



dri

The Voice of the
Defense Bar™

The Voice

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- Your New Virtual Law Firm—FREE Webinar, April 2,
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Quote of the Week

"Courage is the most important of all the virtues because without courage, you can't practice any other virtue consistently."

— Maya Angelou.

This Week's Feature

Why Not Record It?

Legal Considerations for Recording Agency Phone Calls

By Jessica C. Richardson



Insurance agents may find themselves on the receiving end of an E&O claim based on a customer's claim: "I *asked* you to add the new business location to my policy," or "I *told* you to increase my coverage to \$1,000,000," or "You *said* I am entitled to replacement cost." Some agencies consider using a phone system that records calls as a tool to defend potential claims. Agencies should carefully evaluate applicable wiretap statutes, along with common law privacy concerns, when choosing whether—and how—to implement recording systems.

Most states apply an "order taker" standard to insurance agents, finding that an insurance agent's duty is limited to the duty of reasonable care and diligence, absent special circumstances. After a loss occurs, E&O claims can materialize when an insured claims that his or her agent failed to follow specific instructions. Without clear documentation of all conversations with the unhappy customer, these claims often result in he said/she said disputes decided largely on credibility. Recording agency phone calls can reduce E&O exposure and provide powerful evidence in defending against claims. However, recording calls is subject to both state and federal statutes and common law tort claims.

Referred to as the Wiretap Act, 18 U.S. Code Chapter 119—Wire and Electronic Communications Interception and Interception of Oral Communications, controls when and how a person or entity can intercept oral communication at the federal level. The Wiretap Act has teeth: although it is a criminal statute, it authorizes recovery of civil damages with or without proof of actual damages. 18 U.S.C. § 2520. A party proving violation can recover actual damages or statutory damages of \$10,000, or \$100 per day of violation, whichever is greater, plus punitive damages, attorneys' fees, and costs. Forty-nine states (all except Vermont) have similar wiretap statutes, and many of them mirror the federal statute both in requirements and damages provided.

Under federal law, a person who is a party to the conversation can record the conversation without penalty, even if the other participants are unaware that the conversation is being recorded. 18 U.S.C. § 2511(2)(d). This is often

referred to as "one-party consent." State laws may impose stricter requirements and require "two-party consent." Wiretap statutes in 12 states (California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington) and Puerto Rico require two-party consent. All other states' statutes parallel federal law, requiring one-party consent. Some statutes also provide a business exemption to statutory violations, which may apply to conversations between an insurance agent and customer. However, a phone system that indiscriminately records both personal and business conversations could run afoul of business exemption requirements. If relying on one-party consent to avoid liability under the statutes, agencies should be sure that *all* agents and employees are aware of and well acquainted with any recording system.

Where two-party consent is required, providing notice to a customer at the beginning of a recorded conversation may be sufficient to avoid violating wiretap statutes, because courts analyzing the Wiretap Act have held that the consent exception is to be construed broadly and includes implied consent. *Griggs-Ryan v. Smith*, 904 F.2d 112, 116-17 (1st Cir. 1990). As for "implied consent," it "is 'consent in fact' which is inferred 'from surrounding circumstances indicating that the [party] knowingly agreed to the surveillance.'" *Id.* (quoting *United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987)). See also *Deal v. Spears*, 980 F.2d 1153, 1157 (8th Cir. 1992). A party who "voluntarily participates in a telephone conversation knowing that the call is being intercepted, this conduct supports a finding of implied consent to the interception." *United States v. Corona-Chavez*, 328 F.3d 974, 978 (8th Cir. 2003).

Aside from wiretap statutes, recording conversations can also create exposure for invasion of privacy claims based on common law, and in some states, privacy statutes. Generally, "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652. Comment b to the Restatement specifically

provides that the invasion may be by the use of senses, with or without mechanical aides, to overhear the conversations as by “tapping...telephone wires.” Some states codify privacy laws that would apply to recording phone conversations. Delaware, for example, requires one-party consent under its criminal statute, but under its privacy law, all parties to a conversation must consent to recording. 11 Del. Code § 1335 (2019).

Courts throughout the country use Fourth Amendment case law when assessing causes of action premised on privacy rights, and it is well settled that “[w]hat a person knowingly exposes to the public...is not a subject of Fourth Amendment protection.” *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576 (1967). Factors to consider in determining whether a reasonable person would have an expectation of privacy in a conversation include “the nature of the location where the interception took place...; whether the conversation could be overheard with the naked ear; [and] the subject matter of the conversation (e.g., business versus personal)....” *Aldrich v. Ruano*, 952 F. Supp. 2d 295, 302–03 (D. Mass. 2013), *aff’d*, 554 F. App’x 28 (1st Cir. 2014).

While a court may find that an insurance customer does not have a reasonable expectation of privacy in a conversation pertaining to a commercial transaction, such as purchasing insurance, many sales conversations include a personal component. Because even the most defensible claims can be time-consuming and costly to address, best practice for an insurance agency implementing a recording system is to get express verbal consent recorded from all participants at the beginning of any recorded conversation.

[Jessica C. Richardson](#) is a shareholder in **Tomsche Sonnesyn & Tomsche PA** in Minneapolis, Minnesota. She has been defending individuals, professionals, associations, and insurers for 18 years. Her professional liability practice includes representing insurance agents and brokers, design professionals, engineers, and nonprofit boards in both civil lawsuits and professional disciplinary matters. Ms. Richardson has successfully tried and arbitrated cases in venues throughout Minnesota, including claims of professional negligence, catastrophic orthopedic injury, brain injury, and wrongful death. She is a member of the DRI Professional Liability Committee.

COVID-19

Now, More than Ever, DRI Membership: It's Personal

By Douglas Burrell, DRI First Vice President

Several years ago, when I was on DRI's Membership Committee we coined the term, "DRI Membership: It's Personal." We came up with this slogan to convey what we felt was the practical aspect of being a DRI member. Namely, beyond the top-level CLE and the business development opportunities, we felt that the strength of DRI was its members and the strong ties our members feel for each other; especially in times of need. Thus, DRI began publishing stories from members who talked about how and why their personal relationships bound them to DRI.

We are now in the unknown and scary era of the COVID-19 pandemic where people are becoming sick and dying; where businesses and law firms are closing or laying off employees, and people are not sure how they will pay their bills. Other businesses and law firms are trying to adapt while adhering to social distancing (some say social isolation) by working remotely. Despite the challenges that we face, both personally and professionally, I am finding that DRI is here for its members. DRI leadership is meeting a minimum of once a week with one primary goal in mind, what can DRI do to help its members with what is needed now to keep their practices and livelihoods going. Why? Because our members need help, information, and support! But DRI's help doesn't begin and end with DRI leadership. Our members are stepping up with ideas and suggestions about how to help their fellow members.

Although several DRI seminars have been cancelled, several committees have developed are in the process of developing webinars, online programming, and podcasts. Beyond that, DRI has and is developing simple things so members can stay connected. For instance, every day at 12:00 PM EST, DRI President-Elect Emily Coughlin is holding a virtual coffee break via Zoom. Many have found this daily break a nice diversion from the stress of social distancing. If you want to join Emily and other members on the daily coffee break (no password or ID required), please [click here](#).

A list of some of the additional things being done follows (with more coming each day!):

- March 19, [DRI President's message](#).
- March 19, DRI first COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).
- March 20, [COVID-19 landing page with resources](#) goes live on DRI website (continuously being updated).
- March 20, [Details on seminar cancellations](#) posted as a resource to DRI's COVID-19 landing page.
- March 23, First DRI Community Coffee with Emily Coughlin. To connect with DRI COMMUNITY COFFEE each day at 12:00 PM Eastern Time (no password or ID required), join Zoom Meeting [here](#).
- March 23, DRI second COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).
- March 24, DRI posts [member testimonials](#) regarding the importance of DRI during these uncertain times to DRI's COVID-19 landing page.
- March 24, DRI posts [Coronavirus Sanity Guide](#) to DRI's COVID-19 landing page, SLDO and SLC Communities, DRI for Life.
- March 24, DRI third COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).
- March 24, DRI fourth COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).
- March 25, DRI fifth COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).
- March 25, Article in [The Voice](#) written by Emily Coughlin published; webinars on "New Virtual Law Firm" and "Coronavirus: A Primer on Insurance Implications..." promoted.
- March 26, [MCLE Changes and Updates](#) posted to DRI's COVID-19 landing page.
- March 26, DRI sixth COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).
- March 26, DRI seventh COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).
- March 27, [DRI podcast on Managing Teams Remotely](#) (part one of the Work from Home series) posted to DRI's COVID-19 landing page.
- March 27, DRI eighth COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).

- March 27, DRI ninth COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).
- March 27, [DRI for Life Facebook page](#) launched.
- March 30, DRI tenth COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).
- March 31, DRI eleventh COVID-19 social media post: [Facebook](#), [Twitter](#), [LinkedIn](#).
- April 2, DRI free webinar "[Your New Virtual Law Firm](#)."

- April 6-7, DRI webinar "[Coronavirus: A Primer on Insurance Implications Arising from a Global Pandemic Parts 1 and 2](#)."

As you can see, DRI is focused on doing everything it can to provide its members with as much information and opportunity for social connection as possible because in the end, your connection with DRI *is personal*, and we will never forget that. Please let us know what we can do to help you and we will do our best to respond.

Stay safe, my friends!



DRI News

Dean Martinez Joins DRI as CEO



It is wonderful in these difficult times to be able to bring some good news to DRI members. We are pleased to announce that our Executive Committee has unanimously appointed **Dean Martinez** as our new CEO. He will start on April 27, and we are excited about what's to come under his leadership. We particularly appreciate the experience he brings with him as our organization rises to meet the challenges posed by the COVID-19 pandemic.

As we enter into this transition, we are also grateful for the dedication and service of John Kouris, our Executive Director for the past 22 years. We knew filling this role after John's retirement would be challenging. Thankfully, he will remain on for a period while Dean gets up to speed.

Dean is an attorney who has spent nearly two decades leading wide-ranging association activities and high-visibility government initiatives. He comes to us after serving for 11 years with APICS/ASCM, most recently as its General Counsel (GC) and Chief Operating Officer (COO). During Dean's time at APICS/ASCM, the organization went through three mergers, which resulted in it becoming the largest supply chain association in the world. As part of that, Dean oversaw a new brand launch and participated in the

creation of a new Channel Partner strategy affecting more than 300 partners and implemented in more than 50 countries. He also led an executive-level project that established a China business strategy for APICS/ASCM.

As we looked to fill the CEO role, we knew we wanted someone who would inspire us to think more broadly about who we are as an organization and what we can become. Dean's track record of leading organizations through transformations is exactly what DRI needs. He is a visionary and entrepreneurial thinker who will be an outstanding ambassador for DRI.

Dean has told us he is excited and energized by the possibilities ahead for DRI.

"DRI has a respected history of serving the defense bar for more than 60 years," he said. "I'm looking forward to working with members, volunteers, and staff to ensure that DRI continues to be a leader among legal associations, particularly during challenging times such as these."

Please join us in welcoming Dean to the DRI family. During this period of uncertainty, it is comforting to know we will have a talented leader to guide us through whatever lies ahead.

Share Your Tips for Staying Healthy on DRI for Life's Facebook Page

DRI for Life, the committee created to help members support each other, just launched its Facebook page. Follow along at www.facebook.com/DRIforLife to get useful

information on work-life balance, health issues, and more. And share your tips for staying healthy during quarantine by commenting on this [post](#).



DRI for
Life

Amicus Update

DRI Urges High Court to Clarify the FAA's Preemptive Effect

DRI has filed amicus curiae briefs supporting Supreme Court review of two cases in which the Ninth Circuit again applied California rules hostile to the enforcement of arbitration agreements notwithstanding the preemptive force of the Federal Arbitration Act (FAA).

In *McArdle v. AT&T Mobility LLC*, 772 F. App'x 575 (9th Cir. 2019), and *Tillage v. Comcast Corp.*, 772 F. App'x 569 (9th Cir. 2019), the Ninth Circuit held the FAA did not preempt a California rule providing that arbitration agreements are unenforceable if they purport to bar public-injunction claims. This so-called “*McGill* rule,” from the California Supreme Court’s holding in *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), creates an easy way for plaintiffs to circumvent nearly all arbitration agreements. They need only allege a right to a public injunction in their requested relief.

DRI submitted amicus briefs in support of petitioners to encourage the Court to address whether a State may refuse to enforce an arbitration agreement based solely on a public policy in favor of public-injunction proceedings. In support, DRI asserts that the Ninth Circuit’s holdings disregard long-standing Supreme Court precedent on FAA preemption, as well as the more recent *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which took aim at a

similar California “public policy” against arbitration. DRI also explains that these cases subject defendants to the very financial risks and burdens they sought to contain by contracting for arbitration in the first place. Like class

arbitration, arbitration of public-injunction claims inherently involves protracted, complex, and expensive procedures—including mass discovery—that should not be forced on private parties who agreed to forego them. In fact, those procedures are inherently incompatible with traditional bilateral arbitration.

These Ninth Circuit decisions foster abuses like forum shopping and blackmail settlements, and they will affect millions of arbitration agreements, creating unpredictability for national and

regional businesses. DRI is hopeful the Court will take up this issue and clarify the FAA’s preemptive effect in a way that avoids these negative consequences and restores predictability to the enforcement of arbitration agreements.

DRI’s brief was authored by Zach Chaffee-McClure and Elisabeth A. Hutchinson of Shook Hardy & Bacon LLP in Kansas City, Missouri. Mr. Chaffee-McClure is vice chair of the DRI Amicus Committee. To read the brief in its entirety, [click here](#).



DRI Cares

TTEL Attendees Donate Professional Attire and Assemble Personal Care Packages for St. Joseph the Worker

During the DRI Toxic Tort and Environmental Law Seminar in Phoenix, Arizona, attendees donated gently used professional attire and assembled personal care packages for [St. Joseph the Worker](#). St. Joseph the Worker is a Phoenix-based nonprofit that helps individuals return to the workforce and become productive members of the community, helping clients with job readiness, job search, and employment success.

TTEL attendees were able to see firsthand how St. Joseph the Worker affects the community when they brought the Mobile Success Unit (MSU) to the seminar.

The MSU is an RV designed to take St. Joseph the Worker supplies and resources to the job-seekers anywhere in the community. The MSU is equipped with professional attire, hygiene items, computers, and outreach employment specialists to assist in crafting job-search plans and provide job-hunting advice. It was such a great opportunity to see this firsthand.

Many thanks to all TTEL attendees who participated in these great events. #DRICares



Upcoming Seminars

Employment and Labor Law Seminar, May 20–22, 2020

dri	Employment and Labor Law Seminar
	May 20–22, 2020 Denver
REGISTER TODAY	

If you're a management-side employment and labor attorney or in-house counsel, you don't want to miss DRI's Employment and Labor Law Seminar, May 20–22 in Denver. Participate in sessions featuring the latest developments in matters critical to employers and those who advise them. Save \$100 when you register by April 20. [Click here](#) to view the brochure and to register for the program.

Diversity for Success Seminar and Corporate Expo, June 10–12, 2020

dri	Diversity for Success Seminar and Corporate Expo
	June 10–12, 2020 Chicago
REGISTER TODAY	

Hear nationally recognized thought leaders and political commentators discuss diversity-related issues during DRI's Diversity for Success Seminar and Corporate Expo, June 10–12 in Chicago. Session topics include how to combat juror biases; how to advise clients on mitigating employment risks in the evolving world of diversity; how to promote inclusion in the workplace; and more. Register online by May 11 to save \$100. [Click here](#) to view the brochure and to register for the program.

Young Lawyers Seminar, June 24–26, 2020

dri	Young Lawyers Seminar
	June 24–26, 2020 Atlanta
REGISTER TODAY	

Join other young lawyers and counsel in Atlanta, June 24–26, for DRI's Young Lawyers Seminar. Hear from exceptional in-house and outside counsel on topics sure to improve your practice. Sessions include Trial Prep from Day Zero, Elevate Your Elevator Speech, Mediation 101, and more. Save \$100 when you register by May 26. [Click here](#) to view the brochure and to register for the program.

Upcoming Webinars

Your New Virtual Law Firm—FREE Webinar, April 2, 2020, 12:00–1:00 pm CST



This pandemic has brought new challenges to how we work. We are now all remote workers, which requires equipment, connectivity, and ways to share information, while still maintaining a secure environment. This webinar will address the elements necessary to operate in this “new world” and suggest ways to get there quickly, efficiently, and safely. [Click here](#) to register for this free seminar.

EVIDENCE: The Building Blocks to a Successful Jury Trial, April 3, 2020, 12:00–1:00 pm CST



This course seeks to provide insight into the effect of evidence on the success of the defense during a jury trial. It will provide information on the different types of evidence, the method by which to obtain that evidence, and the admissibility of that evidence at trial. [Click here](#) to register.

Coronavirus: A Primer on Insurance Implications Arising from a Global Pandemic, Parts 1 and 2, April 6 and 7, 2020, 12:00–1:00 pm CST



COVID-19 has brought the world to a standstill. In a matter of weeks, it has resulted in the infection of over 200,000 people in over 150 countries. Thousands of people have died. The World Health Organization has declared it a global pandemic. In its wake, COVID-19 has not only threatened the health of the global population, it has shaken the core of the global economy, resulting in losses in the hundreds of billions and prompting the United States to propose a trillion-dollar stimulus package to aid individuals and businesses in their effort to survive the economic effect of this virus. The effect of COVID-19 on the insurance industry is likely to be significant as the exposures arising from this global pandemic prompts an analysis of myriad insurance risks under a variety of products for first-party property and business interruption benefits, event cancellations, and liability claims. This two-part presentation will explore the emergence of COVID-19 and its effect on insurance risks. [Click here](#) to register.

Attacking the Reasonableness of Medical Expense Claims, April 8, 2020, 12:00–1:00 pm CST



Plaintiffs routinely request damages for overinflated medical expenses. This program offers strategies for collecting the evidence necessary to attack these damages. The end result is intended to give jurors a behind-the-scenes look at how plaintiffs’ doctors and lawyers build a claim. [Click here](#) to register.

DRI Membership—Did You Know...

DRI's Corporate Membership: DRI's Best Kept Secret (and It Shouldn't Be)

If you think that DRI membership is just for law firm attorneys, think again. We have options for clients and business associates as well.

Did you know that DRI Corporate Membership encompasses a variety of nonattorney professionals who want to take advantage of DRI's wealth of resources, increase their profile, develop business connections, and contribute their expertise to the defense legal community?

DRI Corporate Membership is an option for non-law firms such as insurance companies, municipalities, consulting companies, hospitals, nursing homes, auto companies, and pharmaceutical companies, just to name a few.

What do you get with a Corporate Membership?

Each corporate member listed on the application will receive subscriptions to *For The Defense* and *In-House Defense Quarterly* magazines in addition to other valuable resources and benefits of DRI membership. **All first-time corporate members listed on the initial Corporate Membership Application will receive a FREE certificate to attend a DRI seminar, excluding the Annual Summit.**

[Click here](#) for the link to DRI Membership benefits. [Here's the link](#) to join as a corporate member. For just \$500 per year, up to 4 attorneys and nonattorneys can join DRI and receive all the benefits of DRI membership (*that's \$125 per person*); each additional member is \$150 per year. ***Please note that law firms are excluded from Corporate Membership.***

State Membership Chair/State Representative Spotlight

Washington

State Membership Chair



Emily Ann Albrecht, Gardner Trabolsi & Associates PLLC

Areas of Practice: Insurance defense, product liability, and professional liability.

DRI member since 2014.

Emily's experience with DRI: "I became a member of DRI in 2014 and have attended the DRI Young Lawyers, Asbestos Medicine, and Women in the Law Seminars. I also joined the DRI Young Lawyers Committee, the Professional Liability Committee, and the Litigations Skills Committee and have contributed articles for publication in *Raising the Bar* and *For The Defense*, the litigation skills edition."

Fun Fact: "I love to do karaoke."

State Representative



Lori K. O'Tool, Preg O'Donnell & Gillett

Areas of Practice: General insurance defense.

DRI member since 2010.

Lori's experience with DRI: "I am the Washington State representative."

Fun Fact: "I will always be an Iowa farm girl at heart."

New Member Spotlight

Stephani A. Roman



Stephani A. Roman is an associate in the Insurance and Reinsurance Group at Robinson+Cole, in the firm's Hartford, Connecticut, office. She is admitted in Connecticut and practices primarily in insurance coverage disputes, representing the interests of insurers involving commercial general liability, excess liability, and property insurance policies.

Before joining Robinson+Cole, she worked as a claims consultant at a prominent insurance company, handling latent third-party liability claims and litigation relating to asbestos, toxic torts, environmental, and other product lia-

bility. Ms. Roman managed complex coverage issues, which involved commercial general liability policy analysis, review of corporate structures, loss allocation and reserving, and historical claim file investigations. She also handled various claims involving multidistrict litigation.

Ms. Roman graduated from University of Connecticut School of Law in 2019. She is inspired by her Puerto Rican heritage and is actively involved in professional organizations supporting diversity and inclusion initiatives.

Quote of the Week

"Courage is the most important of all the virtues because without courage, you can't practice any other virtue consistently."

— Maya Angelou.