



The Voice of the
Defense Bar™

The Voice

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This Week's Feature



The Importance of an Effective Opening Statement

By Chris Cotter

The morning of the first day of a jury trial presents an interesting dichotomy. The lawyers, and the persons and companies that they represent, have spent the last several months or years in the shadow of this day, gathering facts, conducting discovery, deposing witnesses, working with and cross-examining experts, pouring over evidence, and otherwise attempting to understand every facet of the case in defense of the lawsuit. In sharp contrast, there are perhaps eight or twelve people in the courtroom who had no plans to appear that day until they received a notice in the mail requiring their presence, and they know nothing about the facts, the evidence, or the testimony developed in the lawsuit.

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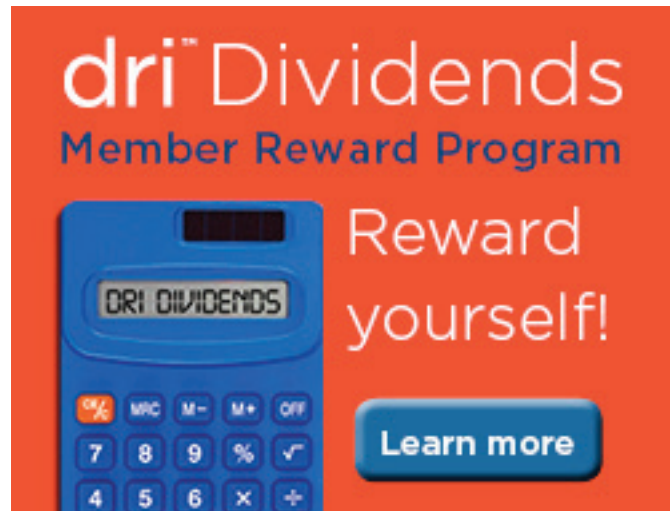
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Upcoming Seminars

- Insurance Bad Faith and Extra-Contractual Liability Seminar, June 5-7, 2019
- Trucking Law Primer, June 26, 2019
- Young Lawyers, June 26-28, 2019
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Upcoming Webinars

- Separating Association from Causation Using Epidemiology, May 21, 2019, 1:00 pm–2:00 pm CST
- Collecting and Preserving ESI to Effectively Defend Motor Carriers and Drivers After Implementation of the ELD Mandate, June 7, 2019, 12:00 pm–1:00 pm CST
- Friction or Fiction: The Changing World of Slip-and-Fall Analysis, June 12, 2019, 12:00 pm–1:00 pm CST
- Preemption in Drug and Medical Device Cases: An Overview and Hot Topics, June 20, 2019, 12:00 pm–1:00 pm CST

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Elizabeth F. Fulton, Hall Booth Smith PC

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Quote of the Week

“One of the marks of a gift is to have the courage of it.”

—[Katherine Anne Porter](#) (b. May 15, 1890), Katherine Anne Porter: Conversations (1987 ed.).

This Week's Feature

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The morning of the first day of a jury trial presents an interesting dichotomy. The lawyers, and the persons and companies that they represent, have spent the last several months or years in the shadow of this day, gathering facts, conducting discovery, deposing witnesses, working with and cross-examining experts, pouring over evidence, and otherwise attempting to understand every facet of the case in defense of the lawsuit. In sharp contrast, there are perhaps eight or twelve people in the courtroom who had no plans to appear that day until they received a notice in the mail requiring their presence, and they know nothing about the facts, the evidence, or the testimony developed in the lawsuit.

The opening statement is the moment when the jury first hears the facts of the case, to understand who the witnesses will be and to learn why the jury should decide in favor of the defense. The defense lawyer can choose to give a run-of-the-mill recitation of facts read from note cards, or the defense lawyer can choose to give a persuasive and powerful presentation that makes an impression and creates a framework for the jury to work from throughout the case. The latter requires preparation, thought, and a little creativity. And the results are well worth it.

In the days and weeks leading up to the trial, the defense lawyer should talk with nonlawyers (i.e., family and friends) about the facts of the case. Their thoughts and feedback are extremely valuable and will be helpful in developing the theory and theme of the case. The theory of the case must be logical and plausible. It must be factually strong, supported by the evidence that will be presented in the case. It must be simple. And it must lead to the correct legal result. The theme of the case gives the jury the *moral* reason to decide in favor of the defense. In a case involving a slip and fall at a grocery store, the theory of the case for the grocery store could be as follows: The liquid that the plaintiff slipped on was observable to anyone who would have looked at the floor before walking through it. The theme could be personal responsibility.

Also, before that first day, the defense lawyer should organize the opening statement by selecting the most persuasive facts and evidence and deciding on the order in which to present them. Organization and a coherent

presentation are so important because of the knowledge gap that exists the morning of the first day of a trial. The jury knows nothing about the case. The defense lawyer must place herself or himself in the position of the jurors, and he or she must construct the opening statement in a way that allows the jurors to take it all in. The attention that the jury gives to the attorneys during opening statements is perhaps the most that it will give to the attorneys during the entire trial. The defense should award the jury for that attention, by presenting the defendant's case in an organized and helpful manner.

Visuals are the key to helping the jury understand and remember the case. While the adage "people remember 20 percent of what they hear, but 80 percent of what they see" may not be statistically accurate, the point is clear. Visuals such as a PowerPoint presentation can be a powerful tool. Every case involves a key photo, a central video, or a crucial document. The jury should see these in the opening statement. The defense lawyer should not fall into the PowerPoint habit of creating slides with bullet points and strings of text. The PowerPoint should be primarily a visual aid, not something for the jury to read.

One final step in preparation is the presentation itself. The defense lawyer should practice, practice, practice—in front of others and in front of the mirror. There is no substitute for repeated rehearsals. And the small, and occasionally significant, revisions to the opening statement that come from practice will be well worth it.

When giving the opening statement, the defense lawyer should talk with the jurors, not at them, and should make eye contact with each person. The opening statement should be delivered without notes. The defense lawyer should not argue or recite facts but tell stories, pausing after key points and repeating key sentences. Volume, cadence, and pace should be varied. Plain English should be used, with a preference toward small words, rather than big, everyday words, rather than legalese. By the end of the opening statement, the jury should be well acquainted with the defense's theory of the case and should have compelling reasons to consider the defendant's evidence and viewpoint throughout the rest of the trial.

Primacy is paramount. The opening statement is the first moment for the jury to hear and understand the case. The defense lawyer should seize that moment and make the most of it for his or her clients.

[Chris Cotter](#) is an attorney with the law firm Roetzel & Andress in Akron, Ohio. His national practice focuses on providing business counsel, litigation strategy, and

trial capabilities to transportation companies, product manufacturers and distributors, retail establishments, professionals, and other businesses and individuals. He serves on Roetzel's Emergency Response Team to address the issues immediately that may arise as a result of industrial accidents, personal injuries, or other catastrophes.

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.

Viiu Spangler Khare and Ryan T. Moore



DRI members [Viiu Spangler Khare](#) and [Ryan T. Moore](#) of **Berkes Crane Robinson & Seal LLP** in Los Angeles, California, won a defense verdict on behalf of CalPortland

Company on March 5, 2019, in the case captioned, *James Godber et al. v. Amcord, Inc., et al.*, Los Angeles Superior Court Case No. BC BC663471 (Mar. 5, 2019).

The plaintiff, age 77, was diagnosed with lung cancer in 2014. He claimed that his lung cancer was caused, in part, by his alleged occupational exposure to asbestos while working in the TV/film industry as a lighting technician from the late 1950s through the early 2000s. The plaintiff claimed that he saw others build TV/film stages with, among other products, CalPortland’s asbestos-containing Colton gun plastic cement in the 1960s and 1970s. The plaintiff also claimed bystander exposure to other construction products and direct exposure to asbestos-containing lighting equipment.

The defense claimed that the sole cause of Mr. Godber’s lung cancer was his extensive smoking history (37–50 pack/years). CalPortland also disputed Mr. Godber’s identification of Colton gun plastic cement and contended that if the jury believed that the plaintiff was exposed to asbestos from the gun plastic cement, the alleged exposure to Colton gun plastic cement was de minimis and not a substantial contributing factor to his disease.

The plaintiff asked the jury to award \$2.1 million in economic damages and \$6,000/day from 2014 through Mr. Godber’s approximate 10-year statistical life expectancy in noneconomic damages. The evidence during the

trial showed that the plaintiff received immunotherapy treatment and has had a such a successful response to the treatment that his cancer has stabilized. Moreover, the evidence showed that the plaintiff suffered from several smoking-related illnesses, including emphysema, and various other cardiovascular diseases. Defense expert cardiologist C. Alan Brown, M.D., opined that Mr. Godber’s cardiovascular life expectancy (assuming that he did not suffer from any form of cancer) was approximately two years.

After a four-week trial, the jury ultimately found that CalPortland did not cause or contribute to Mr. Godber’s lung cancer. The other remaining defendants were a studio lighting manufacturer and a lighting rental company. While the jury found that the lighting companies did contribute to Mr. Godber’s lung cancer, the jury allocated 60 percent of the responsibility to Mr. Godber for his smoking history, 7 percent to Marlboro—Mr. Godber’s preferred brand of cigarettes—and 3 percent to “others” for smoking in Mr. Godber’s presence. The jury allocated only 30 percent fault between the two lighting companies. Further, the jury rejected the plaintiff’s claimed damages and awarded only \$772,500 in economic damages and \$165,000 in noneconomic damages.

Franklin Beahm and Christopher Otten

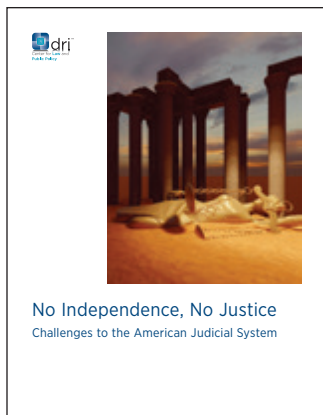


DRI members [Franklin Beahm](#) and [Christopher Otten](#) of **Beahm & Green** in New Orleans, Louisiana, successfully defended a hospital liability claim centering on the

post-Katrina environment, *Hitchens v. Touro Infirmary*. The plaintiffs, family members of the decedent patient, claimed that the conditions in the hospital caused or exacerbated the decedent patient’s preexisting health issues and caused or contributed to her death approximately one month after Hurricane Katrina. The plaintiffs sought damages in the amount of \$800,000. The case was tried to the judge, who took the matter under advisement and entered a defense judgment in favor of the hospital with written reasons in January 2019.

DRI News

DRI Publishes *No Independence, No Justice*



On May 10, 2019, DRI published the white paper titled *No Independence, No Justice*. The paper was researched and written by the Judicial Task Force of DRI's Center for Law and Public Policy and is the successor to two previous white papers on judicial independence, which were titled *Without Fear or Favor* (2007, 2011). The publication features sections on judicial

salaries and the independence of the courts, court funding, defending the courts against political attacks, educating the public on the special role of the courts, and developments in judicial selection and campaign funding.

Unlike *Without Fear or Favor*, which was published in hard copy, *No Independence, No Justice* is published as an electronic document. There are numerous advantages

to this. One, by making it available online, the publication carries minimal costs. Two, as a result, DRI is able to make the publication free to the public on its website, thereby increasing its circulation. Three, the publication can be easily updated by the addition of new chapters and the deletion or modification of existing chapters. Four, all chapters have a multitude of links to other organizations and publications, making it a valuable research tool to readers.

"Regardless of personal ideology or political persuasion, we all have a stake in the independence of the courts," says DRI Executive Director John R. Kouris. "All parties to a dispute are equals in the eyes of the court, but we must ensure that our courts enjoy that same equality as a co-equal branch of government without political or budgetary influences. *No Independence, No Justice* will be a useful and accessible resource to all who subscribe to its title."

The full text of *No Independence, No Justice* can be found [here](#).

DRI Call for Nominees: Annual Professional Achievement and Service Awards

Do you have a colleague who deserves recognition for his or her professional contributions? **DRI's Annual Professional Achievement and Service Awards** celebrate and honor outstanding performance by state and local defense organizations, DRI law firms, and individual members, and we are looking for nominees.

These awards aim to recognize individuals for their achievements on behalf of the defense bar and the civil justice system or their involvement in community and public service activities that have a positive effect on society at large. Recognition enhances members' personal growth and accomplishments, provides us all with role models, and

strengthens members' images in the legal and business communities and with the general public.

Please [download](#) a copy of our awards brochure and read how you can nominate a deserving individual, your organization, and its members. We encourage you to submit an entry for each award by **July 1, 2019**. Winners will be announced at the Celebration of Leadership on Friday, October 18, held in conjunction with DRI's Annual Meeting in New Orleans, Louisiana, from October 16-19, 2019. In addition, DRI will recognize award recipients in *For The Defense* and through press releases to national and local media.

New Episode of DRI's Podcast, "A Conversation with..."

This week's "A Conversation with..." podcast features Philip Willman, DRI President Elect, a principal with the St. Louis regional law firm of Brown & James. He devotes his trial practice to defending physicians, medical schools,

nurses, hospitals, nursing homes, psychologists, and other healthcare providers in medical negligence and healthcare lawsuits and medical device manufacturers in medical device litigation. [Click here](#) to listen to this episode.

DRI Cares

Foley & Mansfield Stuffed Animal Drive

Foley & Mansfield is conducting a firm wide drive to collect [small stuffed animals](#) for the DRI Annual Meeting this October in New Orleans to benefit kids in foster care


programs. The stuffed animals that the firm provides will be included in kids' backpacks with additional items provided by other DRI members and teams.




*Thank you for
working with DRI
and #DRICares in
making the lives
of others just a
little bit better.*

FIRM WIDE **STUFFED** ANIMAL DRIVE

Join our team in collecting new or gently used
stuffed animals for the DRI Annual Meeting this
October.



DRI and #DRICares has set a goal of assembling 1,000 backpacks filled with personal items to donate to foster kids throughout the New Orleans area through Bags4Kids. The majority of the children placed in foster care come into the system with the clothes on their backs and nothing more.

We've been challenged to provide 1,000 stuffed toys, so help us meet our goal! You can also purchase the pack of animals available at <https://tinyurl.com/dristuffed>

Please collect your office's toys and ship them to our New Orleans office (with a count please) no later than Monday, October 7, 2019.

DRI Cares



LegalPoint

Futuristic Technology Is Here to Stay: Latest Updates on 3D-Printed Medical Devices

From prominent news stories of patients receiving tailored, patient-matched devices, to featured storylines on popular television medical dramas, 3D printing has emerged as a fundamental tenet of the medical industry. 3D printing, formally known as additive manufacturing, is the process of making a three-dimensional object by depositing material, typically one layer at a time. The technological advancements afforded to the medical industry with 3D printing has forever transformed the reality of health care and will continue to evolve and encourage creativity and innovation by medical professionals in their daily practices.

Please take advantage of one of the many offerings that [DRI LegalPoint™](#) has to offer and review the resource, [“Futuristic Technology Is Here to Stay: Latest Updates on 3D-Printed Medical Devices,”](#) by Timothy E. Hudson and Mackenzie Salenger, from April 2018. DRI LegalPoint™

(formerly DRI Online) is a DRI members-only service that provides exclusive access to a vast online library of DRI articles, books, and materials. Members can search thousands of documents and filter them by practice area and resource. DRI LegalPoint™ includes content from these resources:

- *For The Defense*
- *In-House Defense Quarterly*
- Committee newsletters
- Defense Library Series (DLS) NEW
- Seminar materials
- DRI Defense Wins Reporter

On-Demand

Artificial Intelligence: Current and Future Applications in Legal Services

This program will introduce you to various technologies that are commonly referred to as artificial intelligence or cognitive computing. Several of these technologies, such as predictive coding and natural language processing, are already in use in legal in fields such as e-discovery, contract analysis, and legal research. Artificial intelligence (AI) is the next technological advancement that will revolutionize legal services around the world. DRI and Thomson Reuters

have joined forces to educate you about the effect that AI will have on your practice and the legal industry as a whole and how to incorporate these technologies into your operations successfully.

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

Upcoming Seminars

Insurance Bad Faith and Extra-Contractual Liability Seminar, June 5-7, 2019

| | |
|---|--|
|  | Insurance Bad Faith and Extra-Contractual Liability |
| |  |
| June 5-7, 2019 Washington, D.C. REGISTER TODAY | |

Bad faith claims against insurance companies continue to evolve, with potentially devastating consequences. DRI's Insurance Bad Faith and Extra-Contractual Liability Seminar is the preeminent program for insurance executives, claims professionals, and outside counsel who specialize in bad faith insurance litigation. You will hear from some of the nation's leading bad faith defense lawyers, who have a long history of winning these difficult cases, as well as many of the in-house professionals who manage significant bad faith litigation, and industry consultants who assist with these cases across the country and beyond. This seminar can attract record numbers, so we invite you to register early. Then, come enjoy this exceptional CLE and networking opportunity and the sights and sounds of Washington, D.C. [Click here](#) to view the brochure and to register for the program.

Trucking Law Primer, June 26, 2019

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|  | Big Rig Meets the Court Room A Mock Trial Primer in Trucking Law |
| |  |
| June 26, 2019 Nashville, TN REGISTER TODAY | |

The DRI Trucking Law Committee is hosting a defense litigation primer on how to try a trucking case, designed for young lawyers and those new to the practice area. This dynamic presentation centers on a trucking trial, with interactive segments that will include instruction, demonstration, and feedback from attendees. Experienced attorneys will guide attendees through a common trucking accident fact pattern and demonstrate trial methods and techniques used for effective representation of a trucking client at trial. With the opportunity for participants to engage in breakouts and analysis, this is a primer not to be missed! [Click here](#) to view the brochure and to register for the program.

Young Lawyers, June 26-28, 2019

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|---|--|
|  | Young Lawyers Seminar |
| |  |
| June 26-28, 2019 Nashville REGISTER TODAY | |

Welcome to Nashville, Music City and home to some of the best barbeque there is! This seminar is jam-packed with sessions to teach young lawyers practical skills while giving them ample opportunities to develop and grow meaningful, career-rocketing relationships. Join like-minded, enthusiastic young lawyers not only to develop critical skills, but also to create genuine friendships with top attorneys from around the country. Hear from engaging in-house and outside counsel alike on key issues such as voir dire techniques, making compelling opening statements and persuasive closing arguments, interfacing with the news media on behalf of your client, and more! [Click here](#) to view the brochure and to register for the program.

Appellate Advocacy, July 19, 2019

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|  | Appellate Advocacy Seminar |
| |  |
| July 19, 2019 Chicago REGISTER TODAY | |

This program will benefit all attorneys interested in appellate practice. All appellate practitioners, including seasoned appellate advocates, attorneys looking to branch into or build an appellate practice, and young lawyers, will learn relevant and practical skills to apply to their daily work. Moderators will pose thought-provoking questions and hypotheticals to panels of distinguished judges, practitioners, and academics who will share their knowledge of appellate practice, business development, legal writing, records on appeal, appeals of injunctions, and judicial recusal. As a bonus, the committee is teaming up with the National Foundation for Judicial Excellence (NFJE) to provide two sessions of joint programming and a joint networking reception at the end of the

seminar. [Click here](#) to view the brochure and to register for the program.

Upcoming Webinars

Separating Association from Causation Using Epidemiology, May 21, 2019, 1:00 pm–2:00 pm CST



Epidemiology is the study of the causes and patterns of diseases in populations. This science is essential to establishing general causation, that is, whether exposure to an agent is capable of causing a health effect. This webinar will provide an overview of epidemiology and explain how an exposure and a health outcome may be associated due to a causal effect or due to other, non-causal reasons. Examples will be given to illustrate how epidemiologists evaluate the weight of scientific evidence to determine whether general causation has been established. [Click here](#) to register.

Collecting and Preserving ESI to Effectively Defend Motor Carriers and Drivers After Implementation of the ELD Mandate, June 7, 2019, 12:00 pm–1:00 pm CST



During this “Lunch and Learn” webinar, attendees will hear from experienced lawyers and a senior claims specialist regarding the Federal Motor Carrier Safety Administration’s implementation of the ELD Mandate, the best policies and practices for ensuring that clients collect and preserve relevant and discoverable electronically stored information (ESI) in light of the new advancements in technology, and what ESI plaintiffs will be looking to obtain during discovery and how this information can be used to inflate the value of their claims. Attendees will take away practical tips that can be immediately implemented by their motor carrier clients and will be more knowledgeable regarding a plaintiff’s use of ESI and available technology to his or her advantage. [Click here](#) to register.

Friction or Fiction: The Changing World of Slip-and-Fall Analysis, June 12, 2019, 12:00 pm–1:00 pm CST



The past 10 years have brought significant advances in the field of reliable walkway slip analysis. At the same time, the inertia of decades of questionable analysis methods has not been overcome. Many “experts” still rely upon these questionable methods. This presentation, which features numerous case studies, takes an in-depth look at methodologies, research, standards, and practical applications of tri-bometer testing. A brief review of litigation considerations will be discussed as well. [Click here](#) to register.

Preemption in Drug and Medical Device Cases: An Overview and Hot Topics, June 20, 2019, 12:00 pm–1:00 pm CST



Federal preemption is a key defense in drug and medical device product liability cases, and the FDA’s regulatory framework is the ever-present background factor for our clients and for litigation involving their products. This webinar will provide a brief introduction to federal preemption, aimed at newer lawyers, before shifting to a robust discussion of strategically raising preemption defenses, and it will conclude with a forecast of where federal preemption is headed, particularly given the impending changes to the FDA’s 510(k) clearance program. [Click here](#) to register.

DRI Membership—Did You Know...

How to Break Out

Recently, a DRI member told us that her firm encouraged her to raise her profile in the legal community because she had significant experience and insight to offer and it would help her professional progress within the firm. She didn't need to hear that twice.

A quick call to DRI and she learned that she should join (*for free*) and participate in one or more of DRI's substantive law committees and work with her committee leadership to write an article or speak at an upcoming seminar. DRI's national magazines, *For The Defense* and

In-House Defense Quarterly, and *The Voice*, an online newsletter, are read by thousands of members of the legal defense community.

Another DRI member is getting it done—making connections, sharing her expertise, and raising her profile with an upcoming article in DRI's national publication *For The Defense*.

"Those at the top of the mountain didn't fall there."
(Unknown attribution.)

State Membership Chair/State Representative Spotlight

Maine



State Membership Chair

Steven Silver, Associate, Ogletree Deakins

Areas of Practice: ERISA litigation, sports law, and entertainment law.

DRI member since 2017.

Steven's experience with DRI: "I joined DRI in 2017, at the recommendation of my mentor, Byrne Decker. Since then I have attended the ERISA Bootcamp in Chicago and the Life, Health and Disability Seminar in Boston. Those experiences were immensely valuable in terms of substantive legal learning and networking. I have taken on the role as the Maine State Membership Chair and the DRI Young Lawyers Committee Vice Liaison to the DRI Life, Health and Disability Committee.

Fun Fact: "Before law school, I was a sports reporter for the Las Vegas Sun and currently teach a class about sports betting at the University of Maine School of Law."



State Representative

David Very, Member, Norman Hanson & DeTroy LLC

Areas of Practice: Professional liability, product liability, transportation/trucking, and general liability.

DRI member since 2011.

David's experience with DRI: "I have enjoyed being the DRI State Representative from the great state of Maine. DRI's annual, regional, and leadership meetings have been great networking experiences for me. I look forward to my continued involvement in DRI!"

Fun Fact: "I enjoy driving my convertible with the top down in the dead of a Maine winter."

New Member Spotlight



Elizabeth F. Fulton, Hall Booth Smith PC

[Elizabeth F. Fulton](#) is a senior associate attorney with **Hall Booth Smith PC** in its Charleston, South Carolina, office. She is a trial attorney with a wide-ranging practice within the insurance defense industry. Her practice focuses on premises liability; transportation and trucking; negligent security and hiring; professional negligence; toxic mold exposure; first-party bad faith; subrogation; and commercial and residential landlord-tenant disputes.

Ms. Fulton is a *cum laude* graduate of Charleston School of Law. She is admitted to practice in South Carolina, the

U.S. District Court of South Carolina, and the Fourth Circuit Court of Appeals.

Her community involvements include the South Carolina Bar Foundation as an ambassador; the South Carolina Bar House of Delegates, Ninth Circuit; and the South Carolina Lawyers Fund for Client Protection. She is also an Advisory Board Member for Lowcountry Street Grocery (a mobile farmers market dedicated to service food deserts in the Charleston area) and a tour guide for the History Charleston Foundation Festival of Homes and Gardens.

Quote of the Week

“One of the marks of a gift is to have the courage of it.”

—[Katherine Anne Porter](#) (b. May 15, 1890), Katherine Anne Porter: Conversations (1987 ed.).