

**MEDICAL
MALPRACTICE
IN
NEW YORK**

FOURTH EDITION

**Editor-in-Chief
Robert Devine, Esq.**

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PREFACE

In 1993, the New York State Bar Association published *Medical Malpractice in New York*. The book was designed to provide attorneys trying these cases with practical tips and fundamental principles in one volume.

This edition is not an update. It is intended to present a more advanced insight into various aspects of the trial of a medical malpractice case, with many observations that apply to the trial of any case. We are fortunate to have recognized leaders in our field contribute their knowledge and wisdom to give us the benefit of their experiences. It is certainly a better substitute for our own trial-and-error approach, which usually has a heavy emphasis on the error aspect. “Seasoning” as a trial lawyer is hard to come by. These authors give such guidance to all of us.

A special thanks must go to Daniel McMahon and his staff at the New York State Bar Association. Their cite checking, fact checking and organizing have contributed greatly to the high-quality publication that our readers deserve.

Robert Devine
Editor-in-Chief

ABOUT THE EDITOR

ROBERT DEVINE, ESQ.

Robert Devine is a partner of the firm Bartlett, McDonough & Morahan, LLP in Mineola, New York. He received his law degree from Georgetown in 1964. His primary area of practice is the defense of medical malpractice and negligence cases. Mr. Devine is a member of the Executive Committee of the Trial Lawyers Section of the New York State Bar Association and a former chair of that section. He also served as that section's chair of continuing legal education for nine years. Additionally, Mr. Devine is a member of the American Board of Trial Advocates and the Medical Malpractice Defense Lawyers' Association.

ABOUT THE AUTHORS

MARTIN B. ADAMS, ESQ.

A graduate of Case Western Reserve University School of Law, Martin Adams is a partner in the New York City law firm of Dopf, P.C. His primary area of practice is professional liability defense with extensive experience in research, analysis, and the application of scientific-legal issues and preparation of motions and briefs at the trial and appellate level.

CLIFFORD A. BARTLETT, JR., ESQ.

Clifford A. Bartlett, Jr. is a partner in the firm of Bartlett, McDonough & Monaghan, LLP, with offices in Mineola, White Plains and Manhattan. Mr. Bartlett received his law degree from St. John's University School of Law, and since his admission to the bar in New York State, he has focused his practice on the defense of physicians and hospitals relative to medical malpractice claims. Mr. Bartlett has taken more than 500 cases to verdict and has lectured widely on topics involving the trial of medical cases.

RAYMOND W. BELAIR, ESQ.

Raymond W. Belair is a senior partner in the New York City law firm of Belair & Evans LLP, where his primary areas of practice include trials, professional liability and personal injury. Mr. Belair graduated from Fordham University School of Law and engaged in post-graduate work at New York University Law School. He holds a master's degree from the Institute of Religious Studies and is a doctoral candidate at the Graduate Theological Foundation. A member of the American Association for Justice, he is certified by both the National Board of Trial Advocacy, for whom he has

served as an examiner, and the American Board of Professional Liability Attorneys.

BRUCE M. BRADY, ESQ.

Bruce M. Brady is a partner in the firm of Koster, Brady & Nagler LLP. He received his law degree from Boston University School of Law after graduating from Columbia College. Mr. Brady began his legal career as a prosecutor in the Kings County District Attorney's Office. For more than 25 years his primary specialty has been the defense of medical malpractice claims. Mr. Brady is a charter member of the New York State Medical Defense Bar Association, a member of the American Bar Association, the Association of Trial Lawyers of America, the New York State Trial Lawyers Association, the New York County Lawyers Association and the Bergen County Bar Association.

Mr. Brady has taught and lectured extensively on the topic of trial techniques and the defense of medical malpractice cases for the New York State Trial Lawyers Institute and Law Journal Seminars. He is admitted to practice before the courts of the states of New York, New Jersey and Massachusetts, as well as the U.S. District Courts for the Southern and Eastern Districts of New York and the Supreme Court of the United States.

W. RUSSELL CORKER, ESQ.

W. Russell Corker, of the Law Office of W. Russell Corker, P.C. in Huntington, New York, is a medical malpractice attorney. He received his law degree from Boston University in 1974. His primary area of practice is representing plaintiffs in medical malpractice and negligence cases. Mr. Corker has been teaching trial techniques for more than 28 years. He is a recognized authority in the use of technology as a tool of persuasion in the courtroom.

LAURENCE M. DEUTSCH, ESQ.

Laurence M. Deutsch is a partner at North & Deutsch LLP, which specializes in medical malpractice and negligence cases. With more than 25 years in the field, he has achieved some of the leading verdicts in counties throughout New York State. He has been recognized for attaining one of the Top 20 Verdicts in New York by Topverdict.com and included in the Verdicts and Settlements Hall of Fame by the *New York Law Journal*. Mr. Deutsch also received the highest rating from the Avvo rating service and was awarded the Distinguished Attorney rating in national peer attorney reviews.

ROBERT P. ESGRO, R.PH., J.D.

Robert P. Esgro is a practicing pharmacist and attorney. Mr. Esgro began his career in the pharmaceutical industry at Merck & Co. Assignments included industrial manufacturing pharmacist, pharmaceutical sales and pharmaceutical product promotion manager. Presently, Mr. Esgro is pharmacy manager at a national retail pharmacy chain. In addition, he consults in retail pharmacy malpractice cases throughout the country. His legal practice concentrates on professional licensure defense claims. He also is an adjunct professor of pharmacy law and ethics at the University of the Sciences in Philadelphia. He is a regular speaker on pharmacy law topics for pharmacist continuing education seminars.

ROBERT F. ELLIOTT, ESQ.

Robert F. Elliott is a partner at Bartlett, McDonough & Monaghan, LLP. Over the last 20 plus years Mr. Elliott has had more than 50 defense verdicts in complex litigation trials ranging from medical malpractice to municipal and premises liability and construction accidents in a wide variety of jurisdictions. Most of these were multi-million dollar matters ranging from eye injuries, orthopedic injuries including amputations, to neurologically impaired children and adults. He regularly represents licensees before Professional Discipline Boards. He has handled numerous billing and compliance matters for Hospitals, Long Term Care Facilities and Residential Care Providers. He has a specific specialty in Mental Health Law and Litigation.

Mr. Elliott regularly teaches attorneys through continuing legal education and also teaches health care providers at continuing medical education seminars. His presentations range from healthcare ethics to medical liability.

Mr. Elliott is a graduate of Downstate Medical Center where he received a Bachelor of Science in Nursing. He worked as a registered professional nurse, hospital risk manager and safety officer from 1981 through 1989 when he graduated from Brooklyn Law School with his J.D. degree.

DAVID M. FREEMAN, ESQ.

David Freeman is a senior litigation attorney at the law firm of Philip J. Rizzuto, P.C., where he is the director of the Nursing Home Litigation Unit. He graduated from Brooklyn Law School in 1992 and worked as a trial litigation law clerk while attending law school. He had previously

earned a master's degree in community and organizational psychology and worked at the New Jersey Department of Human Services Bureau of Research and Evaluation. There, he led a research project addressing the social support received by patients deinstitutionalized from New Jersey mental health facilities following the reported abuses to residents of the Willowbrook State School. While his legal career has focused primarily on being an advocate for plaintiffs, he has tried cases on behalf of both plaintiffs and defendants.

JEFFREY C. GERSON, ESQ.

Jeffrey C. Gerson is a partner in the Garden City, New York office of Kaufman Borgeest & Ryan LLP. He received his law degree from Franklin Pierce Law Center in 1991. His primary area of practice is the defense of physicians, hospitals, nursing homes, podiatrists, dentists and other health-care providers. Mr. Gerson has lectured extensively in New York and other states on various topics in malpractice litigation and risk management. He is licensed to practice in New York and Connecticut.

BARBARA DECROW GOLDBERG, ESQ.

Barbara DeCrow Goldberg is a partner at Martin, Clearwater & Bell, and the head of its appellate department. With more than 20 years of experience in appellate litigation, Ms. Goldberg has handled a wide variety of appeals and is noted for several important decisions in the areas of medical malpractice, negligence, workers' compensation and products liability law. Ms. Goldberg is a *magna cum laude* graduate of Radcliffe College and obtained her law degree from Boston University School of Law, where she graduated *cum laude*. She is the author of several articles on products liability, medical malpractice, and evidentiary issues, and has frequently lectured at continuing education programs. In addition, Ms. Goldberg is a member of the OCA's Advisory Committee on Civil Practice.

BRUCE G. HABIAN, ESQ.

Bruce G. Habian is a senior partner in the New York City law firm of Martin Clearwater & Bell. His primary areas of practice include medical malpractice defense, hospital liability and attorney malpractice defense. Mr. Habian has specialized in these areas for more than 30 years. Mr. Habian has served as a faculty member for the Practising Law Institute and the Law Journal Seminars-Press (he regularly presents programs on breast cancer and neurologically impaired infant cases). Mr. Habian has been published by Matthew Bender Corporation and The Williams-Wilkins Publishing Corporation. He has served as a faculty member of the National

Institute of Trial Advocacy, is continually listed in Best Lawyers in America in his specialty and is a fellow of the American College of Trial Lawyers.

E. MARC HYMAN, ESQ.

E. Marc Hyman is a partner in the law firm Heidell, Pittoni, Murphy & Bach, LLP. He obtained his J.D. degree from the Boston University School of Law in 1984. He has practiced medical malpractice law in New York for 20 years. He has lectured on related topics for CLE programs by the New York State Bar Association, the Practising Law Institute and the New York County Bar Association, as well as in other forums. He is a member of the New York State Medical Defense Bar Association.

SHAWN P. KELLY, ESQ.

Shawn P. Kelly is the senior partner of Kelly, Rode & Kelly, LLP. He handles a broad range of civil litigation matters with a particular interest in the defense of medical and hospital malpractice matters as well as general liability matters. He was admitted to the NYS Bar in January of 1978 and has earned a rating of AV by his peers in Martindale-Hubbell.

He received his undergraduate degree from the University of Notre Dame in South Bend, Indiana and graduated in 1974. He then earned his JD degree from St. John's Law School in Queens in 1977 and was admitted to the Bar in January of 1978. In 1978 he successfully completed the NITA program, an intensive trial advocacy program, at Cornell University in Ithaca, New York and later was asked to become an instructor of the program. He is an adjunct faculty member of Hofstra University School of Law and has also lectured at St. John's School of Law.

He is admitted to practice before all state courts in New York, the Eastern and Southern Districts of the Federal District court in New York, the United States Supreme Court and the United States Court of Appeals for the Armed Forces. He is also a member of the New York State Bar Association where he is a member of the Torts, Insurance and Compensation Law (TICL) Section as well as the Trial Lawyers Section. He has lectured widely on matters of trial practice to the New York State Bar Association, the Practising Law Institute (PLI), the Nassau Academy of Law, and the Law Department for the City of New York.

PETER C. KOPFF, ESQ.

Peter Kopff, of Peter C. Kopff, LLC in Garden City, New York, defends physicians and hospitals in medical malpractice lawsuits. He received his A.B. from Princeton University in 1970 and his J.D. from Albany Law

School in 1975. Mr. Kopff is a past president and founding board member of the New York State Medical Defense Bar Association. He is also a member of the Executive Committee of the New York State Bar Association's Trial Lawyers Section and has served as the program chair or co-chair of that section's 2004–2008 summer meetings.

DANIEL KRAMER, ESQ.

Daniel Kramer has co-authored books on medical malpractice and evidence in negligence cases for the Practising Law Institute. He co-wrote a column titled "Medical Malpractice" for the *New York Law Journal* from 1977 until 1989. He is an adjunct professor of law at St. John's Law School, where he teaches legal medicine. He has lectured numerous times for the New York State Trial Lawyers Association and the New York State Bar Association on medical malpractice. He chaired the medical malpractice subcommittee of the New York State Trial Lawyers Association. Presently, Mr. Kramer is retired and spending his winters in Scottsdale, Arizona.

STANLEY A. LANDERS, ESQ.

Stanley A. Landers is senior partner in the law firm of Landers & Cernigliaro, P.C. in Carle Place, Nassau County. The firm concentrates on plaintiffs' medical malpractice. A graduate of St. John's University School of Law, Mr. Landers is a member of the American Association for Justice, the New York State Trial Lawyers Association, the New York State Bar Association, the Nassau County Bar Association and the Queens County Bar Association.

AMY G. LONDON, ESQ.

Amy G. London is a senior counsel in the Tort Division of the New York City Law Department. She graduated from Brown University in 1980 and received her law degree from the University of Pennsylvania in 1983. Her primary areas of practice are municipal liability and medical malpractice. She is author of an article titled "Mediation Offers Promise but No Cure for System's Ills," published in the *New York Law Journal*. She has also served as a continuing legal education instructor on the subject of defending EMS cases.

D. CARL LUSTIG, III, ESQ.

D. Carl Lustig, III is a partner at the Manhattan law firm of Arye, Lustig & Sassower, P.C., and handles the trials and appeals of major personal injury cases on behalf of plaintiffs. His primary area of concentra-

tion is construction accident litigation under the New York State Labor Law.

Mr. Lustig has written law review articles that have appeared in the New York State Trial Lawyers Institute publication, *The Trial Lawyers Quarterly*, and other legal periodicals. He has lectured extensively for various entities including the New York State Trial Lawyers Institute, The Practicing Law Institute, the New York State Bar Association and Yale University and has served as co-chairperson of a number of lecture series for continuing legal education in the area of personal injury trial practice. He has also lectured for the National Institute of Trial Advocacy program at Hofstra University School of Law on Trial Techniques, and at St. John's University School of Law on Alternate Dispute Resolution/Mediation in personal injury cases. Mr. Lustig also has been an invited speaker at the New York State Judicial Conference and has lectured at the New York City Bar Association in their continuing legal education seminar on trials of civil cases.

MATTHEW MAIORANA, ESQ.

Matthew Maiorana is a partner at Queller, Fisher, Washor, Fuchs & Kool, L.L.P. He began his legal career defending cases brought by injured persons against the City of New York. His litigation skills and talents were recognized immediately and he was entrusted with defending the City of New York in the most serious and complex matters in the Special Litigation Unit. His efforts earned him a Municipal Affairs Award from the Association of the Bar of the City of New York, as well as numerous awards directly from the City of New York.

After spending years in practice defending the City of New York, Mr. Maiorana decided to represent private individuals injured through the negligence of others. Today, his practice focuses on the litigation and trial of medical malpractice, serious injury and wrongful death claims. From 2013 until the present, he has been included in Super Lawyers every year. He practices in both state and federal courts throughout New York. He is also a member of various bar associations in New York, including the New York State Bar Association and the New York State Trial Lawyers Association.

STUART MANZIONE, ESQ.

Stuart Manzione is a partner at Furey, Furey, Leverage, Manzione, Williams & Darlington, P.C. He focuses his practice on the defense and trial of medical malpractice and professional negligence cases involving phy-

sicians, dentists, hospitals and nursing homes. He also handles matters involving the trial of premises liability, products liability, automobile liability and general negligence matters involving serious and/or catastrophic injury and death.

Mr. Manzione is admitted to practice in the State of New York and is also admitted in the United States District Court, Eastern and Southern Districts of New York. He is also admitted to the Federal Court of Appeals and is admitted to argue before the Supreme Court of the United States. He is also a member of the Nassau County Bar Association and the Trial Lawyers Association of Nassau and Suffolk Counties. He has lectured to physicians and hospital staff regarding risk reduction strategies in several areas of patient care. He has also lectured on various topics of interest to the insurance defense community at seminars sponsored by Furey & Furey and teaches paralegal studies at C.W. Post College.

Mr. Manzione earned his Juris Doctor degree in 1987 from St. John's University School of Law. He graduated *summa cum laude* and salutatorian from Long Island University, C.W. Post in 1984.

NICHOLAS J. MAROTTA, ESQ.

Nicholas J. Marotta was graduated from St. John's University School of Law in 1985. Following graduation, he was an assistant corporation counsel of the city of New York, ultimately becoming a senior trial attorney in the medical malpractice unit. Since 1990, Mr. Marotta has continued to concentrate his practice in the defense of medical malpractice claims, successfully representing physicians at trial in significant and complex matters. Mr. Marotta was selected by his peers for inclusion in *The Best Lawyers in America 2008*. He frequently has lectured on medical malpractice issues at various New York-area hospitals. He has been a partner at the firm of Aaronson Rappaport Feinstein & Deutsch, LLP since 1994 and is admitted to practice in New York, Connecticut and the U.S. District Courts for the Eastern and Southern Districts of New York.

JEFFREY A. MARSHALL, ESQ.

Jeffrey A. Marshall is a partner at Marshall Conway & Bradley P.C. His areas of practice include arbitration, mediation, construction accidents (involving violations of N.Y. State Labor Law), dram shop, insurance law, liquor liability law, motor vehicle, premises liability, products liability law, and property & casualty. He received a B.A. at the State University of New York at Stony Brook and a J.D. at the New England School of Law.

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, 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. His trial work has usually been for plaintiffs in civil cases. He has frequently appeared on television and radio. He is the author of the *Settlements in the Art of Advocacy* series, as well as editor of *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 Publishing.

RICHARD J. MONTES, ESQ.

Richard J. Montes is a partner in the law firm of Mauro Lilling Naparty LLP in Woodbury, New York, which focuses its practice on appellate advocacy and litigation. He is a former law clerk for the justices of the Massachusetts Superior Court, a judge of the Massachusetts Appeals Court and Justice Anthony Marano, Nassau County. He graduated *cum laude* from Georgetown University and *cum laude* from Boston University School of Law. He is also the current chairperson of the Suffolk County Bar Association's Appellate Committee and is president of the Long Island Hispanic Bar Association.

STEVEN E. NORTH, ESQ.

Steven E. North is a partner at North & Deutsch LLP. Mr. North has been listed as having achieved some of the highest verdicts in the state of New York. He has been included in *Best Lawyers in America* for more than the past ten years and has been named in the *New York Times*, Super Lawyers Section—Top New York Lawyers, *New York Magazine's* New York Area's Best Lawyers and Law Dragon's Leading Plaintiff Lawyers in America. Mr. North is a legal commentator on television, a lecturer at law schools, a contributing author to the *New York Law Journal* and author of more than 20 legal publications, including a text on deposition tactics and strategy. He has also been a guest lecturer at medical schools and teaching hospitals in the New York metropolitan area. He serves as a referee for the New York State Commission on Judicial Conduct.

STEVEN E. PEGALIS, ESQ.

Steven E. Pegalis is the founding partner of Pegalis & Erickson in Lake Success, New York. He has spent his legal career representing plaintiffs in personal injury and medical malpractice cases. He earned his B.A. from Queens College of the City of New York and his J.D. from New York Law School. Mr. Pegalis has been in his own firm since 1972. He authored *American Law of Medical Malpractice*, Volumes I, II, and III, to help other trial attorneys understand the medical aspects of particular malpractice cases. He has lectured for the New York State Bar Association, the New York State Trial Lawyers Association, the New York Law Journal-Seminars Press Series and the Practising Law Institute on medical malpractice litigation and trial practice. Mr. Pegalis is a member of the board of trustees of New York Law School and the National CLE Program Advisory Committee of the American Bar Association on “The Experts Analyze Brain-Damaged Baby Cases.” He also is an adjunct professor of medical malpractice at New York Law School.

LAUREN PENNISI, ESQ.

Lauren Pennisi is an associate at Sullivan Papain Block McGrath & Cannavo P.C. in New York City, where she focuses on medical malpractice. She received a B.A. from Binghamton University and a J.D. from St. John’s University School of Law.

DAVID S. POLLACK, ESQ.

David Pollack maintains a law office in Port Washington, New York. He received his law degree from New York Law School in 1980. His practice is focused on the representation of plaintiffs in medical malpractice and personal injury cases and as trial counsel to the profession. Mr. Pollack has been an attorney adviser to the local high school mock trial team for 15 years and served as a director of the New York State Trial Lawyers Association for 9 years. He has been recognized with an A-V rating by Martindale-Hubbell, a listing in the *Bar Register of Preeminent Lawyers* and *The Best Lawyers in America*. He is also a member of the Million Dollar Advocates Forum.

THOMAS J. PRINCIPE, ESQ.

Thomas J. Principe is a partner in the New York City law firm of Kramer, Dillof, Livingston & Moore, where his practice focuses on civil litigation, including medical malpractice, products liability and general negligence. He is a 1973 graduate of St. John’s University School of Law. A brigadier

general in New York's Army National Guard, Mr. Principe was staff judge advocate for the 53rd Troop Command. He retired in July 2006 with the Legion of Merit medal given by the U.S. Army. He is a member of the New York State, Florida, District of Columbia, Queens County and the New York County Bar Associations and the New York State Trial Lawyers Association. Mr. Principe has also authored "The Law of Vehicular Homicide in New York" (Queens County Bar Bulletin, July 1986) and "No Need for Plaintiff's Bar to Panic: Contingent Fee Rulings May be Dicta" (N.Y.L.J., Feb. 14, 1995). Mr. Principe makes frequent CLE presentations regarding medical malpractice for St. John's University and the New York State Trial Lawyers Institute.

DANIEL RATNER, ESQ.

Daniel Ratner is a senior partner at Levy Ratner, P.C. He began his career in labor with 12 years as an organizer for 1199SEIU and the UAW. His legal career has spanned over 25 years, during which time he has represented a variety of unions in the profit and not-for-profit sectors, including the SEIU, Teamsters and the UAW. He currently serves as General Counsel to 1199SEIU, representing over 300,000 healthcare workers.

Mr. Ratner has litigated labor disputes extensively before the NLRB and the federal courts. He was a member of the AFL-CIO national litigation team that established the health care bargaining unit rules through NLRB rule making and subsequent litigation up to the United States Supreme Court. He has participated in national oral arguments before the NLRB on the issues of RN supervisory status, independent contractor status, and joint employee status of agency workers. He is responsible for the legal victory that initially established the right of graduate teaching assistants to organize under the NLRA in New York University.

JOYCE LIPTON ROGAK, ESQ.

Joyce Lipton Rogak is a trial attorney at Rogak & Gibbons, LLP as well as the firm's managing attorney. Prior to forming Rogak & Gibbons, LLP in 2000, she was a partner and the head of the medical malpractice department of Rivkin, Radler & Kremer. Ms. Rogak has successfully defended numerous cases in the New York State Supreme Courts. Along with her trial experience, Ms. Rogak has handled every other aspect involving medical, podiatric and dental malpractice, including preparing and arguing Appeals, as well as product liability, personal injury and liability defense. She also defends physicians before the OPMC. She is the author of several articles that have appeared in specialty medical newsletters and legal journals.

Ms. Rogak was admitted to the New York State Bar and United States District Court for the Eastern and Southern Districts of New York in 1981. She is a member of the Nassau County Bar Association and the New York State Bar Association. Ms. Rogak received her Juris Doctorate degree from Hofstra University Law School in 1980 and her Bachelor of Arts degree, *magna cum laude*, from Brooklyn College, in 1976.

ROBERT G. VIZZA ESQ.

Robert G. Vizza is a partner at Bartlett, McDonough & Monahan LLP. He heads the firm's Appellate Practice area, dealing with legal issues arising from medical malpractice litigation as well as premises and workplace liability and civil rights cases.

In addition to depositions, trials and appeals, Mr. Vizza assists clients with financial audits, litigation cost schedules and verdict exposure estimates, privileged quality assurance investigations and Dept. of Health inquiries including matters before the Office of Professional Medical Conduct, prospective risk management and quality of care issues, and regulatory compliance issues such as HITECH.

While at Dartmouth College, Mr. Vizza was the President of the Nathan Smith Society for Pre-Health Professionals (pre-med/dental/veterinary students). He served as the Editor in Chief of *Res Gestae*, the St. John's University School of Law yearbook.

ROBERT J. WALKER, ESQ.

Robert J. Walker, a partner at Gallagher, Walker, Bianco & Plastaras in Mineola, New York, focuses on medical malpractice and insurance defense cases. He has many years of experience as a trial attorney responsible for the defense of medical and dental malpractice, products liability, and general liability cases from inception through trial. He received a B.A. in psychology from St. John's University and a J.D. from St. John's University School of Law.

BARRY WASHOR, ESQ.

Barry Washor is a senior partner at Queller, Fisher, Washor, Fuchs & Kool, L.L.P. He began his career on the defense side, working for an insurance defense law firm representing doctors and hospitals. By age 27 he was a partner at that law firm. In 1988 he left the defense side to become a plaintiff's attorney. His experience as a defense attorney gave

him a unique and valuable insight into how insurers defend and evaluate medical malpractice lawsuits.

Mr. Washor has been widely recognized as an expert in his field and is consistently sought after to share his knowledge and experience with other lawyers and law students. He teaches trial advocacy at Cardozo Law School and is a frequent lecturer in trial advocacy for the New York State Trial Lawyers Association (NYSTLA). Since 2002, he has served on NYSTLA's Board of Governors, and is a member of its medical malpractice committee.

AMY S. WEISSMAN, ESQ.

Amy S. Weissman is a partner at Marshall, Conway & Bradley P.C. Her areas of practice include arbitration, mediation, construction accidents (involving violations of N.Y. State Labor Law), dram shop, liquor liability law, motor vehicle, premises liability, products liability law, and property & casualty. She received a B.A. at Lafayette College and a J.D. at New York Law School.

ELLIOTT C. WINOGRAD, ESQ.

Elliott C. Winograd died in 2016. Over his 50-year legal career, Mr. Winograd tried more than 500 jury cases to verdict, served as the Chief Negotiator for the Civil Division of the Law Department for the City of New York, and regularly donated his time as a pro bono Special Master, mediator and arbitrator with the Supreme Court, Nassau County.

DANIEL WOODARD, ESQ.

Daniel Woodard is a partner with Phillips & Paolicelli, LLP, which focuses on litigating medical malpractice, infant lead paint poisoning, toxic exposure and other complex personal injury cases in New York and New Jersey as well as other states around the country.

Mr. Woodard has a diverse background and experience in successfully litigating numerous types of complex legal actions, including representing individuals injured by chemical explosions, dangerous premises, children exposed in utero to harmful chemicals causing birth defects and those injured by defective products.

A trial lawyer at heart, Mr. Woodard has attained numerous multi-million dollar verdicts and settlements on behalf of his clients, many of whom are young children, catastrophically injured as a result of receiving

negligent medical care or being exposed to toxic substances and chemicals. He has also successfully represented lead poisoned children, construction workers injured on the job by dangerous conditions and dangerous products and young children born with birth defects.

Mr. Woodard is licensed to practice law in New York State and New Jersey. In addition, he is licensed to appear before the Federal Courts in both New York and New Jersey. He is also a member of the New York State Bar Association, the New Jersey Bar Association, the American Bar Association, the American Association for Justice, and the New York State Trial Lawyers Association.