

NDNY FEDERAL COURT BAR ASSOCIATION, INC.
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**The NDNY-FCBA's CLE Committee
Presents**

***“Update and Strategies on Expert Witnesses in Federal Court from the
Plaintiff’s and Defendant’s Perspectives”***

**Monday, August 20, 2018
10:00 a.m. – 11:00 a.m.
(Registration at 9:30 a.m.)
RSVP by August 6, 2018**

**Bellevue Country Club
1901 Glenwood Avenue
Syracuse, New York**

Program Description:

This program will provide an update on the law and other current issues relating to expert witnesses and provide practical advice on the selection and use of expert witnesses from both the plaintiff and defense points of view.

Presenters:

Michael Porter, Esq.
Porter, Nordby & Howe, LLP

Robert Smith, Esq.
Costello, Cooney, Fearon, PLLC

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

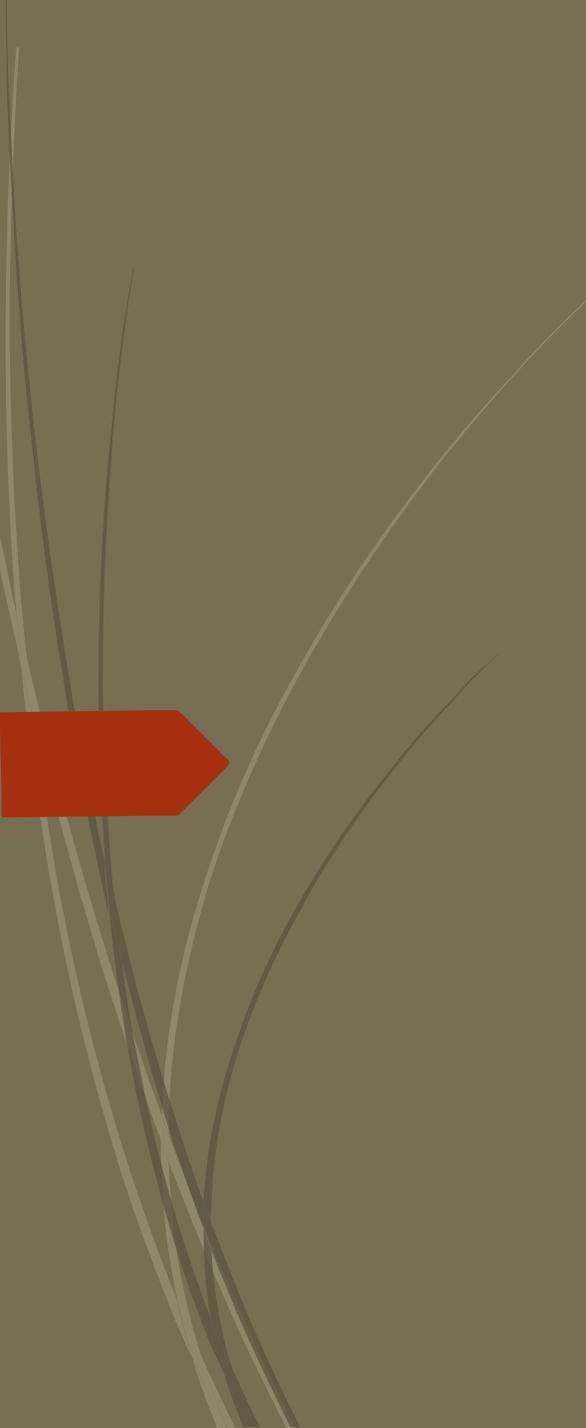
“Update on Expert Witness Selection/Daubert Issues” has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for **1.0** credits towards the **professional practice** requirement.*

This program is appropriate for **newly admitted and experienced attorneys**.

This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

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Update On Expert Admissibility and Cross-Examination

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PART I:

Recent Second Circuit and NDNY Cases on Expert Admissibility



Federal Rules of Evidence 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b)** the testimony is based on sufficient facts or data;
- (c)** the testimony is the product of reliable principles and methods;
and
- (d)** the expert has reliably applied the principles and methods to the facts of the case.



Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)

- ▶ Court ruled that FRE 702 governed admission of “scientific” expert testimony.
- ▶ Prior to admitting scientific expert testimony, the court must conduct “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”
- ▶ Factors for assessment (but no definitive checklist):
 - ▶ Whether a theory or technique can be (and has been) tested;
 - ▶ Whether it has been subjected to peer review and publication;
 - ▶ Whether, in respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and
 - ▶ Whether the theory or technique enjoys general acceptance within a relevant scientific community.



Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)

- Case involved “technical” rather than “scientific” expert testimony.
- Daubert’s general principles all expert matters described in FRE 702.
- However, Trial Court has latitude in deciding how to test an expert’s reliability.
 - “Thus, whether Daubert’s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.”



In re Pfizer Inc. Sec. Litig., 819 F.3d 642 (2d Cir. 2016)

- Securities fraud class action alleging that Pfizer Inc. made fraudulent misrepresentations cardiovascular risks associated with its anti-inflammatory drugs.
- Plaintiffs proffered supplemental expert report that, among other topics, applied a “proportional reduction” to the stock price increases attributable to Pfizer Inc.’s alleged fraudulent misrepresentations.
- District Court determined that Plaintiff’s expert did not adequately explain the proportional reduction, and excluded the entire expert report.



In re Pfizer, cont'd

- Second Circuit affirmed decision to exclude testimony regarding the proportional reduction because it constituted a methodology that was inadequate to support the conclusions reached.
- However, Second Circuit ruled that the remaining portions of the report should have been admitted.
- When the unreliable portion of an opinion can easily be distinguished from testimony that could help the jury, it may be an abuse of discretion to throw the good out with the bad.



Forte v. Liquidnet Holdings, Inc., 675 F. App'x 21 (2d Cir. 2017)

- ▶ Female employee brought action against her former employer.
- ▶ Plaintiff offered expert report on pay discrepancies between Defendant's male and female employees.
- ▶ Plaintiff's expert admitted that he did not independently verify data used in the report.
- ▶ District Court granted Defendant's motion to exclude the report, determining that the report was not the product of reliable principles and methods.



Forte, Cont'd

- ▶ Second Circuit affirmed the District Court's decision.
- ▶ A failure to validate data can itself be grounds for excluding expert report.
- ▶ Report failed to control for non-discriminatory causes of pay discrepancies, and was therefore inadmissible.
- ▶ Plaintiff's expert should have conducted regression analysis to control for variables such as seniority, productivity, education, experience, or performance reviews.



Restivo v. Hessemann, 846 F.3d 547 (2d Cir. 2017)

- ▶ Plaintiffs filed 42 U.S.C. § 1983 action against police detectives after Plaintiffs' convictions for rape and second degree murder were set aside.
- ▶ Plaintiffs offered expert testimony regarding post-mortem root banding (PMRB), a phenomenon that generally occurs to a body's hair days after death.
- ▶ District Court concluded that certain aspects of PMRB had not been established to a degree of scientific certainty, but nonetheless admitted testimony regarding PMRB.



Restivo, cont'd

- Second Circuit ruled that if testimony could not “pass muster” as “scientific” knowledge under the Daubert factors, a scientist witness can nonetheless testify on the topic as “technical” or “other specialized” knowledge, so long as the testimony is “reliable” under Rule 702 and Kumho.
- “[J]ust as non-scientist experts can testify about their opinions, so too can scientists, when their opinions are based on reliable technical or specialized knowledge, though not scientific fact.”



United States v. Gil, 680 F. App'x 11 (2d Cir. 2017)

- Criminal Defendant was charged with being a felon-in-possession of either a firearm and/or ammunition.
- Defendant moved to exclude the prosecution's ballistics expert witness based on two academic reports opining that ballistics analysis as field involves the use of subjective determinations.
- District Court noted the false positive rate for ballistics examination was in the range of 1%.
- District Court admitted testimony of ballistics expert.
- District Court permitted ballistics expert to testify that he reached his conclusions "to a reasonable degree of certainty in the field of ballistics."



Gil, cont'd

- Second Circuit affirmed District Court's decision to admit testimony and to permit testimony regarding degree of certainty.
- Second Circuit ruled that arguments about the subjectivity inherent in otherwise reliable methodologies go to the weight of the evidence, not to its admissibility, and were matters for cross-examination and argument to the jury.
- Second Circuit ruled that District Court properly communicated to the jury that ballistics is a "subjective inquiry," which could not fairly be referred to as "scientific" or statistically certain.



N.K. by Bruestle-Kumra v. Abbott Labs., 731 F. App'x 24 (2d Cir. 2018)

- ▶ Plaintiff commenced the action alleging that drug manufacturer failed to warn of possible birth defects associated with the drug.
- ▶ Plaintiff offered treating physician as expert witness regarding causation, as well as a toxicologist relying on the same medical records.
- ▶ As an alternative, Plaintiff also offered treating physician's opinions regarding causation as a factual witness.
- ▶ District Court ruled that to lay a reliable foundation, treating physician had to perform an adequate "differential diagnosis" by creating a list of possible causes and eliminating each to identify most likely cause.
- ▶ Case record indicated that treating physician identified genetic defect as possible cause, but there was no indication if genetic screening was performed.



N.K. by Bruestle-Kumra, cont'd

- ▶ Second Circuit affirmed the District Court's decision to exclude the expert testimony of the treating physician and a toxicologist who relied on the same medical records because neither proposed expert ruled out the possibility of genetic defect.
- ▶ Treating physician could not be offered as a fact witness on the issue of causation because expert medical opinion evidence is required to establish causation.



Zdziebloski v. Town of E. Greenbush, No. 115CV0298LEKCFH (N.D.N.Y. May 11, 2017)

- ▶ Plaintiffs commenced the action against defendant Town of East Greenbush, alleging violations of the Clean Water Act ("CWA") based on run-off flowing into a pond on Plaintiffs' property.
- ▶ Plaintiffs submitted expert to establish CWA jurisdiction, specifically that water from Plaintiffs' pond travelled to a navigable waterway.



Zdziebloski, cont'd

- ▶ NDNY ruled that Plaintiffs' expert's testimony was inadmissible where opinion that pond overflowed into nearby wetland in the Hudson River watershed was based solely purported observations by Plaintiffs. As such, testimony was not based on sufficient facts or data.
- ▶ One of the Plaintiffs' affidavit opining that water seeps from the pond to the wetland was inadmissible without any evidence that he had expertise in hydrology, even though the affidavit was based on "common sense."



Rizzo v. Applied Materials, Inc., No. 615CV557MADATB (N.D.N.Y. Sept. 11, 2017)

- ▶ Plaintiff brought action alleging that his granulomatosis with polyangiitis (GPA) resulted from exposure to toxic substances and fumes at work.
- ▶ Plaintiff offered treating physician as expert regarding causation, but the basis of the physician's expertise was review of academic literature in the weeks prior to his deposition.
- ▶ The academic literature identified by the proposed expert either related to the general toxicity of the alleged substances, rather than finding a link to GPA, or related to studies of animal or cellular tests.



Rizzo, cont'd

- District Court conducted deep review of academic literature cited by Plaintiff, finding that none of the cited articles found a specific link between the alleged substances and GPA.
- As such, District Court excluded treating physician's testimony as unreliable.
- District Court noted that mere review of literature may have been insufficient for a general physician to be an expert witness regarding toxicology, but that decision as to whether proposed expert had requisite experience was unnecessary based on his unreliable methods.



Singleton v. Fifth Generation, Inc., No. 515CV474BKSTWD (N.D.N.Y. Sept. 27, 2017)

- ▶ Plaintiff commenced proposed class action seeking compensatory and injunctive relief for Defendant's allegedly false, deceptive, and misleading advertising and trade practices with respect to the promotion and sale of its Tito's Handmade Vodka.
- ▶ Plaintiff offered a food science expert with experience in the alcoholic beverage industry to opine on how Tito's compares in terms of quality and price with rival vodkas.
- ▶ The expert performed an analysis comparing Tito's Handmade Vodka to Smirnoff and Sky, which are all corn based vodkas, but did not include high end vodkas in his analysis based on a "personal gut call."



Singleton, cont'd

- ▶ NDNY allowed expert to testify on comparison of the vodkas despite his deposition that he excluded high priced vodkas from his analysis based on a “personal gut call.”
- ▶ Court reasoned that as non-scientific testimony, the Expert’s “somewhat shaky” methodology went to weight of evidence, not admissibility.



**Utica Mut. Ins. Co. v. Munich Reinsurance
Am., Inc., No. 612CV00196BKSATB (N.D.N.Y.
June 27, 2018)**

- ▶ Dispute between Insurer and Reinsurer regarding monies owed under the terms of reinsurance certificates.
- ▶ Insurer offered expert witness to opine on reasonability and good faith of Insurer's allocation of settlement payments among primary and umbrella policies.
- ▶ Reinsurer moved to preclude expert because subject of testimony was the ultimate legal issue to be decided by the Court.



Utica Mut. Ins. Co., cont'd

- ▶ NDNY allowed expert testimony on reasonability and good faith, because it was relevant and helpful to the Court, as it relates to legal conclusions within a specialized industry.
- ▶ Moreover, the Court reasoned that because there would be a bench trial, here is no danger that a jury would give too much credence to an expert's opinion or that an expert will usurp the Court's role in determining the law.



Observations

- ▶ District Courts wield considerable discretion to allow or exclude non-scientific expert testimony based on finding of technical or specialized knowledge.
 - ▶ Compare the permissive standard in Singleton (“shaky” methodology went to weight of evidence) to In re Pfizer (inadequately explained methodology led to exclusion of testimony)
- ▶ Practitioners must be vigilant to identify topic specific rules for admissibility of expert testimony:
 - ▶ Regression analysis for wage disparity (Forte v. Liquidnet Holdings)
 - ▶ Differential diagnosis for medical causation (N.K. by Bruestle-Kumra v. Abbott Labs.)



Observations Cont'd

- ▶ Courts presented with “scientific” expert testimony may perform in depth inquiry into scientific rigor of methods or conclusions. Rizzo v. Applied Materials
- ▶ However, some parties may escape the label of “science” and thereby avoid a review of the scientific literature, so long as they can show sufficient reliability within the relevant field. United States v. Gil, Restivo v. Hesseman.
- ▶ Several cases found expert testimony to be unreliable where experts failed to verify data provided by client. Forte v. Liquidnet Holdings, Zdziebloski v. Town of E. Greenbush.



PART II:

Cross-Examination of the Expert

Key Fundamental Strategies and Considerations



GENERAL CONSIDERATIONS

- HOW IMPORTANT IS AN EFFECTIVE CROSS?
 - WHAT DO JURIES WANT TO HEAR?
- 



PREPARATION OF THE CROSS

- IDENTIFY SHORT LIST OF KEY AVENUES OF ATTACK
 - *Poor Qualifications and/or Lack of Expertise*
 - *Rushed/Incomplete Analysis*
 - *Make the Defendant the Enemy*
 - *Bias*
 - *Make Expert Concede Your Key Case Points*
 - *Identify Convenient Truths/Faulty Assumptions*
- SHORT LIST OF GOALS – NO MORE THAN THREE
- RUN THE QUESTIONS WITH YOUR COLLEAGUE



DOs AND DON'Ts – EXECUTION IS EVERYTHING

- PLAN AND RUN THE SET-UP EFFECTIVELY
 - Make the Expert Agree You're Smart
 - Establish Equal Footing
- BE PATIENT
 - Never Interrupt the Expert – The Great Santini
- KNOW YOUR ENEMY
 - What Will the Expert Concede?
 - What Will She/He Never Concede?



DOs AND DON'Ts, cont'd

- NEVER OVERREACH
 - NEVER LET THEM SEE YOU SWEAT
 - NEVER LOSE CONTROL
 - LEAD, LEAD, LEAD
 - MAKE THE EXPERT TALK TO THE JURORS
- 



FINISH STRONG

- DON'T OVERSTAY YOUR WELCOME IN FRONT OF JURY
- YOU WILL WEAR OUT BEFORE THE EXPERT DOES



Michael S. Porter

Born and raised in Upstate New York, Mike attended Harvard University where he distinguished himself as a student leader. At Harvard, he was an Army R.O.T.C. scholarship recipient, four-year letter winner and captain of the varsity lacrosse team and elected by his peers to the student advisory board of the Harvard Varsity Club. Following his time in Boston, Mike returned home, earning his juris doctor degree from the Syracuse University College of Law.

After law school, Mike served four years on active duty in the United States Army Judge Advocate General's Corps, achieving the rank of Captain. While in the Army, Mike completed Airborne Training School at Ft. Benning, Georgia, and honed his trial skills as both a criminal prosecutor and criminal defense attorney while stationed at Ft. Riley, Kansas and Ft. Drum, New York.

Following his time in the Army, Mike returned home to Central New York to raise his family and practice law. In that time, he has grown his practice as a respected and successful trial attorney, devoting his entire law practice to the representation of injured individuals and their families in cases involving motor vehicle accidents, medical malpractice, product liability, and other categories of catastrophic personal injury. In his practice, Mike relies upon the guiding principles of hard work, devotion to client needs, and integrity in pursuit of the best possible results for his clients.

Between 2011 and 2014, Mike secured five results in excess of \$1 million for the firm's clients at *consecutive* trials – totaling more than \$9 million in those cases alone. This string of trial results is a testament to Mike's skills as a trial attorney, and to the unwavering focus and attention to detail that PNH provides to each and every client the firm represents.

Mike is currently a member of various local boards of directors and is an active member of the New York State Bar Association, Onondaga County Bar Association, and the New York State Academy of Trial Lawyers and various other local charities. He lectures frequently on a wide variety of topics that impact his profession. He resides in Fayetteville, New York with his wife and five children.

Education

- Syracuse University College of Law (J.D.) 1997
- Harvard University (B.A.) 1994

Admitted to Practice

- New York
- United States District Court (Northern & Western Districts)

Professional & Community Activities

- New York State Bar Association
- Onondaga County Bar Association
- Association of Trial Lawyers of America
- New York State Academy of Trial Lawyers
- Board of Directors, Fayetteville-Manlius Youth Lacrosse Association



Robert J. Smith Partner

Practices

Business / Corporate Formations & Transactions
Commercial Litigation
Complex Business Litigation
Construction / Surety Law
Healthcare Law
Insurance Coverage Disputes
Litigation / Trial Practice
Products Liability
Professional Liability Defense

Bio

Mr. Smith joined Costello, Cooney & Fearon in 1983 and has been a partner with the firm since 1988. Prior to joining the firm, he was a full-time professor of law at South Texas College of Law in Houston, Texas, where he is also licensed to practice law. He concentrates in the area of civil trial law with an emphasis on complex commercial litigation, insurance law, construction law, product liability and professional liability, particularly architects, engineers and owners within the construction setting. He was the chairperson of the firm's litigation department from 1991 to 2007. In January of 2008, he was elected the chief executive officer of the firm and continues in that position today.

He has successfully tried over 50 cases to jury verdict in both state and federal courts involving multiple catastrophic injury and wrongful death claims. In the commercial context, he has

successfully tried multi-million dollar claims ranging from construction delay claims to tenant tax allocation disputes. He is increasingly called upon to represent clients or act as an arbitrator or mediator in arbitration or mediation proceedings and to represent parties in disputes surrounding the management, ownership and control of closely-held business entities. He has substantial experience representing governmental entities and individuals, including legislatures and judges. Additionally, he has developed an expertise in the negotiation of leases, financing transactions and municipal agreements for several New York-based real estate developers.

Mr. Smith has lectured and written extensively on various issues involving civil trial law. Among the copyrighted articles he has published are A Practical Guide to Motions in Limine, Subsequent Remedial Measures in Federal Product Liability Actions, A Practitioner's Guide to Magistrate-Judges in Federal Court, Bad Faith Claims in New York, Practical Evidentiary Considerations in Crashworthiness Cases, and New York Insurance Litigation Update. He is also a co-author of the New York Paralegals Handbook. His numerous lectures have included presentations before the American Bar Association's annual convention, the International Association of Defense Counsel's annual meeting and across New York State for various organizations including the New York State Bar Association. He has been retained by the New York State Office of Court Administration to teach trial evidence to newly elected local judges.

Mr. Smith is a 1979 cum laude undergraduate of State University of New York at Brockport; he received his law degree with honors from South Texas College of Law in 1982.

Mr. Smith is admitted to practice before all New York State courts and the Federal Court for the Northern and Western Districts of New York. He is also admitted to and has argued before the United States Second Circuit Court of Appeals on several occasions. Mr. Smith is a member of the Onondaga County, New York, Texas and American Bar Associations and the Defense Research Institute. In September 2002, he was inducted as a Fellow into the American College of Trial Lawyers, and in 2004 he was admitted to the American Board of Trial Advocates. In 2005, he was selected to be a member in the International Association of Defense Counsel. From 2006 to 2015, Mr. Smith was voted by his peers for inclusion in "Best Lawyers in America" in the area of products liability and was more recently selected as "Lawyer of the Year" by Best Lawyers in the area of professional liability defense. He has also been named to the 2008-2015 editions of the New York Super Lawyers. In 2015 he was appointed to serve as a member of the Advisory Committee on Civil Practice. The advisory committee issues annual reports containing legislative proposals to amend the CPLR and judiciary law and also addresses other civil practice statutes and legal issues involving practice and procedure in New York's civil courts of superior jurisdiction.

Contact Robert Smith [via email here](#).

Education

South Texas College of Law, J.D., 1982

State University of New York at Brockport, cum laude, 1979

Admissions

New York

Texas

U.S. District Court, Northern and Western Districts

U.S. Second Circuit Court of Appeals

Memberships and Associations

Onondaga County Bar Association

New York Bar Association

Texas Bar Association

American Bar Association

Defense Research Institute

Community Involvement

New York State Bar Association, 2014, Advanced Insurance Coverage

New York State Bar Association, 2012, Advanced Insurance Coverage

New York State Bar Association, 2010, 2010 Insurance Coverage Update

International Association of Defense Counsel Annual Meeting in Colorado, 2009, Update on Commercial Litigation

New York State Bar Association, 2009, Additional Insured Coverage: Hot Topics and Critical Issues

New York State Bar Association, 2008, P/S- Basic Tort & Insurance Law Practice

New York State Bar Association, 2008, Can the Commercial General Liability Policy Survive?

New York State Bar Association, 2006, Update on Trucking Litigation and Claims

New York State Bar Association, 2006, P/S- Basic Tort & Insurance Law Practice

New York State Bar Association, 2004, Commercial Lines Insurance Coverage

New York State Bar Association, 2003, Insurance Coverage Issues: With a Focus on Personal Lines

New York State Bar Association, 2002, A Primer on Automobile Litigation

New York State Bar Association, 1998, Premises Liability

New York State Bar Association, 1997, Insurance Coverage Issues and Applications

New York State Bar Association, 1997, Practical Skills: How to Commence a Civil Lawsuit

New York State Bar Association, 1995, Practical Skills: How to Commence a Civil Litigation

American Bar Association National Convention in San Francisco, 1992, Use of Demonstrative Evidence

Copyrighted A Practical Guide to Motions in Limine

Copyrighted Subsequent Remedial Measures in Federal Product Liability Actions

Copyrighted A Practitioner's Guide to Magistrate-Judges in Federal Court

Copyrighted Bad Faith Claims in New York

Copyrighted Practical Evidentiary Considerations in Crashworthiness Cases

Copyrighted New York Insurance Litigation Update.

Lectures before American Bar Associations annual conventions, International Association of Defense Counsel's meetings, New York Bar Association meetings

Asked to teach trial evidence to newly elected local judges by New York State Office of Court Administration

New York Super Lawyers, 2008-2014 in the area of commercial/business litigation

Onondaga County Bar Associations Distinguished Pro Bono Service Award, 2006

International Association of Defense Counsel, inducted 2005-present

American Board of Trial Advocates, inducted 2004

American College of Trial Lawyers Fellow, 2002- present

"Best Lawyers in America" voted by peers in the area of products liability

"Lawyer of the Year" by Best Lawyers in the area of professional liability defense

Co-Chairperson of the 5th Judicial District Pro Bono Committee

Co-Author of New York Paralegals Handbook