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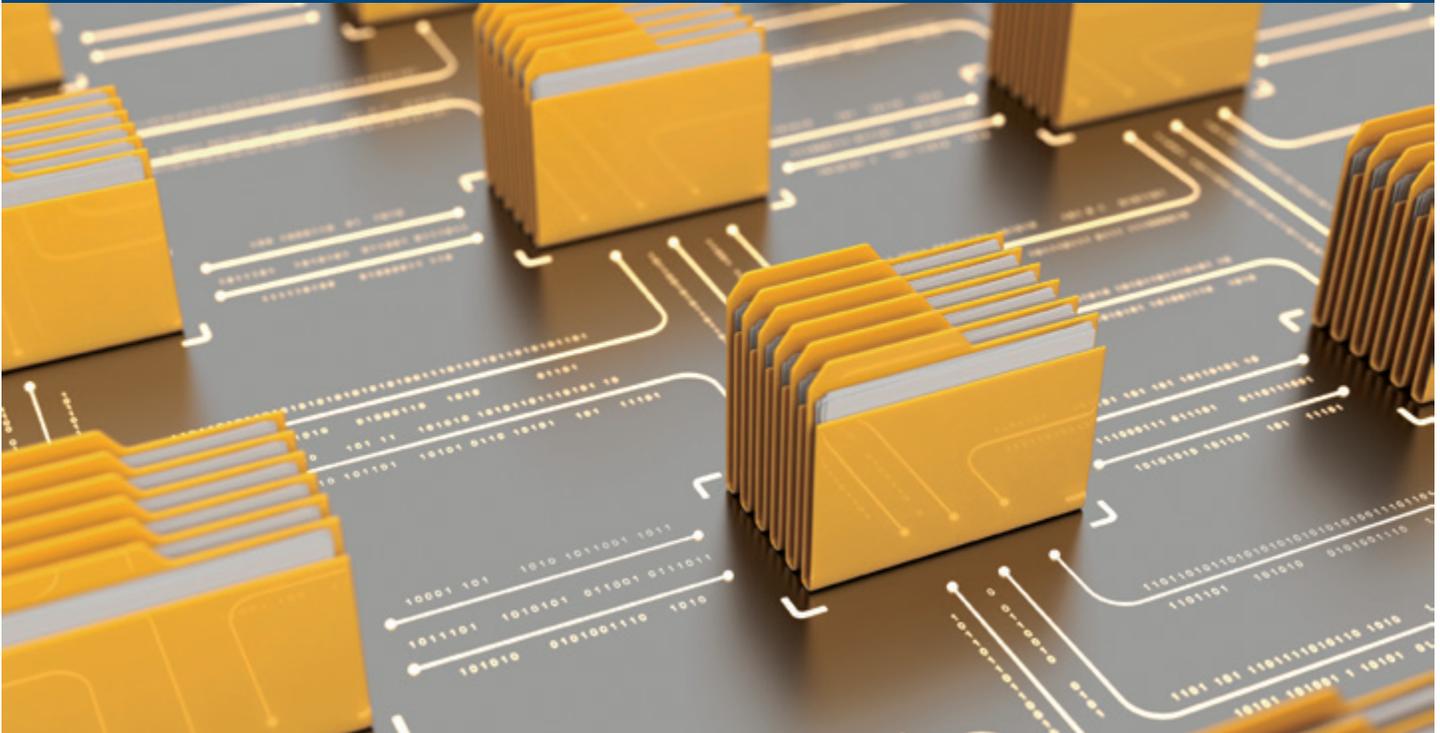
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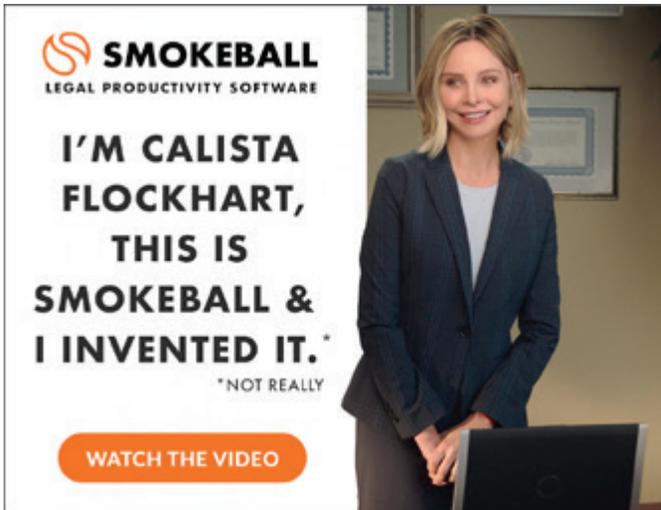


E-discovery and the Defense of a Product

By Leah A. Brndjar and David S. Osterman

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- Strictly Automotive, September 12-13, 2019
- Nursing Home ALF Litigation, September 19-20, 2019
- Talc Litigation: Medical and Scientific Issues, September 19-20, 2019
- Asbestos Medicine Seminar, November 14-15, 2019

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- Lateral Employee Hiring and Separation, August 27, 2019, 12:00 pm-1:00 pm CST

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- Nevada

Brian D. Blakley, Attorney, Lewis Roca Rothgerber Christie LLP

Loren S. Young, Managing Partner (Nevada Office), Lincoln Gustafson & Cercos LLP

New Member Spotlight

Megan L. Ware-Fitzgerald

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Quote of the Week

“To me, poetry is the tragic sense of man. It’s a way of seeing things in the most complete way, the most absolute, and, to a certain extent, the most perfect. Where there’s no poetry, there’s no beauty, and without beauty no kind of artistic work can exist.”

—Reinaldo Arenas (b. [July 16, 1943](#)), “The Literature of Uprootedness: An Interview with Reinaldo Arenas,” *The New Yorker* (Dec. 5, 2013).

This Week's Feature

E-discovery and the Defense of a Product

By Leah A. Brndjar and David S. Osterman



Modern litigation tactics require modern solutions. These simple e-discovery strategies can help navigate a complex and expensive process.

Reliance on technology, and the electronic data that comes from it, is ubiquitous today across all industries. In everyday business practices, employees communicate by email, draft presentations, track spreadsheets, and post social media content. Customers interact with companies by recorded telephone lines, through emails, and on social media platforms. Every one of these instances constitute “electronically stored information,” or “ESI.” When it comes to ESI, companies create and maintain it, and litigators live for it.

Even in this era of hyperbole, the sheer volume of what constitutes ESI is, in every sense of the word, massive. In the world of law, if faced with a lawsuit, this ESI can and will likely be discoverable information that pertains to the defense of your claims. When facing a product liability lawsuit, the old image of traipsing into a dusty library, funneling through some file cabinets, and pulling out folders full of documents to answer discovery requests no longer works. Instead, the searches that are now required are of custodians, emails, servers, and hard drives. The results are multiplied from what used to be hundreds of documents to what is now millions. Discovery production is measured in gigabytes, not page counts.

This process can be time-consuming, cumbersome, expensive, and frankly, overwhelming. But there are strategies that can help minimize the headaches.

Educate Yourself

The first issue is to understand the sorts of documents that are requested by the opposing party. Documents that relate to the design, manufacture, and labeling are most pertinent to the defense of any claim. However, with the onset of ESI, the requests typically now extend to include many of the thought processes that went into the design, manufacture, or labeling, i.e., emails about designs, changes, ideas, sourcing, presentations, costs, sales, customer input and reactions, and recording meetings.

Historically, this type of information wasn't recorded; rather, it would live and die in a conference room meeting, or potentially in the wastebasket after an early draft of something is replaced. Instead, now we have one- or two-line emails that serve as records of an idea or concern that is expressed and is forever memorialized.

While the day-to-day business operations can be informed by litigation considerations, the practical reality is that lawyers cannot and should not dictate how employees communicate about the creation and selling of products (despite their preference!). A portion of any litigation defense strategy should include training employees on what is and isn't safe to communicate in writing. Educate the employees so that they understand that every electronically or digitally recorded thing that they do could potentially be read aloud one day in court.

Understand which types of systems your company uses in its day-to-day course of business. Knowing whether you have a litany of public access drives, or one traditional file cabinet, should inform your company's approach to ESI requests.

Record Retention—Implement!

Record retention policies are an essential component of an ESI strategy. Retention policies are governed by the industry standards and pertinent federal or state regulatory requirements. The most important factor for ESI standards, though, is that they are actually implemented. Once a retention policy has expired, the relevant data should be deleted. While record retention policies for ESI are typically automated with software, experience has shown that just because a policy is in place, does not mean that deletion of documents or ESI has actually happened. In litigation, if these documents are not deleted, they potentially become discoverable. Assuming that they are responsive to the discovery requests, you are now obligated to produce more documents than otherwise could have been required. It is a simple, but important, concept. Ensure that your company applies all legally required record retention policies, and then do quality checks to make sure that they are applied.

Know the “Whos” and the “Wheres”

With most companies, there is a certain set of people or departments that are involved in the life cycle of a product, from inception to sale. Good plaintiffs’ attorneys will ask you to identify every person who has ever been involved in any part of the life cycle of a product, by name. Defendants should resist this effort. Knowing who the key “custodians” are can help you streamline the searches and often reduce the possible responsive data.

In addition to identifying the relevant custodians, you should also map out the pathways for where certain documents are stored. Companies can sometimes have a hodgepodge of systems in place, built up after years of adding new software or new product lines, and changes in corporate structures or departments. Adding in the typical turnover associated with employees in general, you may find that the same document has been saved 30 different ways, in 30 different places. This can lead to substantively duplicative document production. But in the world of ESI, the different versions would each constitute unique documents because of the different underlying metadata.

One way to combat this issue is to train one of the members of the IT department in the basics of litigation and to train one of the members of the legal department (or outside counsel) in the basic infrastructure of the company’s technology. Having each person serve as a liaison is an efficient way to streamline and target which systems need to be searched, over which time period, and for which custodians. It can also preemptively “de-dup” (de-duplicate) documents. It is akin to sifting through a paper file and removing what is unnecessary. While potentially time-consuming, it is valuable in the long run.

Hire the Experts

The final word of advice is to hire the experts! There are vendors and specialists that can assist in every aspect of dealing with ESI. Once a suit has been filed, lean on the experts (law firms or vendors) to help collect, review, and produce the documents. And on the backend of a suit, ensure that the data is appropriately discarded.

Leah A. Brndjar, a partner in **Goldberg Segalla’s** Princeton, New Jersey, office, has a diverse litigation and business background. Her practice includes defending matters in areas such as product liability, personal injury, and premises liability. She frequently appears before state and federal courts, on both the trial and appellate levels, and helps clients resolve their legal disputes through mediation and arbitration. Ms. Brndjar writes and presents on topics related to product exporting, importing, and labeling, provides clients cogent analysis of emerging compliance issues, and also helps clients craft litigation avoidance strategies.

David S. Osterman, a senior partner in **Goldberg Segalla’s** Princeton, New Jersey, office, focuses his practice on complex civil litigation, including commercial disputes, product liability, toxic torts, and class action litigation. Mr. Osterman has tried more than 50 cases to verdict in five states and the District of Columbia, and he has been lead counsel in successful defenses of several state and national class actions involving claims of consumer fraud, breach of warranty, medical monitoring, and product liability. He is a member of the DRI Toxic Torts and Environmental Law Committee.

And The Defense Wins

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your “wins,” including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in “And the Defense Wins,” and it may take several weeks for *The Voice* to publish your win.

Robert H. Berkes and Steven M. Haskell



DRI members [Robert H. Berkes](#) and [Steven M. Haskell](#) of **Berkes Crane Robinson & Seal LLP** in Los Angeles, California, won a defense verdict on behalf of Angela Niparko, as the personal representative of the estate of John K. Niparko, M.D. deceased, in a fraud action brought by the CEO of Enstar, Dominic Silvester, in the case captioned, *Dominic Silvester v. Angela Niparko as the Personal Representative of the Estate of John K Niparko, Deceased, et al.*, Los Angeles Superior Court Case No. BC574789.

The plaintiff, age 59, claimed that he was targeted by Johns Hopkins University and Dr. Niparko as a potentially wealthy donor and defrauded into donating \$2.5 million to Johns Hopkins Hospital for an endowed professorship, all while he was being treated for tinnitus. The plaintiff claimed that Dr. Niparko, his ENT doctor and the interim chair of the Johns Hopkins’ ENT Department, embarked upon a lengthy course of treatment that was unnecessary and harmful and which resulted in the plaintiff being misdiagnosed with, and treated for, a serious autoimmune disease, all as part of a scheme to encourage the plaintiff to invest over \$10 million in an ear institute to be run by Dr.

Niparko. The plaintiff had brought an earlier malpractice suit against Johns Hopkins Hospital, which was settled for a full release for all his treating doctors.

The defense asserted that the plaintiff enthusiastically embraced the idea of donating substantial sums for research into ear disease and that it was plaintiff’s idea and plan to assist Dr. Niparko in establishing an ear institute at Johns Hopkins Hospital or another research facility. The defense also showed that while he was treated at Johns Hopkins Hospital, Mr. Silvester consulted over a dozen doctors around the world about his diagnoses and his treatment. The defense also produced evidence showing that Dr. Niparko never misrepresented or concealed any aspect of his treatment or diagnoses and cooperated fully in providing complete information to all of the plaintiff’s consulting doctors. At this time, Dr. Niparko was world renowned for his research and practice in the field of cochlear implants. Dr. Niparko left Johns Hopkins in 2013 to become the chair of the ENT department at the University of Southern California, Keck School of Medicine. Dr. Niparko passed away in April of 2016, during the pendency of this lawsuit. California law allowed for the suit to continue against Dr. Niparko’s estate and the defendant’s insurer, MCIC.

The plaintiff claimed economic damages of \$357,143 (the amount that he paid toward the \$2.5 million pledge) and non-economic damages for emotional distress. The defense claimed that the plaintiff failed to mitigate his damages by twice refusing to accept Johns Hopkins University’s attempt to return his donation.

After a two-week trial and 90 minutes of deliberation, the jury returned a unanimous (12-0) verdict in favor of the defense.

DRI Cares

DMD Attendees Support D.C.-area Shelter

Once again, DRI Drug and Medical Device Seminar attendees supported a local host city charitable organization. During the Washington, D.C., conference this May, the committee and attendees supported the [Community for Creative Non-Violence](#) (CCNV). CCNV's 1,350-bed federal city shelter is the largest and most comprehensive facility of its kind in America. It has served over five million meals to D.C.-area residents since 1984. Its mission is to ensure that the rights of the homeless and poor are not infringed upon and that every person has access to life's basic essentials: food, shelter, clothing, and medical care.

In addition to the volunteers who went in person to the CCNV facility at the end of the seminar, many attendees generously donated money during the conference to allow DRI to present a sizable donation check to CCNV. Special thanks to Maggie O'Connor, who assisted the committee with electronic VENMO donations, and to all the attendees who went to CCNV ready to work on a Friday afternoon, including Enjolique Aytch, Kim Beck, Sheila Boston, Jim Craven, Sara Gourley, Caycee Hampton, Jeff Holmstrand, Heather Howard, Iryna Kastsyuk, Sherry Knutson, Peter Pappas, Erik Snapp, and David Walz.



Bags4Kids Thank You!



#DRICares and [Bags4Kids](#) thanks **Schwabe Williamson and Wyatt** for donating 1,000 combs and brushes for the Bags4Kids project! On October 18, the attendees of the 2019 DRI Annual Meeting will assemble 1,000 backpacks filled with personal items, to include a comb or brush, to handout to the foster care youth located in the New Orleans area. Thank you Schwabe Williamson and Wyatt for your generous donation!

dri™ 2019 ANNUAL MEETING
Bags4Kids
Community Service Project

DRI and #DRICares is delighted to be partnering with **Bags4Kids**, fulfilling 1,000 backpacks of personal items for foster children throughout the New Orleans area.

The majority of children placed in foster care come into the system with the clothes on their backs and nothing more. DRI would love your help providing these kids with toiletry items, small toys, and personal items. There will be special recognition to any person, firm, vendor, association or organization that commits to providing 1,000 of a particular item(s) on the [Bags4Kids AmazonSmile Wish List](#). Thank you for working with DRI and #DRICares in making the lives of others just a little bit better.

Any items ordered should be shipped, to arrive no later than October 9, to:
Foley Mansfield PLLC
 650 Poydras Street
 New Orleans, LA 70130

Ideas for backpacks:
<http://bit.ly/grlbckpck>
<http://bit.ly/Boybckpack2V7zv1b>
<http://bit.ly/irbckpck>

Items still needed:
<http://bit.ly/wtrbtls>

Each backpack will include:

- Shampoo
- Conditioner
- Shower Gel
- Lotion
- Toothbrush
- Toothpaste
- Deodorant
- Chapstick
- Water Bottle
- Stuffed Animal
- Gel Pens
- Notepad/Journal
- Crayons
- Playing Cards

The Defense Library Series: Insurance Policy Rescission Compendium



One of DRI's latest offerings from the **Defense Library Series** is entitled *Insurance Policy Rescission Compendium*, and it is a joint project between the DRI Insurance Law Committee and the DRI Life, Health, and Disability Committee. The compendium is intended to provide an overview of the law on insurance policy rescission in each of the 50 states, the District

of Columbia, and Canada's 10 provinces. It offers practitioners and their clients a roadmap for how to analyze and assess insurance policy rescission challenges successfully and to understand the full implications of rescission. This text is designed to provide the reader with a historical and current perspective of the law and the necessary litigation tools. Each of the chapters has been authored by a leading and highly respected member of the legal profession.

Access to the [*Insurance Policy Rescission Compendium*](#) is free for DRI members via [LegalPoint](#).

Security Is Only as Good as the Weakest Link: Legal Tech Security Measures Every Lawyer Must Take

Model Rule 1.6(c) stipulates that a lawyer must make reasonable efforts to prevent the disclosure of confidential client information. The comments to Model Rule 1.6 require lawyers to act competently to safeguard client information and to use reasonable safety precautions when transmitting a client communication. The exact meanings of “reasonable efforts,” “act competently,” and “reasonable precautions” may be subject to debate. However, doing nothing certainly won’t meet the standard. The good news is that you don’t have to be a security expert or techie to protect yourself and your office.

Learn how to cover all the bases of computer, smart-phone, tablet, email, wireless, and document encryption. We’ll also cover the fundamentals of backing up your electronic data. Half of the battle is simply knowing which questions to ask, and it’s not nearly as complicated as it sounds. Establish best practices in your office and discover the inexpensive or free tools that will make sure that your confidential information remains confidential.

If this On-Demand offering from DRI sounds valuable to you, [click here](#) to take advantage and check in *The Voice* for a newly featured item.

Upcoming Seminars

Managing Partners and Law Firm Leaders Conference, September 5–6, 2019

dri	Managing Partners and Law Firm Leaders Conference
	September 5–6, 2019 Denver REGISTER TODAY

DRI proudly presents this unique program specifically for managing partners and future law firm leaders. The keynote address will be by Craig A. Thompson, a partner at Venable LLP, who has more than two decades of experience handling civil cases in federal and state courts. He represents clients in the areas of commercial litigation, product liability, premises liability, and personal injury. Mr. Thompson also is active in leading law firm inclusion and diversity initiatives, and he served for five years as chair of Venable’s Diversity Committee. He will share his unique insight about law firm leadership and the tools necessary to lead in today’s challenging legal environment. Join us in the Mile High City for a high-value experience with those who most clearly understand your chal-

lenges and are, therefore, best able to provide you with solutions. [Click here](#) to view the brochure and to register for the program.

Strictly Automotive, September 12–13, 2019

dri	Strictly Automotive Seminar
	September 12–13, 2019 Columbus, OH REGISTER TODAY

Come join your colleagues and peers for two days of interactive learning at the DRI Strictly Automotive Seminar. Hear directly from manufacturers on what is important right now in automotive litigation and what is on the horizon with the advancement of new technology. For the first time ever, participants will travel off-site to attend a live crash test and learn alongside experts as they show the latest ways to help defend your automotive cases. [Click here](#) to view the brochure and to register for the program.

Nursing Home ALF Litigation, September 19–20, 2019

dri	Nursing Home/ALF Litigation Seminar
	September 19–20, 2019 Chicago REGISTER TODAY

Join us in the Windy City for unparalleled programming and networking for defense practitioners, in-house counsel, claims specialists, and other professionals involved in the defense of claims against nursing homes, assisted living facilities, and other long-term care providers across the country. This year, we will hear firsthand the current regulatory challenges facing post-acute operators, including an in-depth analysis of the state of affairs with the assisted living industry. With our panel counsel meetings, Women in the Law lunch, and other networking opportunities, there will be ample time for individuals to connect and collaborate. Register now to ensure your spot at the pre-eminent program in the field. New this year are two workshops designed to help you

build your practice: The Art of the 30(B)(6) Deposition Litigation Skills Workshop, and Defining Your Career Professional Growth Workshop, both on Wednesday. [Click here](#) to view the brochure and to register for the program.

Upcoming Seminars

Talc Litigation: Medical and Scientific Issues, September 19–20, 2019



dri Talc Litigation:
Medical and
Scientific Issues

September
19–20, 2019
Washington, DC

REGISTER TODAY

Over the past 24 months, there has been an avalanche of new cases involving allegations that there were measurable concentrations of asbestos in talc and that those fibers were allegedly responsible for causing mesothelioma. As has been claimed for 20 years, plaintiff experts often stated that any exposure to asbestos above background could be causal (e.g., “every fiber counts”) or that “every fiber contributes to the disease.” Defendants claim that this is inaccurate and irrelevant since there is ample information that no measurable concentrations of genuine asbestos fibers over 5 μm were detected in bulk samples of talc of the era. Interestingly, defendants have been losing a significant number of cases, and juries have, at times, concluded that huge awards were appropriate.

How can this seemingly “implausible” legal conflict over a product that was historically considered harmless have happened, and where is it headed? [Click here](#) to view the brochure and to register for the program.

Asbestos Medicine Seminar, November 14–15, 2019



dri Asbestos
Medicine
Seminar

November
14–15, 2019
Boston

REGISTER TODAY

Head down the pike to join new friends and old in the cradle of liberty this November! The 2019 DRI Asbestos Medicine Seminar will bring together a superb lineup of experts in the science and medicine of asbestos and top-flight litigators to the city on a hill—Boston, Massachusetts. With updates on recent U.S. Supreme Court and state court rulings that affect our ever-changing litigation, the latest on genetics in causation, and insights into cross-examination and deposition taking, this seminar has more touch-downs than Brady to Gronk. And do not miss out on the opportunities for business development during the breaks, mixers, and receptions, or even those over a cup of Dunk’s coffee before the day starts. Attendees at the 2019 DRI Asbestos Medicine Seminar will depart this city, which played a crucial role in American history, with the latest and greatest information to ride home and be revered by their peers! [Click here](#) to view the brochure and to register for the program.

Upcoming Webinars

The Reverse Reptile: Turning the Table on Plaintiff's Counsel (Replay), July 18, 2019, 12:00 pm–1:30 pm CST



Since 2009, Don Keenan and David Ball, the “reptile” founders, claim to have generated \$7.7 billion in settlements and verdicts. While that figure is staggering, it is very important to know that several well-prepared defendants have crushed the reptile attack in several areas of litigation. These defendants and their attorneys have adopted their own “anti-reptile” tactics that have been highly effective in discovery and trial. On the 10-year anniversary of the plaintiff’s reptile revolution, with no end in sight and their membership bursting at the seams, it is vital for the defense bar to understand the past and plan for the next 10 years of reptile maneuvers. Key individuals and entities have empirically studied the evolving reptile methodology and have tracked and defeated newer reptile tactics. Disseminating this information, as well as the newest “anti-reptile” tactics across the defense bar, is essential to future success. The newest of these tactics is called the “reverse reptile,” in which defense counsel can turn the tables on the plaintiff, experts, or other parties in a case. [Click here](#) to register.

Lateral Employee Hiring and Separation, August 27, 2019, 12:00 pm–1:00 pm CST



The presenters will discuss ethical considerations when hiring a lateral attorney as well as considerations when a lateral attorney leaves the firm. Participants will learn limitations on what laterals can do and not do before leaving a firm regarding the firm clients; firm communications when a key lateral is leaving the firm; conflict checks, ethical screens, and other considerations when hiring laterals; and the ABA rules pertaining to lateral hires. [Click here](#) to register.

Are You Ready for More Business? DRI Membership Directory

Are you ready for more business? If so, make it easy for another attorney, a law firm, an insurance company, or a new business connection to find you online—your experience, your particular expertise, in the right city, at the right time. Build your profile in DRI’s Membership Directory and help them find you.

Did you know that DRI’s Membership Directory is online, it’s free, and it’s what more than 10,000 attorneys and companies use every month to find someone like you? The DRI Membership Directory is searchable on a number of important variables.

Build your profile and keep it up to date (most important):

- Your firm and address
- Your practice areas
- Your professional biography
- The DRI committees to which you belong
- The DRI articles that you’ve authored
- Your DRI speaking engagements
- Your defense wins that are published in *The Voice*, DRI’s online newsletter, read by 20,000 members

As Mark Twain has said, “The secret of getting ahead is getting started.”

State Membership Chair/State Representative Spotlight

Nevada



State Membership Chair

Brian D. Blakley, Attorney, Lewis Roca Rothgerber Christie LLP

Areas of Practice: Litigation.

DRI member since 2016.

Brian's experience with DRI: "In addition to serving as Nevada's State Membership Chair, I am an active member of the DRI Young Lawyers Committee and the Southwest Regional Group. I am always happy to help my DRI colleagues with anything in Las Vegas, make restaurant recommendations, and—even better—get together for lunch."

Fun Fact: "I have two daughters, a son, and another baby boy on the way. When I am not at the office, I am usually at a basketball or volleyball practice."



State Representative

Loren S. Young, Managing Partner (Nevada Office), Lincoln Gustafson & Cercos LLP

Areas of Practice: Product liability, premises liability, and civil litigation.

DRI member since 2012.

Loren's experience with DRI: "Founding member of Las Vegas Defense Lawyers (LVDL) and inaugural president from 2011–2018 and worked with DRI to obtain official acceptance as SLDO for LVDL in 2018."

Fun Fact: "Love cycling. Ride multiple charity rides each year for cancer research, including a one-day, 206-mile ride."

New Member Spotlight

Megan L. Ware-Fitzgerald



[Megan L. Ware-Fitzgerald](#) is an attorney at Nelson Mullins Riley & Scarborough LLP in the Huntington, West Virginia, office. She is a member of the litigation team and focuses her practice on commercial litigation, financial ser-

vices litigation, and tax lien resolution. She is admitted to the West Virginia State Bar and the U.S. District for the Southern District of West Virginia.

Quote of the Week

“To me, poetry is the tragic sense of man. It’s a way of seeing things in the most complete way, the most absolute, and, to a certain extent, the most perfect. Where there’s no poetry, there’s no beauty, and without beauty no kind of artistic work can exist.”

—Reinaldo Arenas (b. [July 16, 1943](#)), “The Literature of Uprootedness: An Interview with Reinaldo Arenas,” *The New Yorker* (Dec. 5, 2013).