

Preparing For and Trying the Civil Lawsuit

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**Editors-in-Chief
Neil A. Goldberg, Esq.
John P. Freedenberg, Esq.**

**Managing Editor
Kenneth L. Bostick, Jr., Esq.**

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Oliver Beiersdorf, Esq.

Lonnie Klein, Esq.

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David Harrington, Esq.

Allison M. Surcouf, Esq.

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Saul Wilensky, Esq.

Carl J. Schaerf, Esq.

Allison N. Drachman, Esq.

Carol N. Kotsinis, Esq.

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Hon. Harold Baer, Jr.

Robert C. Meade, Jr., Esq.

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John P. Freedenberg, Esq.

Frank J. Ciano, Esq.

Christopher J. Heller, Esq.

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Thomas F. Segalla, Esq.

Richard J. Cohen, Esq.

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Anthony F. Tagliagambe, Esq.

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Brendan T. Fitzpatrick, Esq.

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Harvey Weitz, Esq.

Andrew L. Weitz, Ph.D., Esq.

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E. Stewart Jones, Jr., Esq.

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Richard Barber, Esq.

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Michael Hoenig, Esq.

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Jeffrey O’Hara, Esq.

Matthew W. Bauer, Esq.

Michael J. Crowley, Esq.

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J. Peter Coll, Jr., Esq.

John L. Ewald, Esq.

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Michael J. Crowley, Esq.

Kevin R. Gardner, Esq.

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Meghan Brown, Esq.

Brendan Fitzpatrick, Esq.

William O'Connell, Esq.

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Daniel S. Ratner, Esq.

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Elayne E. Greenberg, Esq.

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Neil A. Goldberg, Esq.

David S. Osterman, Esq.

Aaron J. Aisen, Esq.

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Neil A. Goldberg, Esq.

John P. Freedenberg, Esq.

Kenneth L. Bostick, Jr., Esq.

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FOREWORD

Even as a young boy who frequented New York City courts to watch litigators practice their craft, I was able to identify a select group of trial attorneys who, at least to me, appeared to be “a breed apart” from their colleagues. These youthful observations of mine were necessarily limited, in as much as I was privy only to the courtroom drama unfolding before me. (The fact that what actually happens in court is merely the “tip of the iceberg” was not apparent until years later.)

Today, simply by virtue of the very nature of the practice of law, it has become increasingly difficult for the young litigator to secure the necessary experience in order to become comfortable before both judge and jury. The present state of litigation now, more than ever, has the overlying issue of a client’s sensitivity to economic issues. The amount of verdicts has been increasing at a steady rate. Because of the higher costs of litigation, clients require a trial attorney to find the right balance between zealous advocacy and cost effectiveness in representation. These considerations all point to having an experienced trial attorney prosecute or defend a case that a less-experienced trial attorney might have worked on independently in years past. However, these economic issues also impact seasoned trial attorneys because they are seeing less of the courtroom due to the low percentage of civil lawsuits that resolve through trial, whether a bench or jury trial.

This book is the New York State Bar Association’s best effort to inform both the aspiring trial attorney and the seasoned practitioner of the “how to” of litigation practice. The chapters of this book have been written by many of the finest trial attorneys in New York State. Each of the contributing authors has evinced a dedication to the art of litigation and a commitment to give back to the legal profession so much of what they have received from it. Their efforts in this regard have been enormous. Their devotion to the task is sincerely appreciated. I consider it a distinct honor to have been able to participate with them in this worthwhile project.

Neil A. Goldberg, Esq.
Goldberg Segalla LLP
Buffalo, New York

ABOUT THE EDITORS

NEIL A. GOLDBERG, ESQ.

Neil A. Goldberg is a senior trial partner with Goldberg Segalla, LLP, in Buffalo. A graduate, *cum laude*, of the State University of New York at Buffalo School of Law, Mr. Goldberg has been the editor/co-editor of seven books and the author of numerous book chapters and articles on products liability, insurance coverage, professional malpractice and trial advocacy. Among his many publications, Mr. Goldberg is the Editor-in-Chief and a contributing author to *Products Liability in New York*, 2d ed. (2012), published by the New York State Bar Association. He is also the editor and a contributing author to the *Daubert Compendium* (2011), published by the Defense Research Institute. He is a past president of Lawyers for Civil Justice (LCJ) and is also a past president of the Defense Research Institute. Mr. Goldberg is a member of the American, New York State and Erie County bar associations; The Federation of Defense and Corporate Counsel and The Products Liability Advisory Council. He is a past chair of the Products Liability Committee of the Torts, Insurance and Compensation Law Section of the New York State Bar Association and the Products Liability Committee of the Defense Research Institute. Mr. Goldberg is a frequent lecturer for the New York State Bar Association, Practising Law Institute, Defense Research Institute and many other state bar associations. In 2016, Mr. Goldberg was the recipient of the Defense Trial Lawyers Association of Western New York's Defense Trial Lawyer of the Year Award.

JOHN P. FREEDENBERG, ESQ.

John P. Freedenberg focuses his practice on the areas of products liability, catastrophic personal injury and intellectual property litigation at the Buffalo, NY firm of Goldberg Segalla, LLP. From 1997 to the present, Mr. Freedenberg has served as national coordinating counsel for General Electric Company, and has handled the defense of numerous products liability actions for GE around the United States. These have included catastrophic personal injury cases and major fire-damage cases, and have involved appliances, controls, power generating equipment, electrical systems and aircraft engines. Jack has had the unique opportunity to depose plaintiffs' experts in a wide range of specialties, and has developed proven techniques for disqualifying "junk-science" purveyors under applicable rules of evidence. A *magna cum laude* graduate of the State University of New York at Buffalo, Mr. Freedenberg received his law degree from the State University of New York at Buffalo Law School and was the recipient of the Robert J. Connelly

Trial Technique Award. He serves as co-chair of the Products Liability Committee Fire and Property Damage Specialized Litigation Group for the Defense Research Institute and is a member of the New York State and Erie County bar associations. Publications include co-authorship of *Defending the Catastrophic Burn Injury Case* (2002), *Defense Counsel's Approach to Cross-Examination in the Post-Daubert Era* (1996) and *Finding Facts in Products Liability Litigation* (1996), all for the Defense Research Institute. He has also presented lectures for the New York State Bar Association.

ABOUT THE AUTHORS

AARON J. AISEN, ESQ.

Aaron J. Aisen is an attorney in Buffalo, NY. He focuses his practice on regulatory matters, with an emphasis on the financial services industry, insurance and reinsurance matters, commercial litigation, and cyber risk. He has written and presented on regulatory matters and cyber risk. Prior to practicing law, he was a compliance investigations officer at a major international bank. There, he had hands-on experience with a variety of federal laws and regulations, with a particular emphasis on the Bank Secrecy Act and the Patriot Act. He also has experience in several legislative offices, including at the state and federal level, as well as time in the United Kingdom House of Commons in London.

Mr. Aisen received his juris doctor degree from the State University of New York at Buffalo Law School. He also has an MPA from Brigham Young University and a BA in International Affairs from George Washington University.

HON. HAROLD BAER, JR.

Judge Baer was a United States District Judge for the Southern District of New York for approximately 20 years. Before that, and until 1992, he served for a decade as a Justice of the Supreme Court of the State of New York, New York County. Among his other positions in public service were Assistant United States Attorney for the Southern District of New York, First Assistant United States Attorney, and Chief of the Criminal Division of that office; Executive Director of the Civilian Complaint Review Board; and member of the Mollen Commission. Judge Baer also was in private practice and was the head of the litigation department of his firm. Between 1992 and 1994, he was the Executive Judicial Officer of JS/Endispute, a private alternative dispute resolution firm.

CONTRIBUTOR BIOGRAPHIES

Over the years Judge Baer was very much engaged in the work of bar associations. He was a member of the New York State Bar Association and the New York City Bar Association and President of the New York County Lawyers' Association. He founded the Network of Bar Leaders and was its first President. Judge Baer graduated from Hobart College (*Phi Beta Kappa* and *magna cum laude*) and took his law degree at Yale Law School. Judge Baer passed away in 2014.

RICHARD BARBER, ESQ.

Richard Barber is a partner of Haworth Rossman & Gerstman, LLC. He has spent his career developing and executing creative strategies to best defend the firm's clients in a variety of civil litigation matters involving issues of complex product liability, catastrophic tort and general negligence. Mr. Barber regularly represents entities involved in the design, manufacture and distribution of products including sports and recreational equipment, medical equipment, industrial machinery, automotive chemicals and specialty access products. He has obtained summary judgment, voluntary dismissals and other beneficial results for the firm's clients including product manufacturers and distributors, property owners and management companies, commercial tenants, restaurants, service providers and construction entities throughout New York and New Jersey. Prior to joining Haworth Coleman & Gerstman, LLC, Mr. Barber was associated with two national law firms where he defended clients in professional malpractice matters and multidistrict toxic tort class action litigation. Mr. Barber received his Juris Doctorate from Brooklyn Law School and his Bachelor of Arts from Binghamton University.

MATTHEW W. BAUER, ESQ.

Matthew W. Bauer is a partner at Connell Foley LLP. He maintains a complex litigation practice concentrating in transportation, premises liability, product liability and general business disputes. Mr. Bauer is a member of the New York and New Jersey Bars and is admitted to numerous federal courts.

OLIVER BEIERSDORF, ESQ.

Oliver Beiersdorf is a partner at Reed Smith LLP and is resident in the firm's offices in New York City. He focuses his practice on aviation, products liability, shipping and commercial litigation. Mr. Beiersdorf represents airplane, automobile, ship and component part manufacturers; foreign and domestic airlines; aircraft and ship operators and owners; and many other corporate clients in federal and state courts throughout the

United States. His experience includes representing clients in multi-district litigation stemming from large-scale aviation and maritime accidents, and counseling clients outside of the courtroom on international treaties, contracts and insurance issues. Mr. Beiersdorf has tried high-profile cases for notable clients such as Cirrus Aircraft Corporation and United Airlines Inc. He was recognized in *Chambers USA* as one of America's leading lawyers (2014).

Mr. Beiersdorf is admitted to the New York and New Jersey bars and numerous federal district and appellate courts. He has been admitted *pro hac vice* to represent clients throughout the United States. Mr. Beiersdorf is a frequent author and lecturer on legal issues relating to aviation and shipping law. He received his B.A. from the University of Oregon, his J.D. from Brooklyn Law School and also studied as a fully matriculated student at the University of Stuttgart in Germany. Mr. Beiersdorf is fluent in German.

KENNETH L. BOSTICK, JR., ESQ.

Kenneth L. Bostick, Jr. is an associate at Goldberg Segalla, LLP. He is an experienced litigator who focuses his practice on general liability matters, as well as matters involving product liability. His clients include restaurants, retail stores, automobile service centers, professional sports franchises, fitness facilities, and the manufacturers of sports and fitness equipment. His practice also includes defending negligence claims against nursing homes and assisted living facilities and representing professional athletes in contract negotiations and disputes.

In addition, Mr. Bostick devotes a significant part of his practice to matters involving drones, advising clients in industries including construction, security, sports and entertainment, retail, and more on the use of all types of unmanned aerial vehicles. He is a frequent lecturer on the myriad legal issues arising from the widespread proliferation of drones across numerous industries, as well as on the impact of national, state, and local legislation pertaining to commercial and private drone use.

At the State University of New York at Buffalo Law School—where he earned his J.D., magna cum laude—Mr. Bostick served as a publications editor for the Buffalo Law Review and received the 2011 Marie Nesbitt Promise Prize. He's a member of the Bar Association of Erie County and the Minority Bar Association of Western New York.

MEGHAN BROWN, ESQ.

Meghan Brown is an associate in Goldberg Segalla's Buffalo office. She focuses her practice on general liability, including matters involving personal injury, medical malpractice, and occupational exposures. Ms. Brown's experience includes private practice in civil litigation and serving for two years as a law clerk at the New York State Supreme Court, Appellate Division, Fourth Department, in Rochester. During law school, she was Executive Editor of the *Buffalo Law Review* and Articles Editor of the *Buffalo Intellectual Property Law Journal*, and she was a member of the Jessup International Moot Court Board. Upon graduation, Ms. Brown was awarded the Robert J. Connelly award for excellence in trial technique. She has lectured on legal ethics for the Women's Bar Association of the State of New York and has also served on the Judiciary Committee for the Western New York Chapter. She is an adjunct professor at the State University of New York at Buffalo Law School, where she teaches health law.

EILEEN E. BUHOLTZ, ESQ.

Eileen E. Buholtz graduated from Eastman School of Music with a Bachelor of Music degree as a clarinet major, and from Syracuse University with a Doctor of Jurisprudence degree. She is a member of Connors, Corcoran & Buholtz PLLC in Rochester, where she focuses her practice on litigation, both commercial and insurance defense. She is past chair of the New York State Bar Association's Torts, Insurance and Compensation Law Section and serves on the President's Committee for Access to Justice. She currently serves on the House of Delegates and has served on the Executive Committee of the New York State Conference of Bar Leaders.

Ms. Buholtz is Past President of the Greater Rochester Association for Women Attorneys and has served as secretary, treasurer and vice-president of the Women's Bar Association of the State of New York. She is a member of the American Board of Trial Advocates, the Defense Research Institute and the Monroe County Bar Association. She is past chair of the Monroe County Bar Association's Committee on Access to Legal Services. She has lectured for the New York State Bar Association, the Monroe County Bar Association, National Business Institute, and the Greater Rochester Association for Women Attorneys on topics involving civil litigation and ethics.

FRANK J. CIANO, ESQ.

Frank J. Ciano is a senior partner in Goldberg Segalla's New York office and the leader of the firm's Risk and Litigation Avoidance Strate-

gies and Food and Beverage Practice Groups. He is also a senior member of the firm's Product Liability and Commercial Litigation Practice Groups. A registered patent attorney, Mr. Ciano concentrates his practice in the areas of products liability, labor law, asbestos, catastrophic personal injury and intellectual property litigation. He is a graduate of Hofstra University School of Law and received his Bachelor of Engineering from Manhattan College. His professional memberships include the New York State Bar Association, the Federation of Defense and Corporate Counsel, Columbian Lawyers Association and the Association of Defense Trial Attorneys.

RICHARD J. COHEN, ESQ.

Richard J. Cohen, managing partner of Goldberg Segalla since the firm's inception in 2001, is an AV-rated trial lawyer with nearly three decades of experience. His practice spans sophisticated insurance and reinsurance coverage and regulatory matters; bad faith, D&O, and E&O claims; professional liability; sports and entertainment; and complex commercial litigation. He has served as chair of the firm's Professional Liability Practice Group and chair of its Global Insurance Services Practice Group, which has been recognized as one of the largest of its kind in the United States. Widely recognized as a leader in the national legal community, Rick is one of a select group of lawyers in the United States inducted into the invitation-only American College of Coverage and Extracontractual Counsel. He has served DRI in numerous roles, including national co-chair of its Insurance Company Relations Subcommittee, chair of the Insurance Law Subcommittee of the Construction Law Section, programming chair of the Law Practice Management Committee, and national membership chair of the Life, Health, and Disability Section. He is also a former chair of the National Committee for the Claims and Litigation Management Alliance (CLM). Rick has lectured across the U.S. and in Canada and has authored dozens of works for publications including *Mealey's* and *Appleman on Insurance*. He also served for more than a decade as an instructor, lecturer, and keynote speaker for the Chartered Property Casualty Underwriters (CPCU) Society. *Best Lawyers in America* and *Super Lawyers* repeatedly recognize him as a leading legal practitioner, while *Business First* has recognized him among its "Legal Elite" and "Power 250," additionally honoring him with its "C-Level" award for prominent, visionary executives.

J. PETER COLL, JR., ESQ.

Peter Coll is a senior litigation partner at the law firm of Orrick, Herrington & Sutcliffe LLP, in New York City. He is a general commercial litigator and has tried cases across the state of New York, as well as in state and federal courts throughout the United States. He is a graduate of Duke University and received his law degree from Georgetown University Law School.

MICHAEL CROWLEY, ESQ.

A member of the law firm Connell Foley LLP in its New York City office, Michael Crowley is a trial attorney, with his practice primarily focused on the areas of aviation, products liability, construction accidents, commercial and retail operations, transportation, subrogation, and mass tort litigation. He serves as the Managing Partner of the firm's New York office and is Chair of their Aviation Practice Group. Mr. Crowley is a graduate of Fairfield University and Fordham University School of Law. He is an active member in a number of bar associations and industry groups, including the New York State Bar Association, New York City Bar Association, the Defense Research Institute, and the International Association of Defense Counsel. He has written and lectured on numerous topics relating to trial practice and the defense of significant matters for corporate clients.

ALLISON DRACHMAN, ESQ.

Allison Drachman, partner at Schnader Harrison Segal & Lewis LLP, has more than 10 years of litigation, arbitration and mediation experience. She handles a variety of cases involving product liability, construction defects, Labor Law, toxic torts and premises liability. Her practice also includes insurance coverage work, analyzing issues related to allegations of breaches of professional liability. Ms. Drachman has obtained summary judgment, dismissals and successful settlements on behalf of manufacturers, distributors, contractors, building owners, construction entities and management companies throughout New York and New Jersey. Her clients range from small "mom-and-pop" shops and private individuals to multi-national corporations, municipalities, manufacturers and suppliers. Ms. Drachman serves as the Chair of the Schnader's Women's LEAD Group and as the Pro Bono Coordinator in New York. She is a graduate of the University of Vermont and the Benjamin N. Cardozo School of Law.

JOHN L. EWALD, ESQ.

A member of the law firm Orrick, Herrington & Sutcliffe LLP in New York City, John Ewald practices primarily in the areas of mass torts and products liability, class actions, and commercial litigation. Mr. Ewald is a graduate of the University of Texas at Austin, and earned his law degree from the University of Texas School of Law.

BRENDAN T. FITZPATRICK, ESQ.

Brendan Fitzpatrick is a partner at Goldberg Segalla. He focuses his practice on all aspects of appellate litigation. In his years of experience, he has briefed and argued appeals in every appellate court in New York, including the New York State Court of Appeals and the Second Circuit Court of Appeals. These appeals have covered a diverse range of issues, including constitutional law, contracts, insurance coverage, products liability, and negligence. He is a Fellow of the American Academy of Appellate Lawyers. As a member of the Amicus Curiae Committee for the Defense Association of New York (DANY), he contributed to the preparation of amicus briefs to the New York State Court of Appeals on significant cases that impact the defense bar throughout the state.

Mr. Fitzpatrick has published articles with the *New York Law Journal*, through Aspatore Publishing, and *USLAW Magazine* on topics such as insurance coverage, the value of having an appellate attorney involved throughout the litigation process, the impact of e-discovery amendments on the Federal Rules of Evidence, and trade dress. For his work with DANY, the organization honored him with its Literary Award “in recognition of his outstanding work on the Amicus Curiae Committee” in 2009 and 2014. Mr. Fitzpatrick has also been selected for inclusion in New York Super Lawyers.

KEVIN R. GARDNER, ESQ.

Kevin R. Gardner is a partner at Connell Foley LLP. He has been representing clients in the federal and state courts for more than 30 years in complex commercial, construction and environmental litigation, class actions, products liability claims, employment restrictive covenant disputes, and trade secret litigation. His practice includes service as National Coordinating Counsel and Regional Litigation Counsel for multinational corporations. Mr. Gardner also has substantial experience handling crisis management issues for clients. He regularly assists companies in preparing and executing crisis management and emergency response plans.

CONTRIBUTOR BIOGRAPHIES

By appointment of the New Jersey Supreme Court, Mr. Gardner has served six terms as a member of the Supreme Court's Civil Practice Committee. Since 2002, he has been selected by his peers to be listed in Best Lawyers in America for Commercial Litigation and, since 2015, for Environmental Litigation. Mr. Gardner has also been elected by his peers to be a Fellow of the Litigation Counsel of America, as well as a Fellow of the American Bar Foundation.

While attending Seton Hall University School of Law, Mr. Gardner served as the Managing Editor of *The Law Review*. Upon graduation, he served as a law clerk to Hon. Robert L. Clifford, Associate Justice, Supreme Court of New Jersey. Mr. Gardner joined Connell Foley LLP in 1980.

ELAYNE E. GREENBERG, ESQ.

Elayne E. Greenberg is the Assistant Dean of Dispute Resolution Programs, Professor of Legal Practice, and the Director of The Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law. She offers a breadth and depth of experience in dispute resolution. She is a mediator and conflict management consultant who has developed programs, educated, trained, written and lectured internationally on the subject of dispute resolution. In her role as Chair of NYSBA's Committee on ADR, she spearheaded the efforts to make the committee the Dispute Resolution Section.

Professor Greenberg has been selected by Best Lawyers in America as among the top New York lawyers in the field of Alternative Dispute Resolution every year since 2005. In the spring of 2014, ABI presented Professor Greenberg with the ABI Annual Service Award, the organization's highest membership award for her extraordinary contributions in developing and conducting the first-ever nationally recognized bankruptcy mediation training program. In 2014, Professor Greenberg was also recognized by the American Registry as among the top 5% of America's Most Honored Professionals, a cross-industry and cross-profession award to successful professionals recognized for professional excellence.

DAVID J. HARRINGTON, ESQ.

A partner in the law firm Condon & Forsyth LLP (condonlaw.com) in New York City, David J. Harrington practices primarily in the areas of aviation, space and product liability law (including aviation accident investigation and litigation). His experience includes representing clients (including foreign and domestic air carriers and aircraft manufacturers) in

complex civil litigation, in cases involving claims for wrongful death, personal injury, product liability, premises liability, breach of contract/warranty, complex liability issues, damages assessment and settlement negotiation. Mr. Harrington has extensive and practical knowledge on National Transportation Safety Board investigation procedures and represented numerous clients during NTSB investigations, including Public Hearings. He is a graduate of Marquette University with a B.A. in mechanical engineering and the Catholic University of America Columbus School of Law. He served 10 years in the U.S. Navy as a naval aviator flying the F-14 Tomcat and holds a commercial pilot's license. An active member of the American Bar Association (former Chair of the Aviation & Space Law Committee of the Torts Trial and Insurance Practice Section), the Defense Research Institute and the Tailhook Association, Mr. Harrington writes and lectures frequently on aviation and litigation topics.

SCOTT HAWORTH, ESQ.

Scott Haworth is the Founder and Managing Partner at Haworth Rossman & Gerstman, LLC, a 20-lawyer defense firm with offices in New York City and Hackensack, New Jersey. He has spent his career defending and trying matters involving products liability, construction and intentional torts, as well as complex catastrophic injury matters involving fire, transportation and other accident modes in state and federal courts. He is most often retained in connection with complex high-exposure matters, oftentimes to try matters previously defended by other firms.

Mr. Haworth's clients include self-insured manufacturers of cosmetics, medical devices, industrial machinery, heavy equipment, recreational and children's products, as well as those in the construction, packaging and telecom industries. He also represents nationally prominent retailers and foreign corporations in the construction industry. Mr. Haworth is frequently retained by third-party administrators and insurance carriers on both the primary and excess levels.

Mr. Haworth is active in the Defense Research Institute's (DRI) Product Liability Committee and The Gavel, a national network of defense practitioners. He is a Past Chairman of DRI's Specialized Litigation Group on Recreational Products and is also a past Chairman of DRI's Specialized Litigation Group on Food Law. He is also a Past Vice-Chair of the New York State Bar Association's Torts, Insurance and Compensation Law Section's Products Liability Committee and is the Past Chair of the New York State Bar Association's Continuing Legal Education Committee on Product Liability and has been a member of the Steering Commit-

tee of DRI's Committee on Class Actions. Mr. Haworth often lectures on construction litigation, risk transfer issues, and trial practice issues.

CHRISTOPHER J. HELLER, ESQ.

Christopher J. Heller, an associate in the New York City office of Goldberg, Segalla LLP, focuses his practice on products liability and catastrophic personal injury litigation. He has represented product manufacturers, distributors, and sellers in products liability matters venued in state and federal courts across the country, handling tasks related to initial accident investigation and analysis, fact and expert witness discovery, dispositive motion practice, and trial preparation. He is a graduate of Yale University and Boston College Law School, and resides in Manhattan.

MICHAEL HOENIG, ESQ.

Michael Hoenig is a member of Herzfeld & Rubin, P.C., focusing on products liability, class actions, complex litigation and appeals. He received his J.D. degree from St. John's University School of Law, where he was Articles Editor of the *St. John's Law Review* and an editor of its *Biannual Survey of New York Practice*. He has served as national, regional and local defense counsel for a number of major foreign and domestic companies including all phases of products litigation; class actions; negotiations in complex and catastrophic injury cases; regulation matters; and preventive counseling. Author of a monthly "Complex Litigation" column in the *New York Law Journal*; chapters on "gatekeeping" of expert testimony and New York products liability law; many law review articles; and the book, *Products Liability: Substantive, Procedural and Policy Issues* (1992), Mr. Hoenig has lectured at numerous legal education programs, including CLE programs for New York Judges on Judicial 'Gatekeeping' of Scientific Evidence and Expert Testimony. He is a member of the Products Liability Advisory Council, Inc., and of its Case Selection Committee; a member of the American, and New York State bar associations and the New York County Lawyers Association.

PROFESSOR MICHAEL J. HUTTER

Professor Michael J. Hutter is a member of the Albany Law School faculty, having joined the faculty in 1976. His teaching areas include Evidence, N.Y. Practice, Federal Jurisdiction and Procedure, Conflict of Laws and Trade Regulation. Professor Hutter is a recognized expert in the area of Evidence. He has served as an educator to the New York State Court System, invited by the New York State Office of Court Administra-

tion and its Judicial Institute to teach evidence and discuss evidence developments at its annual seminars for Justices and Judges throughout the state, as well as seminars for law clerks and court attorneys. Recently, he was appointed by the Chief Judge of the State of New York to act as the Reporter to a Special Committee, charged with compiling a guide to New York's existing law of evidence that will be readily available to judges, lawyers and the public. Professor Hutter is also the Evidence columnist for the New York Law Journal, publishing a bimonthly article discussing recent New York evidence cases decided by the courts. He is an honors graduate of Brown University and Boston College Law School.

E. STEWART JONES, JR., ESQ.

E. Stewart Jones, Jr., of E. Stewart Jones Hacker Murphy, is a Fellow of the International Academy of Trial Lawyers, the International Society of Barristers, the Inner Circle of Advocates, the American Board of Criminal Lawyers and the American College of Trial Lawyers. He is certified as a Civil Trial Specialist and as a Criminal Trial Specialist of the National Board of Trial Advocacy. He is a member of the New York State Bar Association, the New York State Trial Lawyers Association and the Association of Trial Lawyers of America; and is a Fellow of the American and New York Bar Foundations. He has lectured on criminal and civil practice and trial techniques for a number of state, local and national bar associations, and has published extensively on trial advocacy.

LONNIE KLEIN, ESQ.

Lonnie Klein is an associate in the Complex Litigation group at Reed Smith LLP, practicing out of the firm's offices in New York City. He is a general commercial litigator, with experience handling complex commercial disputes, product liability, aviation, maritime and financial services litigation, in the State and Federal courts of New York. Mr. Klein received his J.D. from American University, Washington College of Law, and a B.A. from Wesleyan University.

CAROL N. KOTSINIS, ESQ.

Carol N. Kotsinis is a member of the Litigation Services Department at Schnader Harrison Segal & Lewis LLP. In her practice, she litigates and advises clients on a variety of product liability, general liability, municipal law, motor vehicle, construction defects, premises liability, toxic torts, and commercial matters. She handles matters through trial in both state and federal courts and has extensive mediation and arbitration experience.

KENNETH A. MANNING, ESQ.

Kenneth A. Manning is a partner in the Litigation Practice Group at Phillips Lytle LLP, a full service law firm with offices in New York State, Washington, D.C., and Canada. Mr. Manning has experience in bet-the-company corporate and commercial litigation, including dissolution proceedings, employment termination disputes and controversies involving the sale of goods and services. In addition to personal injury and wrongful death claims involving products liability, workplace accidents, negligence and environmental exposure experience, Mr. Manning has prosecuted and defended class actions in both state and federal court. Mr. Manning also has experience in challenges to governmental actions, including taxes and assessments, as well as actions for declaratory relief. Additionally, he concentrates his practice in the area of education law. Mr. Manning currently serves as the Leader of the Firm's Class Action, Government Operations and Education Practice Teams. He is a graduate of the State University of New York at Buffalo Engineering School, M.S., B.S., and the State University of New York at Buffalo Law School, J.D. Mr. Manning is a member of the New York State Bar Association where he is active on the Torts, Insurance and Compensation Law Section, and its Class Action Committee, and NYSBA's Court Structure and Operations Committee.

ROBERT C. MEADE, JR., ESQ.

Robert C. Meade, Jr. has been in private practice and public service. He currently serves in the administration of the Supreme Court, Civil Branch, New York County. From 1989 to 1992, he was the Law Secretary to Honorable Harold Baer, Jr., then Justice of the Supreme Court, New York County. Mr. Meade is a graduate of Fordham University School of Law.

Mr. Meade is a member of the New York State Bar Association and its Dispute Resolution and Commercial and Federal Litigation Sections. He is also a long-time member of the New York County Lawyers' Association and its Committee on the Supreme Court, of which he is a former Co-Chair. For 20 years, he has contributed to the editing of the latter association's annual publication, the *Attorneys' Guide to Civil Practice in the New York County Supreme Court*.

HENRY G. MILLER, ESQ.

Henry G. Miller, a graduate of St. John's College (1952) and St. John's Law School (1959), is Past President of both the Westchester County Bar Association and the New York State Bar Association. He is a Past Regent

of the American College of Trial Lawyers, a Past Director of the International Academy of Trial Lawyers and a Fellow of both the American and New York Bar Foundations and a Past Director of the New York State Trial Lawyers Association. Mr. Miller is presently the senior member of the White Plains, New York law firm of Clark, Gagliardi & Miller, P.C., where he is still actively trying cases. Mr. Miller's trial work has usually been for plaintiffs in civil cases. He has frequently appeared on television and radio. He is the author of *Settlements in the Art of Advocacy* series as well as the editor of the *New York Practice Guide on Negligence*, both published by Matthew Bender, and most recently, *On Trial: Lessons from a Lifetime in the Courtroom*, published by ALM (Incisive Media) Publishing.

WILLIAM O'CONNELL, ESQ.

William O'Connell is a partner in Goldberg Segalla's White Plains office and is one of the leaders of its appellate practice group. Mr. O'Connell focuses his practice on the areas of appellate practice, New York labor law and construction site litigation, products liability, commercial litigation, and general defense litigation. He has successfully defended numerous property owners, construction companies, and product manufacturers in complex litigation in both federal and state courts. Mr. O'Connell has appeared on behalf of firm clients and won cases in three of New York's four Appellate Divisions, two federal circuit courts, and other state trial and appellate courts.

Prior to joining Goldberg Segalla, Mr. O'Connell had more than a decade of experience as a judicial law clerk in the New York State trial and appellate courts, where he participated in drafting over 300 judicial opinions. He served as Executive Assistant to the Presiding Justice of the Appellate Division, First Department; Principal Law Clerk to two Associate Justices of that court; and Law Secretary to a criminal trial judge in Supreme Court, New York County. Mr. O'Connell began his career as an Assistant District Attorney in New York County.

JEFFREY L. O'HARA, ESQ.

Jeffrey L. O'Hara is an experienced trial lawyer with 62 jury verdicts and in excess of 80 jury trials as of September 2018. Recognized by the New Jersey Supreme Court as a Certified Civil Trial Attorney since 1999, he was re-certified in 2006, 2012 and 2016. He has attained the rank of Advocate in the American Board of Trial Advocates, has served on the steering committee of the Trial Tactics Committee for the Defense Research Institute and has received the Bullseye Barrister Award for trial

achievement on four occasions. Mr. O'Hara served as the Vice-Chairman of the Board of Directors for the 2014 Special Olympics USA Games and serves as an advisor to the Board of Directors for the Patriot Fund.

DAVID S. OSTERMAN, ESQ.

David Osterman is a senior partner resident in Goldberg Segalla's Princeton, New Jersey office. He is a Fellow in the American College of Trial Lawyers and focuses his practice on handling complex civil litigation, including commercial disputes, products liability, and class action litigation. Mr. Osterman is certified as a Civil Trial Attorney by the New Jersey Supreme Court and has tried more than 50 cases to verdict in five different states (New Jersey, New York, Pennsylvania, South Carolina, and Arizona) and the District of Columbia. He has also served as lead counsel in the successful defense of several state and national class actions involving claims of consumer fraud, breach of warranty, medical monitoring and products liability.

Mr. Osterman's practice involves the representation of manufacturers, retailers, and distributors of a wide variety of products including pharmaceutical and medical device products, consumer products, food products, heavy industrial machinery, airplanes, outdoor power equipment, gas grills, glass products, and flammable fabrics. He has extensive toxic tort experience, including the successful representation of manufacturers and distributors against claims of personal injury or property damage as a result of exposure to asbestos, silica, paint products, graphite carbon, diacetyl, industrial solvents and MTBE. This experience includes the largest consolidated asbestos trial in New Jersey history. He successfully defended class action litigation brought under state consumer protection statutes, including the New Jersey Consumer Fraud Act. He has also handled a variety of commercial disputes, including partnership dissolution disputes, breach of non-compete agreements, and patent, trademark and copyright litigation.

DANIEL S. RATNER, ESQ.

Daniel S. Ratner is a managing partner at Heidell, Pittoni, Murphy & Bach, LLP in New York City and heads the firm's Appellate Practice group. Mr. Ratner represents pharmaceutical and medical device companies, hospitals, and individuals in the defense of products liability and professional liability actions. He has briefed and argued more than 200 civil and criminal appeals in the United States Courts of Appeals, the New York Court of Appeals, the Connecticut Supreme Court, and the state intermediate appellate courts. Mr. Ratner joined HPM&B in 1994 after

five years as an Assistant District Attorney in the Office of the District Attorney, Bronx County, New York. In addition to handling substantive motions at the trial level, he works closely with the firm's trial attorneys in developing legal strategies. Mr. Ratner received his undergraduate degree from Dickinson College and his law degree from Fordham University School of Law. He is a member of the Defense Research Institute and the New York State Medical Defense Bar Association.

DAVID RICHMAN, ESQ.

David Richman is a partner at Rivkin Radler and the head of its Complex Tort & Product Liability and Medical Malpractice Defense Practice Groups and a past member of the firm's executive committee. For more than 30 years, Mr. Richman has successfully represented corporations, hospitals and other medical care providers, universities, and insurance companies in medical and dental malpractice, asbestos litigation, construction job site and New York Labor Law litigation, toxic torts, lead paint, general liability, pharmaceutical product liability, product liability, commercial litigation, bad faith litigation, general negligence, mass tort litigation, nursing home litigation, medical and nursing licensing, false advertising class actions, and regulatory matters. He routinely represents clients before the New York Department of Health Office of Professional Medical Conduct and New York Department of Education Office of the Professions as well as handling credentialing and privileges matters. Mr. Richman also leads a team of attorneys defending clients sued in the New York City Asbestos Litigation, as well as other asbestos actions throughout New York. He is also the lead attorney representing the owner, construction manager, and sub-contractors involved with the Columbia University Manhattanville Construction Project.

A member of several professional organizations, Mr. Richman lectures widely on a variety of subjects, including trial advocacy and the defense of asbestos, lead paint, and medical malpractice actions. He has published articles offering practice pointers on medical malpractice and the handling of cases before state regulatory boards. Mr. Richman serves on DRI's Toxic Torts and Environmental Law committee. He also is a member of the New York State Bar Association's Health Law Section, Tort System Committee, and the Torts, Insurance and Compensation Law Section's Toxic Tort Committee. Additionally, he is a member of the Professional Liability Underwriting Society (PLUS), and has been named a Top Lawyer of Long Island for 2016 by *New York Law Journal*.

CARL SCHAEERF, ESQ.

A member of the law firm of Schnader Harrison Segal & Lewis, LLP in New York City, Carl Schaerf focuses his practice on defense of civil litigation, primarily in the areas of products, premises and municipal liability. He is the chair of Schnader's antitrust group. Mr. Schaerf has extensive trial and appellate experience at all levels, and in both state and federal court. He serves as regional counsel for a large electrical manufacturer. He lectures frequently on topics ranging as widely as trial practice to employee benefits. His is a graduate of Columbia College and the Fordham University School of Law.

THOMAS F. SEGALLA, ESQ.

Thomas F. Segalla, a founding partner of Goldberg Segalla, is a nationally recognized authority on bad faith, reinsurance, and insurance, as well as an ARIAS-U.S. certified arbitrator and mediator. Retained as counsel and as a consultant by numerous major insurance carriers and policyholders in more than 40 jurisdictions nationally and internationally, he has also served as an expert witness in more than 100 bad faith, coverage, and extracontractual cases across the country.

Mr. Segalla is the coauthor of the renowned insurance law treatise *Couch on Insurance 3d* and editor of the *Reinsurance Professional's Deskbook*, published by Thomson Reuters and the Defense Research Institute (DRI). He currently serves on DRI's Barrister Task Force and has previously served as chair of DRI's Insurance Law Committee, chair of its Law Institute, chair of its Publications Board, and a member of its Board of Directors. He is also a member of the Federation of Defense and Corporate Counsel, and past president of the American College of Coverage and Extracontractual Counsel. An AV Preeminent-rated attorney recognized by *Best Lawyers in America*, *Super Lawyers*, and other publications and organizations for his superior skills and accomplishments across numerous areas of the law, Tom is also the recipient of DRI's Louis B. Potter Lifetime Professional Service Award, Best Lawyers in America's Buffalo Insurance Law "Lawyer of the Year" Award, the Defense Association of New York's (DANY) James S. Conway Award for Outstanding Service to the Defense Community, and the State University of New York at Buffalo Law Alumni Association's "Distinguished Alumni Award for Private Practice."

ALLISON M. SURCOUF, ESQ.

Allison M. Surcouf is a partner at Condon & Forsyth LLP, a national law firm with offices in New York, Los Angeles and Miami. Founded in 1935, C&F is internationally recognized for its expertise in handling aviation, complex tort, products liability, insurance and commercial litigation.

Ms. Surcouf specializes in all aspects of aviation litigation, representing airlines, manufacturers and other aviation servicing companies. She has extensive trial experience involving aviation, product liability and employment issues, as well as general commercial and civil matters. She has been first and second chair for several federal and state trials and appeals, as well as representing the firm's clients before administrative agencies and in regulatory matters. She also regularly advises airlines and insurers on their obligations under the mandatory Medicare reporting laws and the Medicare Secondary Payer Act.

Her memberships include the New York City Bar Association (Aeronautics Committee, Former Chair), the International Aviation Womens Association (Mentoring Committee), the American Bar Association (Litigation Committee), and the New York Women's Bar Association.

ANTHONY F. TAGLIAGAMBE, ESQ.

Anthony F. Tagliagambe is a senior partner at London Fischer LLP in New York City. Mr. Tagliagambe tries and defends major cases involving construction accidents resulting in personal injury, products liability, construction defect claims and municipal liability. He is a member of the Federation of Defense & Corporate Counsel and the New York State Bar Association. He has frequently lectured and written about trying and defending construction accident and products liability cases for numerous bar associations and industry groups. He has been designated a New York Super Lawyer, a Top Rated Lawyer by Martindale-Hubbell and is listed among the Best Lawyers in New York City.

ANDREW L. WEITZ, PH.D., ESQ.

Andrew L. Weitz, founding partner of WeitzPascale, is an accomplished trial lawyer with diverse experience. He has handled many cases that have resulted in multi-million dollar verdicts and settlements. Mr. Weitz is serving his second term as Village Justice for the Historic Village of Roslyn and is a Director of the New York State Academy of Trial Lawyers. Mr. Weitz, who earned his Ph.D. from New York University, is a graduate of Brooklyn Law School. He served as Articles Editor for the

CONTRIBUTOR BIOGRAPHIES

Brooklyn Law Review and has authored numerous articles in the personal injury and product liability field. From 2001 to 2009, Mr. Weitz served as editor-in-chief of *Bill of Particulars*, the prestigious quarterly publication of the New York State Trial Lawyers Association (NYSTLA). Among other honors, he has been named to the National Trial Lawyers 100 and Best Lawyers in America.

HARVEY WEITZ, ESQ.

Harvey Weitz was elected to the Trial Lawyers Hall of Fame housed at Temple University in 2017. He is a member of the Inner Circle of Advocates, Past President of multiple bar associations, including NYSTLA, holder of many record jury verdicts, lead counsel for New York State against Big Tobacco, recovering more than 27 billion dollars for the State of New York, and he is the undisputed “father” of many innovative trial techniques. Mr. Weitz is also the author of three critically acclaimed works on Summation and Trial Practice.

SAUL WILENSKY, ESQ.

Saul Wilensky is a seasoned trial lawyer at Schnader Harrison Segal & Lewis LLP who focuses on the defense of products liability lawsuits relating to design, manufacture and repair of products and services. Through his involvement in a significant number of cases of first impression, he has helped shape products liability law in New York.

Mr. Wilensky represents major manufacturers of heavy construction equipment and recreational equipment, as well as legal malpractice defendants, regularly trying complex matters throughout New York’s state and federal courts. He has handled cases concerning swimming pools, punch presses, commercial food preparation equipment, FELA, automobiles, electrical equipment, printing equipment, commercial and household laundry equipment, aviation, ship design, waste disposal equipment, consumer appliances, asbestos, hazardous materials, toxic torts, industrial hygiene, legal malpractice and tainted food. Mr. Wilensky has also become involved in the issues surrounding dietary supplements.