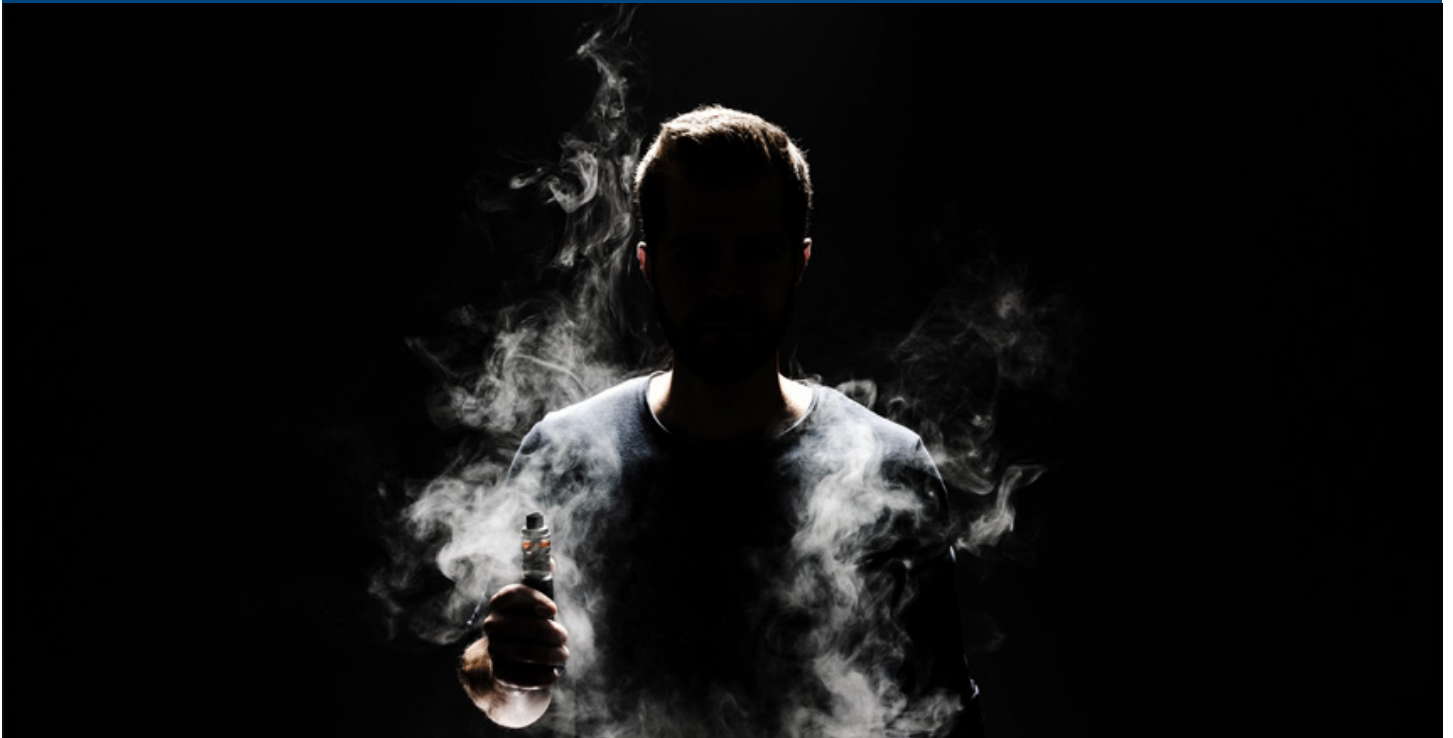


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Does the Cloud of Vaping-Related Injuries Portend a Storm of Litigation?

By J. Mark Adams Jr., Alexander G. Thrasher, and Whitt Steineker

Electronic cigarettes and vaping have been heralded by many as a safer alternative to smoking traditional cigarettes. An outbreak of illnesses last fall allegedly related to vaping, however, ignited public hysteria and will almost certainly lead to substantial mass tort litigation aimed at manufacturers of e-cigarette devices and vaping liquids. Similarly, because many e-cigarette and vape manufacturers have placed the blame on THC-containing products, the cannabis industry can expect a rash of lawsuits as well. Manufacturers of these products need to be well prepared to defend against a potential wave of complex product liability litigation.

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DRI Membership—Did You Know...

- DRI's Defense Library Series—It's Free, It's Online, and It's Knowledge that You Can Use

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New Member Spotlight

Ryan Hathcock, Drew Eckl & Farnham LLP

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Quote of the Week

“This year’s Youth Day occurs as the lives and aspirations of young people continue to be upended by the COVID-19 pandemic. Some have lost their lives, and many have seen family members and other loved ones perish. ... But this generation is also resilient, resourceful and engaged....I call on leaders and adults everywhere to do everything possible to enable the world’s youth to enjoy lives of safety, dignity and opportunity and contribute to the fullest of their great potential.”

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This Week's Feature

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According to the final update by the Centers for Disease Control and Prevention (CDC) on e-cigarette, or vaping, product use-associated lung injury (EVALI), as of February 25, 2020, 2,807 cases of EVALI and 68 deaths had been linked to vaping. At the onset of the illnesses, many news reports speculated that the use of THC oil was at least partly to blame, and the U.S. Food and Drug Administration (FDA) issued a [MedWatch Safety Alert](#) in September 2019 to consumers warning against the continued use of THC-containing vaping products. According to the FDA, early reports indicated that many samples tested by both states and the administration contained THC and vitamin E acetate, a substance used in topical consumer products but on which there is limited data on the effects of inhaling it.

Although the FDA pointed out that more information was needed to understand the relationship between specific products and the reported illnesses, the FDA urged consumers to “avoid buying vaping products from the street” and “to refrain from using THC oil or modifying/adding any substances to product purchased in stores.” In an October 4, 2019, [consumer update](#), the FDA further explained, “No one substance has been identified in all of the samples tested. Importantly, identifying any compounds that are present in the samples will be one piece of the puzzle but will not necessarily answer questions about what is causing these illnesses.” Ultimately, the CDC identified vitamin E

acetate as the “primary cause of EVALI,” but this finding alone may not be enough to insulate other manufacturers from allegations of product liability.

Despite the decline in EVALI since last fall, the potential consequences for manufacturers have been worsened by a rise in vaping among teenagers. In 2018, then-FDA Commissioner Scott Gottlieb voiced his commitment to getting vaping products out of teens’ hands, and the FDA imposed regulations restricting the availability of flavored vape products at certain stores. Then, on September 11, 2019, President Trump announced a plan to ban the sale of e-cigarettes in flavors other than tobacco in a more aggressive effort to curtail the rise in vaping among teenagers. Senators Jeff Markley (D-OR) and Mitt Romney (R-UT) responded to the president’s announcement by introducing legislation to the same effect, but no action on that legislation has since been taken. In February of this year, however, H.R. 2339, the Protecting American Lungs and Reversing the Youth Tobacco Epidemic Act of 2020, was passed in the U.S. House of Representatives and sent to the U.S. Senate. Although the Senate has not yet taken up this legislation, it seems unlikely that legislative focus on this issue will altogether disappear.

In many ways, these circumstances produced a perfect storm that has captured the attention of the mainstream media. EVALI involves a “new” product that the public does not fully understand and marijuana, a topic that is politically and socially divisive. A number of implicated manufacturers are based in foreign countries, China in particular. And, moreover, the science may not be sufficiently developed to prove or disprove either side of any allegations. These conditions are ideal for the development of widespread litigation with all types of claims ranging from the credible to the baseless.

The crossroad of vaping and THC-containing products makes this situation particularly appealing for critics and troublesome for manufacturers. Quite simply, because vaping and state-legalized marijuana use are relatively recent developments, the medical community does not have sufficient reliable data regarding the long-term effects of vaping and THC ingestion on the body. Just as it took

This Week's Feature

decades for medicine to understand fully the detrimental effects of traditional smoking, it will likely take years before medical science can sufficiently evaluate allegations of injuries caused by vaping.

Unfortunately, this lag in supporting science has seldom, if ever, stopped the pursuit of mass tort litigation, which can be very effective, based on public opinion alone, if it is not properly managed by experienced defense litigators. One needs to look no further than the explosion of thousands of plaintiffs claiming that the use of talc-containing products led to their cancer. While talc-containing products are still used daily by thousands of consumers worldwide and have been recognized as safe and effective by the scientific community, that has not prevented plaintiffs and their attorneys from naming manufacturers in widespread litigation across the country.

Although EVALI cases have fallen significantly since the startling spike last fall, we anticipate an increase in cases involving a variety of product liability claims against manufacturers throughout the supply chain. Plaintiffs will allege that manufacturers at multiple tiers failed to warn consumers adequately about the risks associated with the use of e-cigarettes, vaping liquids, and other aftermarket or homemade products. It is also likely that plaintiffs will assert claims alleging that defendants' manufacturing processes are flawed, or their products are designed in a way that caused the plaintiffs' injuries. Moreover, as would be expected in all mass tort litigation, credentialed experts will not be in short supply to opine on various manufacturing and design defects related either to the e-cigarette devices or the liquid formulations that are turned into an inhalable substance.

While couched as traditional product liability causes of action, potential cases likely to arise from these illnesses are unique because of the intersection of the relatively modern e-cigarette technology and the use of THC-containing products. To minimize the significant exposure presented by these cases, manufacturers of e-cigarettes, THC oils, and other vaping products should act soon to evaluate potential exposure to claims from vaping-related illnesses. To start, these companies should engage skilled mass tort litigators with knowledge of cannabis products and experience in the fast-developing cannabis industry. All parties along the supply chain need to think carefully

and critically (and with advice of counsel) about methods of shifting risk exposure. These companies should consider liability-shifting provisions, such as indemnities and appropriate disclaimers related to alterations of a product. In doing so, these companies should be mindful that plaintiffs are nearly certain to allege that any alteration of the products was not only a foreseeable use of the product, but, perhaps, an intended use.

J. Mark (Mark) Adams, an associate with **Bradley Arant Boult Cummings LLP** in Birmingham, Alabama, maintains a diverse general litigation practice defending product liability and life sciences litigation, toxic tort litigation, business torts, and general commercial litigation. He has significant experience defending clients in product liability cases in state and federal courts across the country. Mr. Adams has defended manufacturers of products ranging from prescription drugs to tires, and as a member of the multi-district litigation national counsel teams for pharmaceutical manufacturers, he has extensive experience in all aspects of defending mass litigation. Mr. Adams is a DRI member.

Alexander G. (Alex) Thrasher is an associate in **Bradley's** Construction Practice Group in Birmingham who represents general contractors, subcontractors and owners across the country. He litigates complex commercial disputes between parties in state and federal courts and before the American Arbitration Association. In addition, Mr. Thrasher routinely counsels clients with respect to strategic business decisions and project planning and assists clients with contract drafting and review, contract administration, and lien issues. He is a DRI member.

Whitt Steineker, a **Bradley** partner who is also located in Birmingham, has devoted his legal career to representing companies that provide a wide range of goods and services. He provides clients of all types with litigation counsel, transactional advice, and practical strategies for growth. Mr. Steineker assists financial institutions that provide services to cannabis companies operating in Canada or states that have legalized cannabis under state law, advising on how to best comply with the complex state and federal laws governing the provision of financial services to cannabis companies. He is a DRI member.

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COVID-19

The Importance of Membership in a Pandemic

By Jodi V. Terranova, DRI National Director and Co-Vice Chair, DRI Membership Committee

The past five months have been challenging. On March 10, 2020, the governor of Virginia closed schools. On March 18, 2020, I began working from our three-bedroom condo. My husband and I had to create a new routine for our four-year-old autistic son, who thrives on consistency and needs school for socialization. Living in the heart of Arlington, Virginia, a few Metro stops from Washington, D.C., we never thought twice about urban living. I would walk a block to the Metro and be downtown at my office in 20 minutes. I never needed a home office, as our son would be sleeping when I would work at night. We have a handful of playgrounds within a mile walk. But, our Metro station closed, the playgrounds were locked, and I continued my medical malpractice defense work from a beanbag chair in our bedroom.

My calendar was no longer filled with the DRI Medical Liability and Health Care Law and the DRI Employment and Labor Law Committees' seminars, the Mid-Atlantic Regional Meeting, and the spring board meeting. Taking their places were countless Zoom "Happy Hours." I was able to catch a few noon coffee breaks with President-Elect Emily Coughlin. I attended the timely webinars relevant to my practice, including *Litigation Against Nursing Homes/ALFs Following the COVID-19 Pandemic: Three Things to Do Now to Prepare*, discussing relevant legal aspects of COVID-19, and *COVID-19 and Its Effects on Communities of Color*, addressing health care disparities in the United States in communities of color. Many of my weekly DRI calls became Zoom meetings, and I was able to stay in touch with colleagues and friends who I would talk with regularly, but now see on a weekly basis. These webinars and Zoom calls made me feel connected, when I often felt isolated in my daily practice of law on my beanbag chair.

My work also continued as the co-vice-chair of the DRI Membership Committee. Anne Talcott, chair of the DRI Membership Committee, Gary Grubler, my co-vice chair, and the DRI staff felt that it was important to shift our bi-weekly membership leadership calls to weekly meetings.

While our committee is charged with recruiting new members to DRI, we temporarily put aside our recruiting efforts to do what DRI does best: we focused on our members. Our Membership Committee meetings, state membership chair meetings, and substantive law committee membership meetings became Zoom meetings. We shared stories of hand sanitizer hoarding; we compared how different jurisdictions were handling depositions, hearings, and trials in the time of COVID-19; and we discussed how everyone was handling the struggles with health, work, and families. If my membership in DRI has taught me anything, it is that my family's experiences, while different, were no less challenging than anyone else's.



My experiences through the pandemic also reinforced the importance of my membership in DRI and in my state and local defense organizations (SLDOs). One of the biggest challenges during the pandemic was and continues to be keeping up with the ever-changing status of court openings, tolling of statutes of limitations and other deadlines, and filing procedures. Luckily, there was Maryland Defense Counsel, Inc., D.C. Defense Lawyers' Association, and Virginia Association of Defense Attorneys. These SLDOs have been on top of the local legal climate.

Additionally, in the past few months, as many of us have moved to various phases of reopening, DRI has also shifted its seminars to the virtual format. One of the projects that kept me busy since the start of the pandemic has been tracking state immunity executive orders and statutes protecting health care providers from medical malpractice claims. Engagement in DRI has provided me with the opportunity to speak on this topic at the virtual Medical Liability and Health Care Law Seminar, on August 20-21, 2020, with fellow board member, James Craven. I encourage those of you who typically attend this DRI Medical Liability and Health Care Law Committee seminar to register so that we can catch up virtually.

COVID-19

For all the good days, and the not so good days, I'm grateful for our health and the health of our close family members and friends. I'm grateful for our son's amazing therapists. I'm grateful to my firm's leadership and my team of associates. I'm grateful to my husband for all he does. I'm grateful for the extra-long PB&J lunch breaks and too many viewings of the Disney *Cars* movie franchise with our son. I'm thrilled that the playgrounds are now open. I hope that everyone will wear a mask so that it is safe for my son to go back to school.

While I now go to the office two days a week to try to regain a bit of "normalcy," I am one of the few. Downtown

is empty and my colleagues are still working from home. Washington, D.C.'s "Black Lives Matter Plaza" is one block away, and I've watched as the boarded up windows have come down. I've conducted virtual mediations and virtual hearings, but it still feels far from normal. In those moments, I'm grateful for my connections to DRI and its members. I'm looking forward to seeing many of my DRI friends at the upcoming virtual [DRI Medical Liability and Health Care Law Seminar](#) and the virtual [Annual Meeting](#) in October. I hope you will join me.

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Ready, Set, Go: It's Time to Act, It's Time to Win

By Atoyia S. Harris



I have been a dedicated athlete for most of my life. I was a sprinter on the track team and played college basketball. Although I did not make it to the WNBA due to my 5'3" stature, I will always have an athletic mentality focused on real results, improvements, and wins. The recent brutality events against people of color have yet again demonstrated that we have not won the fight in overcoming racism. We are experiencing a new wave of the same anti-racism movement that we have been fighting about for decades. The recent murders of Breonna Taylor, George Floyd, Ahmaud Arbery, and so many others reignited the familiar concern of racial inequality and systemic racism experienced by the Black community. We have talked *ad nauseam* about racism, diversity and the benefits thereof, inclusion, and biases. Action and improvement, however, have been slow and in some instances, stagnant.

As a Black woman, I have personally experienced all forms of racism. Growing up in a small town in Louisiana known for its history of overt racism and racial division, I learned to persevere beyond racial barriers. I could not, however, have overcome those barriers without a strong support network of people in the community who mentored and guided me, and even advocated on my behalf. In elementary school, one of the two Black teachers, along with my mother, demanded that the school enroll me in an honors club, as I met all criteria and was at the top of my class. I later learned that I was the first Black student enrolled in this honors club. Without the persistent advocacy of my Black teacher and my mother, the school would not have included me.

As you may imagine by this experience in elementary school, I grew up in a predominately white environment. Thus, this concept of being the first Black person is a common theme in my life; I was the first Black president of my senior high school class, the first Black homecoming queen in my hometown, and the first Black woman associate at one of my prior firm's offices after law school. As a result of being the first, I often encountered people who had never worked with or engaged with a Black person and/or Black woman in these unique circumstances. Oddly, even in those moments, and even considering all of my hard work, people still said and did racist things and excluded me from

certain opportunities. To survive in that environment, I felt it necessary to put on a "mask" to avoid drawing attention to the color of my skin or any trait that may be perceived as "different." Then I realized my "mask" did not protect me from racism; so, I ultimately decided to embrace my differences, remain resilient, and fight for equality (like my Black elementary school teacher and my mother), so that people like my daughter will grow up in a more inclusive and less racist environment.

The recent anti-racism protests have taught us that this fight against racism is not just a minority issue—it's everyone's issue and everyone has a role on the team. The consistent message heard from this movement is clear—it's time for real results. I acknowledge that we cannot change the heart of every person who may dislike me and those who look like me solely because of our skin color; however, there are things that we can do to advance racial equality. Particularly in the legal profession, the push for more diversity and inclusivity has to be a collective effort. At minimum, we all should be a sponsor or mentor of at least one diverse lawyer. I can personally attest to the critical need and importance of being a diversity sponsor and mentor. Candidly, I would not have had certain opportunities if it were not for sponsors and mentors like Ricardo Woods, chair of the DRI Diversity and Inclusion Committee, who helped me overcome certain barriers. As a sponsor and mentor, I encourage you to develop a relationship with the person you support, such that you learn and understand their background, interests, and aspirations. Contrary to popular belief, we are not monolithic—not all diverse people are the same. Creating this genuine relationship and experience will help cultivate an inclusive environment and ultimately assist you in learning how you can contribute to your mentee's success.

Another way to improve diversity and inclusion in the legal profession is to become actively engaged in organizations whose focus is to improve the lack of diversity in the legal profession. Simply being a member, without any direct engagement, does not assist with moving the needle to a more diverse and inclusive profession. I encourage you to serve on committees and in board positions, and to make your voice heard on the importance of diversity and inclusion.

DRI Voices

Additionally, when there is an opportunity to promote or assist a diverse lawyer, I encourage you to engage in that process proactively as appropriate. Let others know about the diverse lawyer's accomplishments and contributions to the firm, company, or organization. If you notice that a diverse lawyer is encountering challenges, speak up and find opportunities to help him or her through that challenge.

We are all responsible. We are all members of the diversity and inclusion team. Ready, set, go: it's time to act; it's time to win.

Atoyia S. Harris practices labor and employment at **Proskauer Rose** and is a member of Proskauer's Employ-

ment Litigation & Counseling Group. Ms. Harris has advised and successfully defended matters on a wide variety of issues, provides employment-based training and conducts in-house investigations. She was an appointed member of the 2017-2018 and 2018-2019 DRI Membership Committee. Ms. Harris is an active member of the DRI Diversity and Inclusion Committee currently serving as the Marketing Chair for the 2021 DRI Diversity for Success and Corporate Expo. Ms. Harris received her Bachelor of Music in Industry Studies with emphasis in classical piano from Loyola University New Orleans and was member of Loyola's Women's Basketball Team. She received her Juris Doctorate and International Law Certification from Loyola University New Orleans College of Law.

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DRI News

DRI Announces Its 15th Annual Diversity Law Student Scholarship Competition

DRI announces its 15th annual **Law Student Diversity Scholarship Competition** in which two \$10,000 scholarships will be awarded. The program is open to students who will be in their second or third year of law school in the 2020–21 academic year. Eligible are African American, Hispanic, Asian, Native American, LGBT, and multi-racial students. Also eligible are female law students, regardless of race or ethnicity and law students who come from backgrounds that would add to the cause of diversity, regardless of race or gender.

The goal of these scholarships is to provide financial assistance to two worthy law students from ABA-accredited law schools to promote, in a tangible way, the DRI Diversity and Inclusion Statement of Principle. Since its inception, the program has awarded \$300,000 in scholarships.

To qualify for this scholarship, a candidate must be a full-time student. Evening students also qualify for consideration if they have completed one-third or more of the total credit hours required for a degree by the applicant's law school.

Two scholarships in the amount of \$10,000 each will be awarded to applicants who best meet the following criteria:

- Demonstrated academic excellence
- Service to the profession
- Service to the community
- Service to the cause of diversity

Click [here](#) to access the scholarship application and information or go to www.dri.org. **Applications must be received by DRI no later than August 31, 2020.**

DRI Cares

Consider Supporting Mt. Hood Kiwanis Camp

Back in 2004, when the news was received that the fourth child of former DRI board member **Jeanne Loftis** and her husband Blair had down syndrome, the legal community, including DRI friends, reached out with support and encouragement! Over the last 16 years, this support has not diminished. **Joey Loftis** has attended a number of DRI board retreats, along with SLDO meetings in Wyoming, Montana, Washington, Idaho, and Oregon. He counts as his friends several DRI current and past presidents, including Toyja Kelly and daughter Ava. Joey's DRI-related travels have taken him to Cabo San Lucas and to the Amalfi Coast.

Back at home in Portland, Oregon, Joey regularly attends a summer camp, called **Mt. Hood Kiwanis Camp**,

where he and others with intellectual disabilities, enjoy rafting, rock climbing, and horse back riding during a week-long, sleep-away camp. During the COVID-19 pandemic, the challenge to MHKC and other summer camps is to maintain their operational structure and core so the camp can re-open when the pandemic ends. With this backdrop, over social media, Jeanne reached out to friends far and near, to join in the fun of a virtual auction to rally support for MHKC Camp. The auction was a huge success and now MHKC is running its annual Walk, Roll, or Stroll in the form of a virtual fundraiser. Feel free to check out www.mhkc.org and consider supporting team Joey Loftis!



Quinn Douglas

Why is it important to help other people who need our help?

Because they might be poor or sick and we need to help each other because God wants us to.

If you could put on a project to help out others, what would you do?

I would build houses with brick for people who do not have money.

What do you like daydreaming about?

Having any play date I want after the virus is over.

Tell me something about you that you think I might not know.

I snuck some Oreos and Capri Suns when my friend was over.

What's a memory that makes you happy?

My fifth birthday party and playing UNO with my mom and dad.

What do you look forward to when you wake up?

Cuddling with my mom.

At what age is a person an adult?

24

Do you think animals can talk?

Yes. But we cannot understand them.

What is the hardest thing about being a kid?

The hardest thing about being a kid is that if I am sick, I cannot play with anyone.



Quinn Douglas with little brother Julian

If you could give one gift to every kid in the world, what would it be?

iPad...(no judgment 😊).

If you could make one rule that everyone in the world had to follow, what rule would you make?

You have to care for others.

What is your perfect meal?

Chicken nuggets and French fries from McDonalds...(again no judgment 😊)

What do you want to be when you grow up?

Firefighter.

How can you make the world a better place?

By following God's rules.

Quinn is the daughter of DRI Diversity and Inclusion Committee Vice Chair [Stacy Douglas](#) of Collinson Daehnke Inlow & Greco in Torrance, California.

Upcoming Webinars



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DRI Membership—Did You Know...

DRI's Defense Library Series—It's Free, It's Online, and It's Knowledge that You Can Use

If you are not taking advantage of DRI's free online [Defense Library Series](#), you are leaving money on the table. Did you know that DRI tapped the experience and expertise of national defense leaders in their practice areas to author and publish more than 18 publications that are free and online to all DRI members?

Go to www.dri.org and log in to your membership account. Click on "Legal Resources," scroll down to "Access DLS Titles" and select it, and then select a **practice area**. Among others, in the **Drug and Medical Device** category,

you will find *FDA Basics for the Drug and Medical Device Lawyer*; in the **Insurance Law** category, you will find *Duty to Defend Compendium* and *Insurance Bad Faith—A Compendium of State Law*; in the **Intellectual Property Litigation** category, you will find *Remedies in Intellectual Property Cases*; and in the **Product Liability** category, you will find *Products Liability Defenses: A State-by-State Compendium*.

New Member Spotlight

Ryan Hathcock, Drew Eckl & Farnham LLP



Ryan Hathcock is a senior associate with **Drew Eckl & Farnham LLP** in Atlanta, Georgia. He is licensed to practice law in Georgia, Kentucky, and West Virginia. His practice is focused on representing employers, self-insurers, and insurance companies in workers' compensation in Georgia. In addition, he has participated in the representation of various large to small construction companies in construction litigation matters. Mr. Hathcock has pursued legal action on behalf of his clients in breach of contract claims and has assisted in the defense of multiparty litigation

claims involving wrongful death, contractor disputes, payment disputes, bond claims, collection enforcement, and engineering defects.

He earned his bachelor's degree in Finance from Auburn University before receiving his juris doctorate from the Walter F. George School of Law at Mercer University in 2012. When he is not working, Mr. Hathcock enjoys attending Auburn University and Atlanta-area sporting events. He also enjoys traveling abroad and spending time outdoors with friends and family.

Quote of the Week

"This year's Youth Day occurs as the lives and aspirations of young people continue to be upended by the COVID-19 pandemic. Some have lost their lives, and many have seen family members and other loved ones perish. ... But this generation is also resilient, resourceful and engaged....I call on leaders and adults everywhere to do everything possible to enable the world's youth to enjoy lives of safety, dignity and opportunity and contribute to the fullest of their great potential."

—António Guterres, U.N Secretary-General, [International Youth Day 2020](#) (Aug. 12, 2020) [message](#). [#youthday2020](#).