

**SUPREME COURT OF THE  
STATE OF WASHINGTON**

Case No. 80251-3

(Court of Appeals No. 57011-1-I)

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VERNON BRAATEN,

Respondent,

v.

BUFFALO PUMPS, INC., et al.,

Petitioners.

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**RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF OF  
COALITION FOR LITIGATION JUSTICE, ET AL.**

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## ARGUMENT

The Coalition for Litigation Justice and several other organizations were granted leave to file an amicus curiae brief in support of the various petitions for review. This brief was filed on June 28, 2007. Respondent filed an answer to this brief on July 30, 2007.

The Court again granted leave to the same organizations to participate as amici after granting review in this case. Respondent sees no need for duplicative briefing and will rely on the previous response to this brief. Respondent would, however, like to amplify one point made previously.

The Coalition and petitioners' other friends cite several opinion pieces, without acknowledging that they were written by petitioners' own lawyers or lawyers for amici or other asbestos defendants. Respondent noted this at p. 9 of their previous response, but now wishes to provide details for the record.

Amici cite John W. Petereit, *The Duty Problem with Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, Toxic Torts and Env'tl L. 7 (Defense Research Inst. Toxic Torts & Env'tl . Comm. Winter 2005), at p. 7 of their brief. Mr. Petereit represents petitioner Crane Co. See the printout of the first

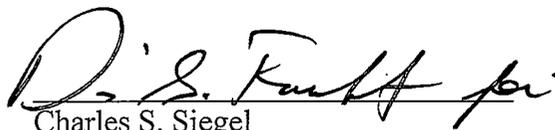
page of Mr. Petereit's column, stating that he "defends prominent manufacturers and contractors in toxic tort and products liability cases in Texas, and several other significant jurisdictions[,]” and a pleading for Crane, attached as exhibit A. At pp. 5 and 6, amici cite Thomas W. Tardy, III and Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin Columns: Asbestos, May 2007. Mr. Tardy and Ms. Frase are members of the firm of Forman, Perry, Watkins, Krutz & Tardy, which represents many asbestos defendants including General Electric Co. General Electric is technically a respondent in this case but supports petitioners in seeking reversal. The firm also represents Ingersoll-Rand Co., which has filed an amicus brief supporting petitioners, and numerous other asbestos defendants and insurers. See printout from the firm website, attached as exhibit B.

The authors of the Coalition brief even quote themselves at p. 8, citing Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002). The two principal authors of the brief are Mr. Mark A. Behrens and Mr. Victor E. Schwartz, both of whom are partners at the firm of Shook, Hardy & Bacon. The firm has long represented the insurance industry in asbestos litigation, and Messrs. Schwartz and

Behrens are counsel for the American Tort Reform Association. See their profiles at [www.shb.com](http://www.shb.com), viewed on February 19, 2008, attached as exhibit C.

One longtime defense counsel not cited by petitioners' friends is Patrick Hanlon. Mr. Hanlon is now teaching at the University of California Law School, but until 2007 was a dean of the asbestos defense bar. See academic profile and law firm profile attached as exhibit D, the latter identifying Mr. Hanlon as "counsel for several coalitions of defendants caught up in asbestos litigation in an effort to obtain federal reform legislation." See also Patrick M. Hanlon, *An Elegy for the Fair Act*, 12 Conn. Ins. L. J. 517, 582 n. a1 (2006) identifying Mr. Hanlon as counsel for the National Association of Manufacturers, one of the amici filing the brief. Respondent cited Mr. Hanlon at p. 10 n. 9 of his previous brief, noting Mr. Hanlon's statement that new asbestos filings have declined dramatically in recent years.

Respectfully Submitted,



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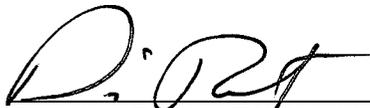
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## APPENDIX

- Exhibit A: Mr. Petereit's column and a pleading for Crane Co.
- Exhibit B: Printout from the website of the law firm of Forman, Perry, Watkins, Krutz & Tardy.
- Exhibit C: Profiles of Mark A. Behrens and Victor E. Schwartz, both of whom are partners at the law firm of Shook, Hardy & Bacon.
- Exhibit D: Profiles of Patrick M. Hanlon, a teacher at the University of California Law School; and a partner at the law firm of Goodwin Procter.



# The Duty Problem with Liability Claims against One Manufacturer for Failing to Warn about Another Manufacturer's Product



By John W. Petereit

John W. Petereit is member of Kirkpatrick & Lockhart Nicholson Graham LLP in Dallas. He is a former police officer who defends prominent manufacturers and contractors in toxic tort and products liability cases in Texas, and several other significant jurisdictions. His practice also includes policyholder insurance coverage and business tort litigation. Mr. Petereit was recently named a Texas Rising Star in 2005 by Texas Monthly and Law & Politics magazines. He is co-chairman of the Lawyers Promoting Diversity Committee for the Dallas Association of Young Lawyers. Mr. Petereit received his B.S. cum laude, from Truman State University (KJ) Northeast Missouri State University and his J.D. from Baylor University, where he was a member of the Baylor Law Review and Order of Barristers.

This article originally appeared in the Winter 2005 issue of Toxic Torts and Environmental Law, the newsletter of DRI's Toxic Torts and Environmental Law Committee. Reprinted with the author's permission.

As the title of this article indicates, the author strongly advocates that product liability law goes too far when it imposes a "duty" to warn or instruct about another manufacturer's products, even though a third party might use those products in connection with the manufacturer's own product.

Nevertheless, asbestos plaintiffs make such claims across this country against equipment defendants (such as pump and valve manufacturers) alleged asbestos-containing products affixed to the finished product of the defendants (such as asbestos containing flange gaskets and external insulation)—products neither made, sold, specified nor recommended by the manufacturers of the equipment.

Clearly, a "duty" to warn may exist for an unreasonably dangerous product. However, to argue that the absence of a warning for defects in other products (i.e., the external insulation) somehow makes unaltered, completed equipment defective is nothing less than "semantic nonsense" (*Garman v. American Clipper Corp.*, 117 Cal.6 Toxic Torts and Environmental Law Winter 2005 App. 3d 634, 638 (Cal. Ct. App. 1981)). It is not the product supplied by the defendant (equipment) but the product used in connection with the equipment (external insulation, flange gaskets) that may be defective for lack of warnings (See *Blackwell v. Phelps Dodge Corp.*, 157 Cal. App. 3d 372, 378 (Cal. Ct. App. 1984)). Therefore, regardless of whether phrased in strict liability, warranty or negligence terms, defense counsel must ensure that the plaintiffs and courts do not permit boundless, ludicrous duties.

In this article, we will explore the concept of duty and its role in warnings claims. Next,

we will look at several popular arguments put forth by plaintiffs in an attempt to impose a duty to warn with respect to another's products that are used in connection with the defendant manufacturer's product. Finally, we will evaluate counter-arguments and discuss a suggested defense strategy for eliminating the need for lengthy, costly defense of these absurd claims.

## The Concept of "Duty"

In general terms, "duty" is a question of whether one party is so particularly situated in relation to another as to create a legal obligation for the benefit of the other (W. Page Keeton *et al.*, Prosser & Keeton on Torts §53 (5<sup>th</sup> ed. 1984)). The concept of duty is firmly rooted in our law and remains an essential means of limiting a party's legal responsibility. It is no surprise then that the analysis of the existence of a duty is so hard to confine to a simple formula. As observed by Dean Prosser, as our ideas of human relations change, the law as to duties changes with them (Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 12-15 (1953)).

In recent years, the role of public policy as an influence upon the definition of human relations has greatly increased. As a result, in deciding questions of duty, courts across this country have considered such issues of public policy (overtly and off the record) as convenience, capacity to bear the loss, prevention of future harm, moral blame, changing social conditions, foreseeability, certainty of injury and many others. (See, e.g., *Vu v. Singer Co.*, 538 F. Supp. 26, 29 (N.D. Cal. 1981)). Thus, we must make a conscious effort to see that law is decided in a manner that achieves desirable social results.

EXHIBIT

A

tabbies



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CAUSE NO. 2006-08035

PHILLIP R. BRASSFIELD	§	IN THE DISTRICT COURT OF
<i>Plaintiff</i>	§	
	§	
vs.	§	HARRIS COUNTY, TEXAS
	§	
ALCOA, INC., et al	§	
<i>Defendants</i>	§	11 <sup>TH</sup> JUDICIAL DISTRICT

Transferred from

CAUSE NO. 06-562-L

PHILLIP R. BRASSFIELD	§	IN THE DISTRICT COURT OF
<i>Plaintiff</i>	§	
	§	
vs.	§	DALLAS COUNTY, TEXAS
	§	
ALCOA, INC., et al	§	
<i>Defendants</i>	§	193 <sup>RD</sup> JUDICIAL DISTRICT

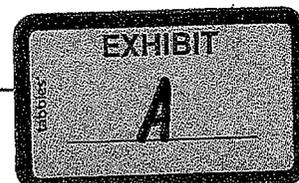
**DEFENDANT CRANE CO.'S RULE 58 ADOPTION AND JOINDER IN DEFENDANT YARWAY CORPORATION AND TYCO INTERNATIONAL INC.'S RESPONSE TO PLAINTIFF'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE DESIGNATED RESPONSIBLE THIRD PARTIES**

**TO THE HONORABLE JUDGE:**

COMES NOW Defendant Crane Co., and files this Adoption and Joinder of Defendant Yarway Corporation and Tyco International Inc.'s Response to Plaintiff's No Evidence Motion for Summary Judgment and Motion to Strike Designated Responsible Third Parties, and would respectfully show the Court as follows:

**I.**

**DEFENDANT CRANE CO'S RULE 58 ADOPTION AND JOINDER IN DEFENDANT YARWAY CORPORATION'S RESPONSE TO PLAINTIFF'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE DESIGNATED RESPONSIBLE THIRD PARTIES**



Crane Co. hereby adopts and joins in Defendant Yarway Corporation and Tyco International Inc.'s Response to Plaintiff's No Evidence Motion for Summary Judgment and Motion to Strike Designated Responsible Third Parties, in the above numbered cause of action because the arguments and authorities cited by Defendant Yarway Corporation and Tyco International Inc. are equally applicable to Crane Co.

Defendant Crane Co. adopts, joins, relies and incorporates herein for all purposes as if set forth at length in this pleading Defendant Yarway Corporation and Tyco International Inc.'s Response to Plaintiff's No Evidence Motion for Summary Judgment and Motion to Strike Designated Responsible Third Parties as a whole to avoid unnecessary and duplicative efforts and to avoid any unnecessary use of judicial resources.

**WHEREFORE, PREMISES CONSIDERED,** Crane Co. requests that the Court grant Defendant Crane Co.'s relief requested by Defendant Yarway Corporation and Tyco International Inc.'s Response to Plaintiff's No Evidence Motion for Summary Judgment and Motion to Strike Designated Responsible Third Parties and for such other and further relief, at law and in equity, to which Crane Co. may be justly entitled.

Respectfully submitted,

**Kirkpatrick & Lockhart Nicholson Graham LLP**

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DEFENDANT CRANE CO'S RULE 58 ADOPTION AND JOINDER IN DEFENDANT YARWAY CORPORATION'S RESPONSE TO PLAINTIFF'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE DESIGNATED RESPONSIBLE THIRD PARTIES

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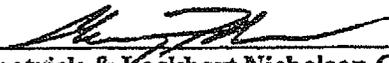
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I hereby certify that a true and correct copy of the above and foregoing motion was served on all other counsel of record via LexisNexis File and Serve on the 31 st day of October, 2006.

  
\_\_\_\_\_  
Kirkpatrick & Lockhart Nicholson Graham LLP

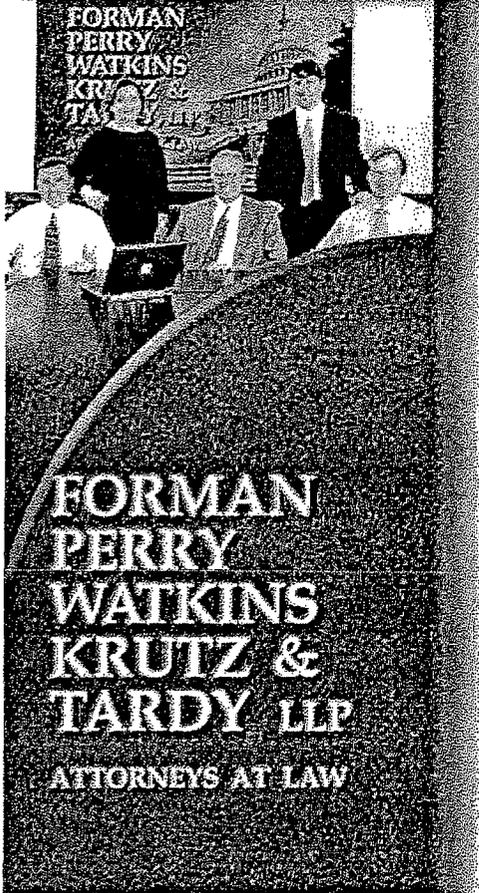
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DEFENDANT CRANE CO'S RULE 58 ADOPTION AND JOINDER IN DEFENDANT YARWAY  
CORPORATION'S RESPONSE TO PLAINTIFF'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT  
AND MOTION TO STRIKE DESIGNATED RESPONSIBLE THIRD PARTIES

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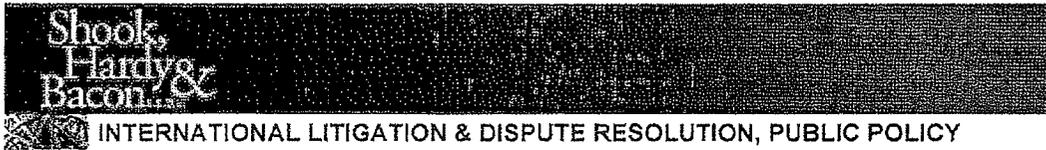


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- US Industries, Inc.
- Zurn Industries, Inc.



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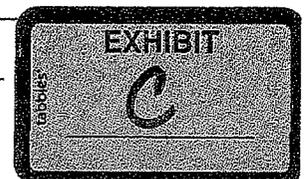
Mark has extensive experience in product liability law, defense litigation, liability reform and counseling in the prevention of liability exposure. He has served on the adjunct faculty of The American University, Washington College of Law.

Mark has been listed by *Washingtonian* as one of D.C.'s "top lawyers" (Dec. 2007). He has published numerous articles on tort and civil justice issues in leading national journals including the *Harvard Journal on Legislation*, *Cornell Journal of Law and Public Policy*, *Texas Review of Law & Politics*, and *University of Pennsylvania Journal of International Business Law*, among others. Mark's other legal honors include a Burton Award for Legal Achievement for his writing and an award from several national organizations for major research contributing to civil justice issues. *Business Insurance* named Mark in its 2004 "40 Under 40" list. He has been quoted in publications such as *The Washington Post*, *The Wall Street Journal*, *The New York Times*, *The National Law Journal* and the *Journal of Commerce*. He has also appeared on radio programs and television segments including *CNBC*, *Bloomberg*, *CNN*, *MSNBC*, *Fox Morning News (D.C.)* and *C-Span*. *The Insider Guide to Public Policy Experts and Organizations* lists him as an expert in tort and civil justice reform, health care reform, and the judiciary. He has the highest ratings for Legal Ability and General Ethical Standards under the Martindale-Hubbell Peer Review Ratings system.

Mark is a member of the Product Liability Advisory Council, Inc., co-counsel to the American Tort Reform Association, co-counsel to the Coalition for Litigation Justice, Inc., co-chair of the Federalist Society's Tort and Product Liability Subcommittee, Advisor to the American Legislative Exchange Council's Civil Justice Task Force, and a member of the Washington Legal Foundation's Legal Policy Advisory Board. While in law school, Mark was Associate Articles Editor of the *Vanderbilt Law Review* and received an American Jurisprudence Award for achievement in tort law.

**Publications**

Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer Ex Rel. Coplín v. Fluor Corp.: Sound Policy Should be Restored to a Vague and*





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Victor E. Schwartz chairs the Public Policy Group at Shook, Hardy & Bacon. He co-authors the nation's leading torts casebook, *Prosser, Wade & Schwartz's Torts* (11<sup>th</sup> ed. 2005), and authors *Comparative Negligence*, the principal text on the subject. Victor's amicus briefs and articles on key public policy issues have been cited in decisions by the Supreme Court of the United States and state supreme courts.

Victor is former dean of the University of Cincinnati College of Law, and currently serves on its Board of Visitors. During his academic career, Victor litigated cases on behalf of plaintiffs, and secured the first punitive damages award in the Midwest against a manufacturer of a defective product.

Today, Victor serves as General Counsel to the American Tort Reform Association, and co-chairs the American Legislative Exchange Council's (ALEC) Civil Justice Task Force. He was a recipient of The Jeffersonian Award, ALEC's highest honor bestowed on persons in the private sector.

Victor is the only defense attorney in the United States to serve on the Advisory Committees of all three of the American Law Institute's *Restatement (Third) of Torts* projects: Products Liability, Apportionment of Liability, and General Principles.

Victor chaired the Federal Government's Inter-Agency Task Force on Product Liability and the Department of Commerce's Inter-Agency Task Force on Insurance and Accident Compensation. He was awarded the Secretary of Commerce's Medal of Excellence for his service.

He has been named by the *National Law Journal* as one of the 100 most influential lawyers in the U.S. and by *Washingtonian* magazine as one of the top lawyers and lobbyists in Washington, D.C.

**Publications**

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Victor E. Schwartz, Philip Goldberg & Christopher Appel, *Plaintiffs' Bar Campaign to*



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## Profiles

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### Patrick Hanlon

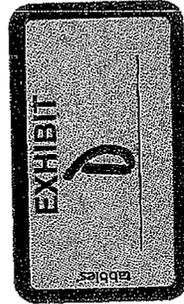
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Patrick Hanlon is visiting Boalt in Spring 2008 after 30 years of private practice. He has extensive experience in complex litigation and class actions, with a special emphasis on toxic tort, environmental, and product liability litigation. He also has had extensive involvement in the legislative process both in connection with mass tort liability and as counsel to public interest advocacy organizations seeking to protect the civil liberties of immigrants and others who come into contact with the Department of Homeland Security.

Hanlon's research focuses primarily on the place of civil liability in society's structures for regulating behavior that may adversely affect health, safety, and environmental and for compensating people who are injured as a result of such behavior. His interests include the operation of the U.S. tort system and alternative forms of compensation for mass injuries, comparison of U.S. and foreign compensatory regimes, representative and group litigation in the United States and abroad, the structure and functioning of the legal profession, and the U.S. legislative process.

Hanlon graduated in 1976 from the Harvard Law School, where he was article editor of the *Harvard Law Review*. He clerked for then Chief Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit and then joined Shea & Gardner, a Washington D.C. law firm that merged with Goodwin Procter in 2004. He is currently on leave from Goodwin Procter.

Hanlon has frequently spoken at conferences in the United States and Europe on mass tort litigation and legal ethics, and has been invited to speak at the Stanford University Interdisciplinary Seminar on Conflict and Dispute Resolution (2004), the University of Connecticut Symposium on Asbestos Litigation (2005), and the Brooklyn Law School Science for Judges Program (2006). He is also founding co-sponsor (with Professors Charles Yablon and Anthony Sebok of Cardozo Law School) of the New York Faculty Seminar on the Social and Economic Aspects of Mass Tort Litigation. His recent articles include "Asbestos Changes," in the *N.Y.U. Annual Survey of American Law* (2007); "Federal Asbestos Legislation: Wrestling with the Medical Issues," in the *Brooklyn Journal of Science &*



*Public Policy* (2007), "Elegy for the FAIR Act," in the *Connecticut Insurance Law Journal* (2006), and "Punitive Damages: Beyond Dogma" in *The Green Bag* (2003).

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## Areas of Practice

Patrick Hanlon, a partner in the firm's Litigation Department, has extensive experience in complex litigation and class actions, with a special emphasis on toxic tort, environmental, and product liability litigation and governmental affairs/legislative counseling in those areas.

## Work for Clients

Mr. Hanlon has represented defendants in large-scale class actions or consolidations involving ERTSA, the Price Anderson Act, RCRA, and state common law issues. He has also represented industry interests in energy and environmental litigation; and done extensive work on federal and state legislation involving asbestos litigation and health care issues.

Since 1997 Mr. Hanlon has been legal counsel for several coalitions of defendants caught up in asbestos litigation in an effort to obtain federal reform legislation. This work has involved extensive preparation for Congressional hearings (primarily before the House and Senate Judiciary Committees), preparation of numerous experts, legislative drafting and participation in an unusual and massive stakeholder mediation under the auspices of Senate Judiciary Chairman Arlen Specter and Judge Edward R. Becker of the U.S. Court of Appeals for the Third Circuit, among other things. Mr. Hanlon also provided legal advice to members of the ABA Committee on Asbestos Litigation, whose recommendations became a model for state litigation reforms adopted in six states.

In addition, Mr. Hanlon crafted legislation that established the functions of the Department of Homeland Security's Officer for Civil Rights and Civil Liberties. This legislation, enacted as part of the comprehensive intelligence bill in 2004, makes the OCRCL the primary advocate for civil rights and civil agencies in an agency whose activities require to face civil liberties issues on a daily basis. Mr. Hanlon worked with a consortium of public interest groups in the areas of immigration and civil liberties law in helping to shepherd this legislation through Congress.

Mr. Hanlon has also conducted many arbitrations and has represented the nation's major railroads in numerous "Presidential Emergency Boards" under the Railway Labor Act. less  
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**Professional Activities**

Mr. Hanlon has been very active in civic affairs. In 1988, he organized the United States Association for the U.N. High Commissioner on Refugees (USA for UNHCR) and currently serves on the Board of Directors of that organization. Mr. Hanlon has also been active in his local community, serving in leadership roles in numerous civic associations and citizens advisory committees in Northern Virginia, including eight years as member and six as vice-chairman of the Fairfax County Planning Commission. He has served since 1996 on the Board of the Northern Virginia Community College Education Foundation.

Mr. Hanlon presently sits on a 15-person committee appointed by the Vera Institute of Justice as part of the congressionally mandated Prison Rape Prevention Project. The committee is charged with studying the issue of sexual abuse in prisons, particularly as this affects persons held as immigration detainees.

**Publications/Presentations**

Mr. Hanlon frequently appears at CLE conferences in the U.S. and in Europe on asbestos and silica litigation. He is a founding co-sponsor (with Professors Charles Yablon of Cardozo Law School and Anthony Sebok of Brooklyn Law School) of the New York Faculty Seminar on Mass Tort Litigation, and in February 2004 he addressed the Stanford University Interdisciplinary Seminar on Conflict and Dispute Resolution on the Federal legislative process. He is the author or co-author of numerous publications, including "Asbestos Reform - Past and Future," *Mealey's Litigation Report: Asbestos*, v. 22, no. 5 (2007); "Asbestos Changes," 62 N.Y.U. Ann. Surv. Am. L. 525 (2007); "Federal Asbestos Legislation: Wrestling with the Medical Issues," presented at Brooklyn Law School Science for Judges Program (forthcoming in *Brooklyn Journal of Science & Public Policy*, 2007); "Elegy for the FAIR Act," 12 Conn. Ins. L. J. 517 (2006); "Asbestos Legislation: The FAIR Act Two Years On," 1 *Pratt's Journal of Bankruptcy Law* 207 (2005); "Developments in Premises Liability Law," study materials for ALI-ABA Course of Study on Asbestos Litigation in the 21st Century (2004); "Premises Liability," study materials for ALI-ABA Course of Study on Asbestos Litigation in the 21st Century (2003); "Punitive Damages: Beyond Dogma" in 6 *The Green Bag* 313 (2003); "The...more »

**Professional Experience**

Mr. Hanlon was a partner at Shea & Gardner prior to its combination with Goodwin Procter in 2004. Prior to his work with Shea & Gardner, he clerked for then Chief Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit.

**Bar and Court Admissions**

Mr. Hanlon is admitted to practice in the District of Columbia and Virginia. He is also admitted to practice before the U.S. Supreme Court; the U.S. Courts of Appeals for the Fourth, Fifth, Ninth, Tenth and District of Columbia Circuits; and the U.S. District Courts for the District of Columbia and the Eastern District of Virginia.

**Education**

J.D., Harvard Law School, 1976 (*cum laude*)  
Ph.D., Harvard University, 1974  
A.B., University of Chicago, 1967 (honors)

While attending Harvard University, Mr. Hanlon was a Woodrow Wilson Scholar and a Graduate Prize Fellow.

**SEARCH »**