisor to Hillary Rodham Clinton, and as a law clerk first to Judge Merrick B. Garland of the United States Court of Appeals for the DC Circuit and then to Justice Stephen G. Breyer of the Supreme Court of the United States. Not only does she manage a high profile career, but she has two small children. An amazing woman and we are honored and excited to have her serve as our keynote speaker.

We will again host out silent auction at the Judges' Dinner and all proceeds of our silent auction will be donated to deserving law graduates in the form of stipend awards, to support them as they study for the bar exam. This year we were able to provide three $500 scholarships, but we had 18 applicants. We would have loved to provide more scholarships and for higher amounts. The applicants were all very qualified, and it was extremely difficult to choose only three recipients.

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For WLAC members, dinner tickets are available at a discounted rate of $100. Non-members can take advantage of this discounted amount by paying a total of $175. This amount would entitle you to receive one dinner ticket and to become a WLAC member through 2016! This is a great deal. Membership entitles you to discounted dinner tickets, receipt of our quarterly newsletter and free admission to various WLAC events throughout 2016, including our Annual Membership Reception at a Judge's home, as well as our MCLE programs. Our upcoming Ethics MCLE is set for October 7th at Meyers Nave at 5:00 p.m., entitled Ethics and Social Media: Spotting the Issues and Finding the Answers. This fascinating topic will be presented by the Honorable Robert D. McGuiness and Mary Cain Simon.

I would also like to encourage each and every one of you to join me at the California Women Lawyers' 41st Annual Dinner and Reception on October 8, 2015, commencing at 5:30 p.m.. There will be at least four WLAC Board members in attendance at the Dinner.

For those of you who have not renewed your membership, please don't delay! Submit your 2016 membership dues along with your registration for the Annual Judge's Dinner and Silent Auction online (www.wlaconline.org/judges_dinner) so you can attend the dinner and renew your dues at the same time at this reduced price! I'm looking forward to seeing you at both dinners. Please make sure to say hello! I would love to hear your ideas as to how to maximize our commitment to promoting the interests of women in the law!

SPOTLIGHT ON: BOARD MEMBER ADETUNJI OLUDE

Board member Adetunji Olude has a knack for finding the sweet spot between hard work and meaningful work. A successful and hard working associate at Bryan Schwartz Law, where she has practiced law since February 2014, Adetunji felt driven to go to law school to help provide a voice for people who cannot speak for themselves.

Adetunji stays busy. When asked what drives her to undertake her many community activities on top of her civil rights law practice, Adetunji quietly explains: "My parents were both immigrants. They believed in education for themselves, and for their children. They made us understand that a meaningful life involved helping other people." Not surprisingly, Adetunji has devoted her legal practice to helping others.

With the Bryan Schwartz Law office, Adetunji devotes herself to advising and representing employees at each step of the pre-litigation and litigation process in such areas as wrongful termination, tort claims, employment discrimination, and wage and hour disputes. Driven to achieve justice for her clients, Adetunji is passionate about helping clients through this process. Adetunji devotes herself to preparing her clients for the rigors of litigation, taking special care to prepare her clients so that they know what to expect in, for example, an upcoming deposition.

Adetunji handles cases on behalf of individuals, as well as class actions, in state and federal courts. In line with her devotion to helping people who cannot speak for themselves, Adetunji shared that she takes special pride in a recent settlement accomplished by the Bryan Schwartz Law firm—they recently obtained a settlement on behalf of misclassified appraisers. In a case against Landsafe Appraisal Services, Inc., a subsidiary of Bank of America, approximately 365 current and former employees working as residential real estate staff appraisers had sought damages for having been misclassified as exempt from overtime, which left them working long hours, day in and day out, without additional compensation. Adetunji radiates quiet pride as she relates the satisfaction of working to vindicate workers' rights.

Quiet pride is also visible when she talks about her service on the board of WLAC, and her goals for the organization. "I happened on the group by accident," Adetunji explains, when asked what brought her to the Board. " I liked seeing there was a place for women lawyers, and was intrigued that Board members in the past have been family law practitioners, criminal law practitioners - women from so many different legal practice areas. My goal is to see the organization grow and draw an even more diverse group of women from all spectrums of practice groups. I see the WLAC as a way to unite women just starting out in the practice of law with more experienced women—to help them find community, support, mentorship, and develop the tools they need to establish themselves in the practice of law. "

Adetunji is not a newcomer to the idea of building and serving communities within her practice of law. Before joining up with Bryan Schwartz Law, Adetunji established her litigation chops by working on unfair competition, fair housing, consumer protection claims, and other complex litigation matters with the non-profit legal

Adetunji Olude - continued

office Housing and Economic Rights Advocates (HERA). HERA is a statewide, free legal services provider whose mission is that all residents of the State of California are protected against discrimination in credit and housing. Before working for HERA, Adetunji earned her J.D. from Georgetown University Law Center in Washington, D.C.

Adetunji has also found a sweet-spot way to exercise and create community. When she is not busy working or volunteering her time in local bar activities, Adetunji likes to unwind by running on weekends with her LGBT running group. This isn't just a running group, though Adetunji explains wryly. "It's also a brunch group. So, we go to different locations to run, and then wind up the run at a brunch place, so we can relax and enjoy each other's company. Oh, and if people don't run, it's fine if they walk!" Adetunji laughs. "We get our exercise, and enjoy a sense of community. And enjoy brunch. "

Adetunji's devotion to her clients and passion for justice have not gone unnoticed in the local legal community. Look for Adetunji in this summer's "Super Lawyers" publication. Not surprisingly, Adetunji was recognized this year as a Rising Star and will be featured in December 2015 issue of San Francisco Magazine as one of the Top Women Attorneys in Northern California.

Welcome to the WLAC Board, Adetunji, and congratulations on your first year of service!

WLAC - OUT AND ABOUT

By Sharon Alkire

Oakland Pride with the East Bay Stonewall Democratic Club

Was it worth it to get up at 6 AM on a Sunday to attend the Stonewall Democratic Club's Oakland Pride Breakfast? You bet! (Did I make it to the actual parade and festival later that day? Well, no, because I was up at 6 AM on a Sunday!) There's nothing like sharing the morning with Sen. Carol Migden (Ret.), Richmond Councilmember Jovanka Beckles and Oakland Mayor Libby Schaff, plus dozens of LGBTQ community members at a Pride celebration.

In addition to cheering the astounding advances in marriage equality after Obergefell v. Hodges, each speaker focused on how much more work is needed in the pursuit of full equality based on sexual orientation and gender identity, especially within the intersections of race and age. Mayor Schaff reminded the audience that approximately 40% of homeless youth in Oakland are LGBTQ, while the national average of LGBTQ adolescents in America's general population is only 3%-6%.

As Mayor Schaff put it, "We need more progress, justice, compassion, more love—Love Oakland Style!"

Oakland Mayor Libby Schaff takes a flaming snail out for a spin
Photo provided by WLAC member Emily Doskow

RATIONALIZATION AND ITS INTENTS:
The Burdens Women Must Labor Under in Pregnancy Discrimination

by Karen Z. Bovarnick

In Jewish law, a classic Talmudic approach is to take two contrary and seemingly unambiguous rules, juxtapose them against each other and ask, if they are each God-given laws, how can we reconcile them so that both are true? Last March, the Supreme Court took a Talmudic approach when it rendered a decision in Young v. United Parcel Service, Inc. (2015) 135 S.Ct. 1338, and wrestled with the question of how to treat women as equals when faced squarely with a bona fide physical difference—the ability to become pregnant. The four opinions—two for the majority, and two in dissent—each interpreted the statutory language and congressional intent in ways that revealed biases and presumptions about women. The Justices' collective efforts to squeeze pregnancy into a classification like all others, e.g., race, sex, ethnicity, national origin, age, and disability, demonstrates that achieving a level playing field for workplace opportunity is still elusive within the present statutory framework. As long as we measure workplace equality with a framework developed when men were "kings," women will have to "man up" and resemble men to get ahead in the workforce.

Just the facts, Ma'am: Young, the plaintiff, was a part time UPS driver when she became pregnant. Having suffered several miscarriages, her doctor advised her not to lift more than 20 pounds during the first half of her pregnancy, and 10 pounds thereafter. UPS had a policy that required its drivers to lift up to 70 pounds—but allowed "light-duty" accommodation for workers disabled on the job; those who had lost Department of Transportation (DOT) certification (e.g. due to a failed medical exam, lost driver's license, or involvement in a motor vehicle accident); or those who suffered a disability under the federal Americans with Disabilities Act (ADA), i.e., a disability that is neither transitory nor minor that substantially limits one or more major life activities. As a pregnant worker with a weight-lifting restriction, Young fell into none of these categories. Young believed that UPS provided disparate treatment motivated by her pregnancy when it denied her request to be treated like other employees provided light-duty accommodation since her manager told her that, while pregnant, she was "too much of a liability."

Young claimed intentional discrimination by UPS in violation Title VII, as amended in 1978 by the Pregnancy Discrimination Act (PDA). The PDA amendment prohibited discrimination "because of, or on the basis of pregnancy, childbirth, or related medical conditions," and required employers to treat women affected by pregnancy the same for all employment-related purposes "as other persons not so affected but similar in their ability or inability to work." Young alleged she was a direct victim of discrimination, and did not bring workplace-practice claims premised on disparate impact or hostile work environment toward women generally.

Traditionally, under the three-step framework set forth in McDonnell Douglas Corp. v. Green (1973) 411 U.S 792, 802, the plaintiff carries the initial burden of establishing a prima facie case of discrimination by showing disparate treatment. Once established, the burden shifts to the employer to set forth a legitimate nondiscriminatory reason for the treatment. In step three, the burden shifts back to the plaintiff to demonstrate the employer's reason was a pretext for discrimination.

The trial court granted summary judgment for defendant UPS finding that Young failed to establish a prima facie case that she was similarly situated to the workers—injured, disabled, or no longer certified by DOT—whom UPS accommodated. In a 5 to 4 decision, the Supreme Court reversed, finding Young had raised a triable issue of fact as to whether UPS's given reason for treating Young less favorably than other employees was a pretext for discrimination.

The Majority—the traditional Mcdonnell Douglas framework applies: The majority, written by Justice Breyer and joined by Justices Roberts, Ginsburg, Sotomayor and Kagan, held that just as with other

Pregnancy Discrimination - continued

protected classes, the traditional three-step burden-shifting framework under McDonnell Douglas applies to individual claims of disparate treatment, and Young could demonstrate a prima facie case by showing that UPS accommodated most non-pregnant employees with lifting limitations, or had multiple policies to accommodate such employees who were not pregnant. The High Court specifically rejected, however, Young's argument that any accommodation of non-pregnant workers suffering disabling conditions established a prima facie case of discrimination, finding this overbroad. The majority characterized Young's approach as seeking a "'most-favored-nation' status" for pregnant workers and that Congress did not intend to grant preferential treatment to pregnant workers over non-pregnant workers with similar work restrictions. In other words, Young's approach would treat pregnant workers as a preferred class, rather than a protected class. Traditionally, as long as the employer has legitimate, non-discriminatory motives behind a neutral policy, an individual employee disadvantaged by the policy cannot claim discrimination based upon a protected classification.

The majority took great pains to find that Congress intended uniformity in antidiscrimination actions, implicitly equating uniformity with fairness. The High Court found Congress did not intend more expansive protection for pregnant employees when it amended Title VII with the PDA, unpersuaded by 2008 amendments to the ADA covering temporary disabling conditions limiting the ability to lift, stand, or bend, or by recent agency regulations requiring an employer to treat pregnancy disability the same as other temporary disabilities. Rather, like a Talmudic scholar, the High Court chose uniformity as the standard by which Congress measured fairness. The law was fair, in essence, if it treated pregnant women like members of other protected classes who faced discrimination.

Alito Concurrence—the accommodations provided non-pregnant workers performing the same job must be extra-neutral: Justice Alito's concurrence implicitly addressed the question—if accommodation is available for some, then why not for pregnant workers too? Justice Alito argued that the second clause of the PDA—requiring pregnant women to be treated the same "as other persons not so affected but similar in their ability or inability to work"— did more than clarify the initial clause prohibiting discrimination on the basis of pregnancy. Rather, it imposed an additional restriction on employer conduct to ensure accommodation policies were not discriminatory, and provided a separate ground for violation. Like the majority, Justice Alito rejected Young's claim that any accommodation required pregnancy accommodation, noting, at length, that a comparison of employees with restricted abilities was limited to those who performed the same or similar tasks. In reviewing the reasonableness of UPS's accommodation of non-pregnant employees, Justice Alito found Young had stated a prima facie case of discrimination insufficiently rebutted by UPS. Justice Alito noted that while it was reasonable for UPS to discriminate in accommodating employees injured on the job versus those injured off the job and, in a footnote, suggested that an employer might legitimately discriminate among special "heroic employees," its accommodation of drivers who, due to a variety of reasons, lost DOT certification raised a triable issue for its failure to similarly accommodate Young's pregnancy limitations.

Scalia Dissent—plaintiff must prove discriminatory motive to overcome neutral accommodation policy. Justice Scalia's dissent, joined by Justices Kennedy and Thomas, argued that pregnant women must be treated the same as other employees with disabling conditions. In colorful language, Justice Scalia rejected the majority holding as "[i]nventiveness posing as scholarship," finding it muddled the distinction between standards for individual claims for disparate treatment with those challenging workplace policies under disparate-impact theory. Like the majority, the dissenters rejected an approach that would accommodate pregnant workers merely because an employer offered accommodation for other workers—again, presuming Congress intended to apply identical protections to all classifications. Scalia added an additional uniformity benchmark, however, arguing that "[i]nstead of creating a freestanding ban on

Pregnancy Discrimination - continued

pregnancy discrimination, the [PDA] makes plain that the existing ban on sex discrimination reaches discrimination because of pregnancy." Scalia noted, the law "does not prohibit denying pregnant women accommodations, or any other benefit for that matter, on the basis of an evenhanded policy." The dissenters argued that by enacting the PDA, Congress merely intended to prohibit an employer from intentionally singling out pregnant workers for discrimination. Thus, in their view, the PDA required no accommodation for pregnant workers distinct from other workers, and in the face of a facially neutral accommodation policy, would require proof of discriminatory motive singling out pregnancy for disfavor. Their criticism of the majority and concurring opinions suggests that cost and inconvenience would qualify as facially neutral reasons to discriminate.

Kennedy dissent—dissent limited to individual plaintiffs claiming disparate treatment. Justice Kennedy's brief dissent emphasized his rejection of the majority holding only because it "injects unnecessary confusion into the accepted burden-shifting framework" of McDonnell Douglas applicable to disparate treatment cases. Nonetheless, with remarkable candor absent from the remaining opinions, Kennedy states that pregnancy and motherhood have traditionally been sanctioned as a legitimate reason to discriminate against women and thus raise issues that "are and do remain an issue of national importance."

Does legislating equal opportunity require such extensive imagination? A review of each opinion left me with the same question—Did Congress truly intend such a gingerly approach to battle pregnancy discrimination? Why does it "prove[] too much" to require an employer, capable of accommodating non-pregnant employees, to always provide accommodation for a pregnancy? If elimination of disparate treatment is the goal, an employer's motive to deny accommodation to a pregnant woman should be immaterial. Justice Kennedy, in dissent ironically, acknowledged the trend in expanding protection against discrimination, starting with the PDA and including the Family and Medical Leave Act of 1993, 2008 amendments to the ADA, along with state statutes. Nonetheless, all the Justices rejected an expansive interpretation as giving pregnant women a preference, rather than an equal opportunity. Why is elimination of a barrier to equal opportunity considered a "preference" rather than fair accommodation of a difference?

Underlying each opinion is a presumption that an employer must be blind to the distinctive qualities of protected class in order not to discriminate. This approach makes sense when the protected classification, e.g. race, sex, national origin, has nothing to do with an employee's performance or qualifications. Unlike these qualifications, however, pregnancy-imposed limitations make this classification more akin to a disability, albeit one that is temporary and requires only temporary accommodation. Indeed, Young returned to work two months after giving birth, notwithstanding loss of pay and medical benefits. Perhaps the Justices feared that acknowledging this difference disadvantages women since it recognizes that, at least temporarily, women who suffer a pregnancy-related disability are disabled. The flip side of this argument, however, is that it measures "ability" in the work place by male standards—and women's movement pioneers have compensated by foregoing maternity leave, children, or in Young's case, her work and her medical benefits.

Because the Justices aimed to treat pregnancy like traditional race, ethnicity, and national origin classifications, each opinion struggled with how to construct an "apples-to-apples" comparison. While comparing employees of different races, ethnicities, or national origin, for example, focuses on the performance or qualifications of the employees, the comparison the Justices reviewed here focused on the employer's discretionary accommodation policies. The problem with such a comparison is that the employer is charged with quantifying the relative burden imposed by pregnancy, and the employee's performance is irrelevant. Rather than outlawing disparate treatment of pregnant workers, this traditional, uniform approach allows an employer to justify disparate treatment by comparing it with other conditions the employer has chosen, or in this case, collectively bargained, to accommodate. Again, this begs the question, is temporary accommodation of pregnancy "too much"

Pregnancy Discrimination - continued

protection, or a "preference" when an employer may arbitrarily decide to accommodate those injured on the job, or "heroes," or must accommodate those with a permanent disability?

By acknowledging that there may be neutral reasons to discriminate based on pregnancy, the traditional approach does little to combat the underlying structure of the workplace that results not only in disparate treatment, but disparate opportunities for women who must shoulder responsibility for pregnancy alone. (One should not confuse a woman's choice to terminate a pregnancy with the decision to bear a child, which traditionally, is made jointly with a partner.)

It is a mistake to apply a Talmudic approach, seeking to reconcile conflicts in a divine text, to federal legislation. The constant in Congress's intent is to eradicate discrimination and provide equal opportunities to suspect classes in spite of and with respect for those differences. As long as our courts and leaders equate fairness with uniformity, they will continue to push the round-peg of pregnancy into the square hole of traditional workplace policies, and treat women's failure to progress as a choice, a fault, or a wonderment.

WLAC – OUT AND ABOUT SOME MORE

By Sharon Alkire

WLAC and FBANC ushered in a new era of collaboration with the 2015 Post-Bar Mixer. The event was held on August 4th at Oakland's Pacific Coast Brewing Co. to celebrate those women and men who survived the rigors of California's bar exam, considered by many to be the most challenging in the nation.

This was also an opportunity for current members of the bar to wax nostalgic about our own exam experiences. (It is surprising how many of us recall walking uphill in the snow both ways, lugging our stone tablets to the test. No computers for us!)

In addition to celebrating, this event allows lawyers-to-be to talk with experienced attorneys who are happy to offer advice and help create professional connections. I am a huge fan of networking and know first hand how generous WLAC members are with time and resources.

Thanks for a great evening to those who attended! And for those who missed it, stay tuned for more fabulous opportunities to mix and mingle with the über-hip members of WLAC, FBANC, BWL-NC and more acronyms, in the not-so-distant future of our fabulous lives!

UPCOMING EVENTS

WLAC MCLE: Ethics and Social Media: Spotting the Issues and Finding the Answers
Wednesday, October 7th
Presenters: Honorable Robert D. McGuiness and Mary Cain-Simon
Registration begins at 5:30, Program from 6 to 7 p.m.
Free to members, $25 for non-members, 1 Hour MCLE credit, Ethics
Location: 555 12th Street, Suite 1500, Oakland
RSVP to Patricia Delgado, wlac@sbcglobal.net

The CWL 41ST Annual Dinner And Silent Auction
Thursday, October 8th
Keynote Speaker: Amy E. Weaver, Executive Vice President, General Counsel, Salesforce Inc.
Individual Ticket: $140
Anaheim Marriott, Anaheim, CA
Register Online at: www.cwl.org/dinner

VABANC 17th Annual Dinner
Friday, October 9th
Keynote Speaker Justice Mariano-Florentino Cuéllar, Supreme Court of California
Hiller Aviation Museum, San Carlos
https://www.123signup.com/event?id=pfmkc

APABA-SV 30th Anniversary Gala
Friday, October 16th
Levi's Stadium, 4900 Maria P. Debartolo Way, Santa Clara, CA
http://www.apabasv.com/gala-tickets/

And, of course…

WLAC'S Annual Judges' Dinner!
Wednesday, October 28th
6 to 9 p.m.
Keynote Speaker: Karen Dunn, Partner - Boies, Schiller & Flexner,
Former White House Associate Counsel to President Barack Obama
Scott's Seafood, Jack London Square, Oakland
www.wlaconline.org/judges_dinner

CALLING ALL "YOUNG" FAMILY LAW ATTORNEYS!

Do you ever wish a Judge would just tell you what they want? Take heart, and join Honorable Alice Vilardi for her lunchtime Practice Pointers in Family Law group! Every 4th Thursday (subject to rescheduling) we discuss practical topics such as § 2030 Request for Attorney Fees, what to include when addressing § 4320 spousal support factors, and issues you may encounter when running DissoMaster reports.

The next gathering is scheduled for Thursday, October 29th from 12:15 to 1:30 in Dept. 520. Please email Judge Vilardi at avilardi@alameda.courts.ca.gov if you would like to join us. (She needs to know how many cookies to bring.)

WLAC Women Lawyers of Alameda County

Presents:

Annual Judges' Dinner

Wednesday, October 28, 2015, 6 to 9 pm

Scott's Seafood, Jack London Square, Oakland

Trials with No Room for Error

A conversation with Karen Dunn about crises, politics, and law

Ms. Dunn, a partner with Boies, Schiller & Flexner, formerly served as Associate White House Counsel to President Barack Obama, Communications Director to Senator Hillary Rodham Clinton, and a federal prosecutor in Virginia. Ms. Dunn's private practice focuses on trial work and crisis management.

We expect this year's dinner to be full. Purchase a ticket or sponsor a table online at: www.wlaconline.org/judges_dinner or use the attached flyer.
Questions? Please email admin@wlaconline.org

WOMEN LAWYERS OF ALAMEDA COUNTY

A VOICE FOR WOMEN IN THE LAW SINCE 1980

2015 ANNUAL JUDGES' DINNER & SILENT AUCTION

Wednesday, October 28, 2015
6:00 p.m.
Scott's Seafood Restaurant
2 Broadway, Jack London Square, Oakland

Keynote Speaker

Karen Dunn
Boies, Schiller & Flexner LLP

FEATURING OUR AWARDEES:

Jurist of Distinction
The Honorable Cecilia Castellanos

Woman of Distinction
Leslie F. Levy

Alameda County Judge
The Honorable Noël Wise

Velvet Hammer
Susan Walsh

WLAC is an unincorporated association - TIN #94-3241007. Visit our website at www.wlaconline.org

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To purchase individual or group tickets, please return this form and your check payable to **WLAC** to:
WLAC c/o Patricia Delgado, 3045 - 23rd Street, San Francisco, CA 94110
Deadline: Friday, October 9, 2015
Please direct dinner inquiries to Ms. Delgado at admin@wlaconline.org.
Individual Sponsors and all Tables will be acknowledged at the dinner and in the printed program.

Individual Tickets		**Sponsored Tables (Table of 10)**	
WLAC Member (*)	$ 100	Superior	$1,500
Non-Member	$ 150	Appellate	$2,000
Individual Sponsor	$ 200	Supreme	$3,000

(*) Non-members may also qualify for the member price by including an additional $75 for their 2016 annual dues.
We also encourage Members to renew their membership at this time by including an additional $75 for the 2016 annual dues.

Name: _____ Number of Tickets: _____ Amount Enclosed: $ _____

Firm name or Affiliation: _____

Address: _____ Tel: _____ Email: _____

Entree Choice (please check one): Salmon _____ Chicken _____ Ravioli _____
(If registration is for more than one person, please attach list with additional names and entree choices)
For more information, including online ticket purchases, visit www.wlaconline.org.