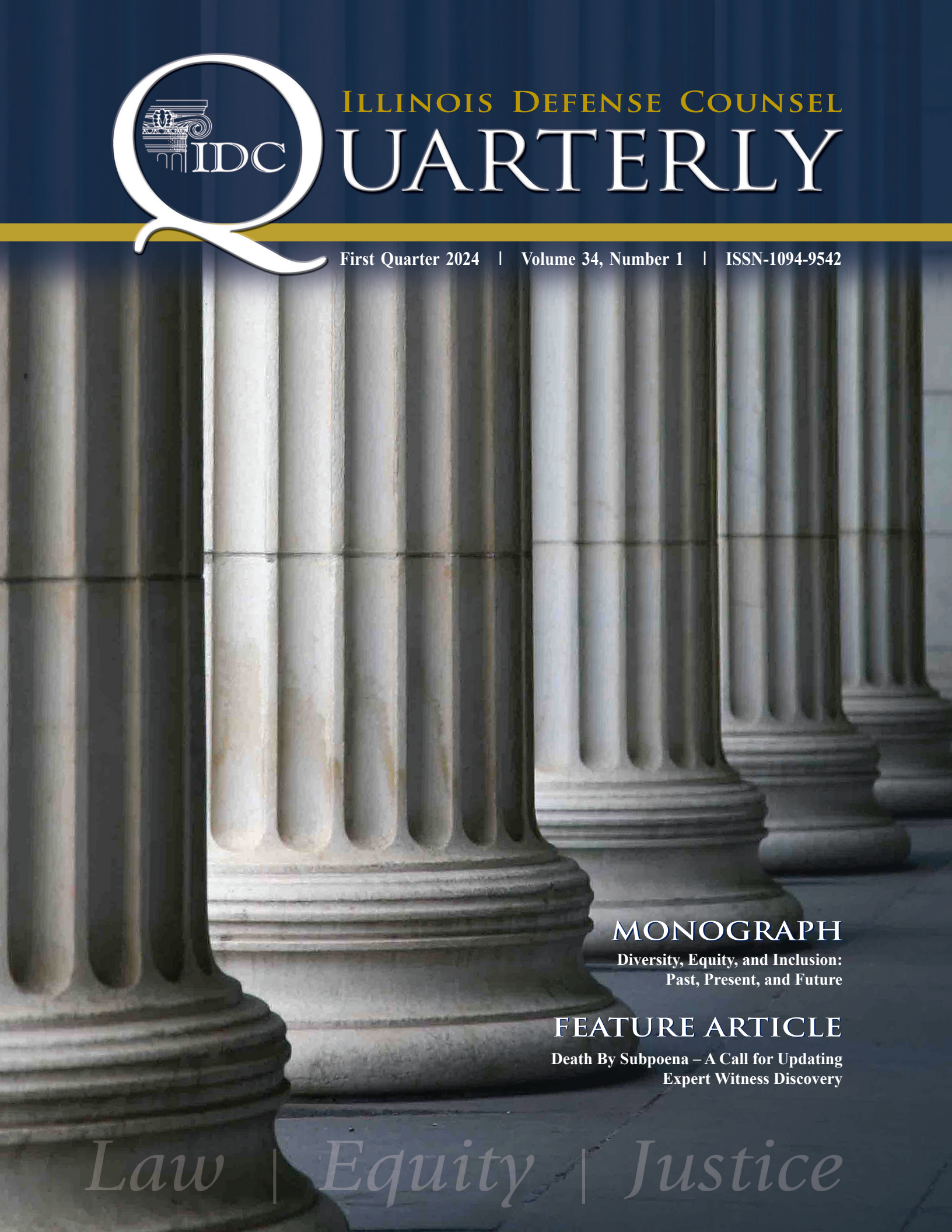

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MONOGRAPH

Diversity, Equity, and Inclusion: Past, Present, and Future

FEATURE ARTICLE

Death By Subpoena – A Call for Updating Expert Witness Discovery

Law | Equity | Justice

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President's Message

Tracy E. Stevenson
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Another quarter of my presidency of the IDC has come to a close. The work and efforts of the IDC and its members is not slowing down. As trial attorneys committed to our clients, the work we perform within the organization strives to promote the defense bar across the board. Our committees remain hard at work to provide a unified front for our members. The practice of trial attorneys is ever evolving, and our members strive to ensure we remain at the forefront of issues facing the bar. Current issues include the recent statements coming from the Illinois Supreme Court concerning the need to promote civility in the practice of law, and the need to look out for the mental well-being of attorneys. The IDC adopts these concerns, and we are striving to promote both of these issues.

As we emerge from COVID, we have encountered a significant trial backlog created during those years. While we want to promote the advancement of trials, the current trial setting processes in place in counties across the state, especially in Cook County, are irrefutably damaging both attorney civility and mental health. Both the plaintiffs' bar and the defense bar share a strong desire to serve their clients' interests and to return to a reasonable trial setting process. But a forum must be created within the system itself to allow talented attorneys to honor their obligations to each of their clients and to schedule trials to clear the backlog with consideration of the attorneys' needs to prepare each client's case fully and competently. Only by setting reasonable trial schedules can the backlog effectively be erased.

Both the plaintiffs' bar and the defense bar share a strong desire to serve their clients' interests and to return to a reasonable trial setting process. But a forum must be created within the system itself to allow talented attorneys to honor their obligations to each of their clients and to schedule trials to clear the backlog with consideration of the attorneys' needs to prepare each client's case fully and competently.

Both the plaintiffs' bar and the defense bar are at each other's throats, lawyers are retiring early or leaving the practice, and others are on the brink in large part due to the untenable trial setting schedules across the State. We should all be aware of the motion brought before the supreme court by a plaintiff's attorney concerning the effect the current scheduling system is having on trial attorneys. Fortunately, the parties are working together and recognizing the predicament. Now, the courts must adapt. A reasonable process must be implemented to clear the backlog while recognizing the impossibility of trying cases back-to-back without reprieve. We cannot lose our experienced attorneys to attrition and exhaustion simply to overcome a trial backlog.

While we are always hard at work to "fix" the practice of law, this year, to promote health, well-being, and community in the practice of busy defense trial attorneys, we are working to add "fun" in person events to rediscover the joy of being together. The IDC encourages members to participate in on-going defense education both as mentors and as students. The IDC continued to put on seminars for our members, including the Deposition Academy, our Trial Academy, and our A to Z Litigation Academy to assist in training the best defense trial attorneys in Illinois. We have hosted seminars in person and via Zoom to promote education related to changes in the law. The *IDC Quarterly* and the *IDC Survey of Law* concisely set forth analysis of a myriad of legal issues to promote motion practice and trial practice. Members of our IDC Legislative Committee continue to work directly with DRI to coordinate nationwide matters of importance to the defense bar. Each of these important teaching and training

experiences should not be compromised as the stress of trial attorneys at the partner level is forced onto the shoulders of other attorneys within any given firm. Are we creating an environment in which mentors cannot mentor due to time constraints? The IDC's members continue to strive towards excellence and our ability to disseminate information to our membership continues to be the core of our engagement. Thank you to each of our members who continuously support one another as trial attorneys in this fast-paced world.

The IDC, as part of our Holiday Spirit of the Season fundraiser, promoted Blessings in a Backpack in its mission to provide food on the weekends for school-aged children across America who might otherwise go hungry. We also joined the Texas defense bar in Crested Butte, Colorado, for a "ski-CLE," combining physical well-being in the mountains with learning opportunities away from our computers. We will also sponsor a golf outing this spring to encourage our clients to take a short break from their busy schedules and simply enjoy a game and the company of their counsel away from the boardroom and courtroom. The IDC also celebrates its 60th year this spring! We will host a gala in June to celebrate all of our members old and new for all that each has contributed to the IDC over the decades. Look for the 2023 edition of the *Survey of Law* also coming out this spring. So much to do and just enough spare time to have some fun while engaging in the trial work the IDC is so proud of even as we are working globally to rectify the trial setting issues which have befallen us! We hope to see you at one of these exciting events soon.

Editor's Note

John Eggum
Foran Glennon Palandech Ponzi & Rudloff, P.C., Chicago

IDC is very pleased to kick-off 2024 with this great edition of the *IDC Quarterly*. This issue's monograph, entitled *Diversity, Equity, and Inclusion: Past, Present, and Future*, is an excellent overview of DEI issues and developments in the law over time, and we think it brings a lot of value to our readership about many important aspects of DEI scholarship, legislation, and history. IDC is very appreciative that our member-authors put so much time and care into the drafting of this great piece.

All our members should also find value in Michael J. Flaherty and Johnathon C. Koechley's Legal Ethics column. It discusses an ABA opinion relating to presenting witnesses, and identifies various ethical issues that can arise during witness preparation. While these rules will undoubtedly be familiar, the column is an excellent resource and review of cases, restatements, and other guidance on the topic of ethical and proper witness preparation.

In the Civil Practice column, Donald Patrick Eckler and Joshua Zhao address a $49.5 million verdict in a medical malpractice case that raises substantial questions about the proper use of discovery deposition testimony and trial procedure. In another great discussion of civil procedure, Jason G. Schutte's article about expert discovery has many important lessons, as well as suggestions for updates to Illinois law. The Evidence column, by Jonathan L. Federman and Paula K. Villela, is a must-read, given it addresses serious issues that can arise with electronic filing.

Turning to substantive law, anyone who represents employers should take note of Julie Bruch's column which discussed continuing developments in potential employer liabilities. Additionally, the Supreme Court Watch column, by John C. Hanson, addresses important considerations pertaining to the Illinois Human Rights Act, and whether it extends to private organizations that use public facilities. Robert Jellen's Insurance Law column addresses important Director & Officer Liability considerations and the duty to defend.

In the Trucking and Transportation Law column, Bill Busse discusses under what circumstances a trucking company can be considered the agent of a freight broker so as to impose vicarious liability on the freight broker. Thomas G. DiCianni and Kathleen M. Kunkle's Municipal Law column provides a great overview of changes to Illinois law regarding the use of drones by law enforcement. Also on the subject of technology, Catherine Geisler's technology article addresses Ransomeware and risks for businesses of all kinds.

For those whose practice focuses on first party property insurance, a recent case involving public adjusters will be of interest. As detailed by James P. DuChateau and Demitri Kladis in their

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column, an insurer recently faced suit after a public adjuster misappropriated funds, and the details of why the Seventh Circuit found the insured had no recourse against the insurer is instructive.

Anyone who defends healthcare practitioners will be highly interested in LaDonna Boeckman's Medical Malpractice column, which discusses in great detail certain immunities relating to COVID-19, and the reaction of Illinois courts to defendants' assertion of those immunities. Also, the Workers Compensation column, by Amber D. Cameron, provides a great overview and commentary on voluntary arbitration under Section 19(p) of the Illinois Workers Compensation Act. It does a great job of shedding light on an underutilized statutory process permitted by Illinois law.

Lastly, we wanted to remind all of our readership that the *IDC Quarterly* is always interested in considering submissions from members of the Judiciary, as well as the IDC membership-at-large. If you would like to author an article for the *Quarterly*, simply email me, John Eggum, at jeggum@fgppr.com, and I will walk you through the very straightforward submission process.

Feature Article

Jason G. Schutte
Koepke, Hiltabrand and Schutte, P.C., Springfield

Death By Subpoena – A Call for Updating Expert Witness Discovery

Pick your poison, catch 22, heads I win, tales you lose—that was the situation we were in. This case could have been any one of those cliches. It was relatively simple on its surface. We were retained to defend a mom and pop business and their employee who had a rear end fender bender in southern Illinois.

The employee client testified that the plaintiff literally got out of her car and said "oh my neck hurts," as if it were a scene in a sitcom. This is not an unusual story when you work in personal injury defense litigation.

The plaintiff had filed her personal injury suit about 5 months after the accident. Plaintiff's attorneys were from a hot shot personal injury firm out of the St. Louis metro east area. We learned very quickly that Plaintiff's counsel was difficult to work with, but that again, is nothing out of the ordinary.

We discovered that the plaintiff had pre-existing conditions in her neck—again, not unusual in our line of work. Plaintiff then underwent a neck surgery in St. Louis. The doctor is well known in the legal community. He never saw a neck that couldn't be improved with a 3-4 level disc replacement surgery. This was a problem, but nothing new to us.

Plaintiff underwent a 3 level disc replacement surgery. No surprise here. We knew the doctor would testify that the accident necessitated the surgery and that she would likely require future surgery, because he always does. Eventually, he provided that exact testimony.

We knew we needed our own expert witnesses when we learned who performed the surgery. This was not a problem. We utilize expert witnesses routinely. We retained two excellent witnesses to testify in the case. One, a billing expert to contest Doctor Disc Replacement's bills. The other being a well-respected orthopedic spine surgeon to contest the causation and necessity of the surgery.

We timely disclosed our experts. Shortly thereafter Plaintiff's counsel served subpoenas on our experts and served expert discovery (interrogatories and requests for production) on us, requesting the production of numerous, overburdensome items. The subpoena and discovery to each expert were largely identical. Below are a select few of those interrogatories and requests for production:

Interrogatories:

- "Please state the total amount of gross expenses and/or payments

About the Authors

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paid to [Doctor]or any employee or agent of [clinic] in each of the last five (5) years for doing medical examinations, medical reviews, giving testimony, performing diagnostic testing, report writing, or any other medical or consulting services for law firms, insurance companies, employers, railroads, the State of Illinois and/or Tristar, barge lines, and/or other defendants"

- "Identify, list and produce any and all income for the past five years generated by [Doctor] or any employee or agent of [Clinic], listing total income, differentiating the total income that was generated from treating patients and the total income from performing medical-legal work and identify each and every record that was used to answer this interrogatory.

Requests for production:

- Copies of all calendar entries, deposition notices, correspondence or any and all other documents that list or give evidence of the nature, frequency, case, income, or hiring party for all medical-legal work (including independent medical examinations, consultation, diagnostic studies, report drafting, record reviewing, deposition or trial preparation, deposition or trial testimony, or any other medical legal service) performed for the last five (5) years by [Doctor] or any employee or agent of [Clinic].

- Any and all records including, but not limited to: electronic records, paper records, invoices, billings, checks, receipts, fee agreements, retainer agreements, calendars, schedules, deposition notices, trial notices, deposition transcripts, trial transcripts, pleadings, orders, electronic correspondence, paper correspondence, facsimile correspondence, advertisements, promotional materials, letters, federal form 1099 tax records, form W-2 tax records, tax returns, TIN numbers, statements, earnings statements, profit and loss statements, check registers, reports, disclosures made in any state or federal case, depositions, procedure documents, job descriptions, or any and all other written or electronic records that in any way reference the participation or involvement of [Doctor] in performing independent medical examinations, consultation, diagnostic studies, report drafting, record reviewing, deposition or trial preparation, deposition or trial testimony or any other medical-legal service with all law firms and insurance companies including, but not limited to, the specific attorneys, insurance companies, parent and subsidiaries thereof that have any interest in or involvement in the subject lawsuit.

- Tax returns and 1099s for the last five years to the present for [Doctor] or any employee or agent of [Clinic].

The subpoena demanded the production of extensive documents and read as follows:

- *"Any and all records including, but not limited to, electronic records, paper records, invoices, billings, checks, receipts, fee agreements, retainer agreements, calendars, schedules, deposition notices, trial notices, deposition transcripts, trial transcripts, pleadings, orders,* electronic *correspondence, paper correspondence, facsimile correspondence, advertisements, promotional materials, letters, federal form 1099 tax records, form W-2 tax records, statements, earnings statements, profit and loss statements, check registers, reports, disclosures made in any state or federal case, depositions, procedure documents, job descriptions, or any and all other written or electronic records that in any way reference the participation or involvement of any and all physicians of [Doctor] and/or [clinic] in performing independent medical examinations, consultation, diagnostic studies, report drafting, record reviewing, deposition or trial preparation, deposition or trial testimony or any other medical-legal service with all law firms and insurance companies in his or her possession or control"*

A second year associate would know the discovery requests and subpoenas were overburdensome, requested irrelevant evidence and invaded the privacy of the expert witnesses. These items were objectionable for many reasons, but some of the more concerning demands were:

- There was no time limit stating how far back in time they were requesting records.

- The subpoenas were not limited to the specific experts we disclosed, but also other doctors and employees providing "medical-legal service."

- Such things as the witnesses' calendars, W-2 tax records, check regis-

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ters, earnings statements, profit and loss statements were of no relevance to the case.

- The subpoenas requested documents that likely described the medical history of persons that were not parties to the suit.

The items listed in the bullets below are only a portion of the problems we saw with the subpoenas.

We were then contacted by a local attorney that represented the clinic of which our retained surgeon was a partner. He advised us that this subpoena had to be quashed if the doctor were going to remain in the case. The clinic would likely make the doctor withdraw from the case, rather than comply with such overburdensome requests. This news created some concern for us.

Through our research, we found two Rule 23 appellate opinions that dealt with very similar oppressive subpoenas and expert discovery in personal injury claims. Those Rule 23 orders did not list the name of the law firms involved. With a little more digging, we learned that this same plaintiff's personal injury firm represented the plaintiff in those two Rule 23 appellate cases. The Plaintiff's firm was able to get the expert witnesses barred for non-compliance in both of those cases. The plot was thickening, and we had learned their modus operandi.

We could tell that the plaintiff's law firm's practice was to issue these abusive subpoenas and discovery when controlled experts were disclosed. When the defense either refused to comply or did not comply to the letter, then plaintiff's counsel filed a motion to bar the witness, arguing that they were unable to properly cross examine the witness. We thought we had them with this information. These type of sharp practices are not envisioned nor promoted by the Supreme Court Rules or the case law interpreting them.

We drafted a Motion to Quash the Subpoena and we objected to the overburdensome discovery requests. We produced the standard, generally acceptable expert discovery information, including the documents sent to the experts, correspondence with the experts, invoices, payments made, prior testimony lists, etc. We then noticed up our Motion to Quash and a Motion for Ruling on our discovery objections. We felt confident that the Court would understand our position.

The hearing did not go as we would have liked. We pointed out the overburdensome nature of the subpoenas and the discovery. We pointed out that our witnesses might abandon the case. We pointed out plaintiff's counsel's track record of utilizing these expert discovery tactics as a sword against defense experts, which was documented in Appellate Court opinions.

After all, "[d]iscovery is not a tactical game but rather a procedural tool for the ascertainment of truth for purposes promoting either a fair trial or fair settlement." *Simkins v. HSHS Medical Group, Inc.,* 2017 IL App (5th) 60478 at par. 34. Of course, "[a]n enduring goal of the discovery process is full disclosure." *Simkins* at par. 33; however, the Illinois Supreme Court Rules provide certain safeguards in civil discovery by limiting discovery to information that is relevant to the issues within the lawsuit. *People ex rel. Madigan v. Stateline Recycling, LLC*, 2020 IL 124417, par. 32.

We argued that the majority of the documents and information demanded were not relevant to the case. "The relevance requirement safeguards against "improper and abusive" discovery and acts as an "independent constraint on discovery." [citation]. Further, the discovery rules' relevance and proportionality requirements ensure the constitutional reasonableness of discovery orders." [citation](observing that, in the context of civil discovery, reasonableness is a function of relevance). *People* at 32. The circuit courts are empowered by the rules governing discovery "to issue orders that will discourage abuse of the discovery process." *People* at 33.

Likewise we argued extensively that the subpoenas and discovery requests were designed to prejudice the defense by driving off their witnesses or obtaining an order barring the witnesses from testifying. "Rule 201 and related rules, which control specific discovery methods, form a comprehensive scheme for fair and efficient discovery, with judicial oversight to protect litigants from harassment. *Id*. at par. 27, *internal citation omitted*. Illinois Supreme Court Rule 201 "sets out the general principals regarding civil discovery." *Id*. at par. 29. Rule 201 contains provisions that prevent discovery abuse by allowing "the entry of protective orders to deny, limit, condition or regulate discovery as justice requires to prevent unreasonable annoyance, expense, embarrassment, disadvantage or oppression." *People* at par. 30.

A major focus of plaintiff's subpoenas and discovery requests were directed toward the income of the defendant's experts. This topic is fair game for discovery, within reasonable limitations thought. The Illinois Supreme and Appellate Courts have spoken to the reasonableness and limitations of discovery and cross examination of retained experts. "The supreme court held that it is permissible to cross-examine an expert witness about the amount and percentage of income that he generates

from his work as an expert witness, the frequency with which he testifies as an expert, and the frequency with which he testifies for a particular side, in order to expose any bias, partisanship, or financial interest that may taint his testimony and opinions." *Pontiac Nat'l Bank v. Vales*, 2013 IL App (4th) 111088, par. 17, citing *Trower v. Jones,* 121 Ill.2d 211 (1988) and *Sears v. Rutishauser*, 102 Ill.2d 402 (1984).

"Nevertheless, cross-examination is not a "free-for-all." It is not a proper function of cross examination to harass expert witnesses or to unnecessarily invade their legitimate privacy. Such unbridled cross-examination discourages reputable professionals from testifying during trial, making it difficult for parties to obtain the expert testimony necessary to meet their burden of proof." *Id*. Examination into bias, partisanship and financial interest of expert witnesses is permissible, however, "there is a point beyond which the inquiry amounts to harassment or invasion of privacy and diverts the proceedings into the trial of a collateral matter." *Pontiac* at par. 19.

Our arguments not only pertained to the impropriety of the subpoenas, but also the overburdensome interrogatories and requests for production that were issued to the defendant regarding the experts. Notably, the discovery rules "do not permit the requesting party to rummage through the responding party's files for helpful information." *Carlson* at par. 29. "Under rules 213 and 214, a party must request *specific information* relevant to the issues in the lawsuit from the other party, which then searches its own files and electronic storage media for responsive information and produces that information. *Carlson v. Jerousek*, 2016 IL App (2d) 151248at par. 29, *emphasis added*.

> Illinois Supreme Court Rule 201 "sets out the general principals regarding civil discovery." Rule 201 contains provisions that prevent discovery abuse by allowing "the entry of protective orders to deny, limit, condition or regulate discovery as justice requires to prevent unreasonable annoyance, expense, embarrassment, disadvantage or oppression."

Additionally, the proportionality provision of Supreme Court Rule 201(C)(3) states that "When making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues."

We argued that the plaintiff's actions were abusive to the defense, and their experts. "The protections of Rule 201(c) apply to discovery directed toward parties and nonparties alike" *Carlson* at par. 30. "The civil discovery rules are not blind to the privacy interests of the party responding to discovery. Although the scope of permissible discovery can be quite broad, "parties engaged in litigation do not sacrifice all aspects of privacy or their proprietary information simply because of a lawsuit."" *Carlson* at par. 31.

After hearing the arguments of counsel at the hearing, the Judge responded that we were "clutching our pearls", and said he would limit the subpoenas to 5 years. We asked for clarification, did this include such things as 5 years of the doctor's calendar? 5 years of profit and loss statements. The answer was "yes" —five years as written. We admonished the Court that our experts may likely abandon the case, to no avail.

We advised the experts that the Court refused to fully quash the subpoena, hence, they had to comply. We decided we would file a Motion to Reconsider or be Found in Contempt so that we could appeal this discovery issue. Then, our orthopedic surgeon abandoned the case. Next, our billing expert abandoned the case. Bad news.

Initially we thought, maybe the witnesses abandoning the case would make our argument for appeal better; then I realized that we were likely facing an argument that our motion was moot since our experts had abandoned the case. Plaintiff argued in their response to our Motion to Reconsider that, surprise surprise—the issue was moot—the defense doesn't have experts anymore.

You may be asking, "How did it end?" We were facing being forced to a trial without experts where plaintiff would likely seek an excess verdict against our client or gambling on the

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judge utilizing his discretion to continue the trial setting or change his prior ruling. Needless to say, we had not had good luck with this Judge in the past. To protect their insured, the insurer paid a good amount more than this case was worth to settle it.

This case ended up being decided on sharp practices rather than the facts and the law. Plaintiff's counsel's underhanded approach accomplished exactly what they wanted it to. They hampered the defense's ability to defend the case to the extent that the defense could not take the risk of going to trial and putting the insured defendant at risk of an excess verdict.

Rule 213(b) notes that it is the duty of attorneys "to avoid the imposition of any unnecessary burden or expense on the answering party." Illinois Supreme Court Rule 3.4 on Professional conduct states that a lawyer shall not ""make a frivolous discovery request." IL R. Professional Conduct 3.4(d). The first comment under this rule states "[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, *improperly influencing witnesses*, obstructive tactics in discovery procedure, and the like." *Emphasis added.*

Further, Rule 4.4 of the Professional Conduct rules states that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." See. IL R. Professional Conduct 4.4(a). The first comment to this rule states "[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility *does not imply that a lawyer may disregard the rights of third persons*. It is impractical to catalogue all such rights, but *they include legal restrictions on methods of obtaining evidence from third persons* and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." *Emphasis added.*

Here are suggested additions to Rule 213 and 214 that this author believes would assist in the fair and efficient pretrial process relative to experts (the bold and italicized text are the suggested additions):

Rule 213. Written Interrogatories to Parties

(a) Directing Interrogatories. A party may direct written interrogatories to any other party. A copy of the interrogatories shall be served on all other parties entitled to notice.

***

(f) Identity and Testimony of Witnesses. Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:

(1) Lay Witnesses. A "lay witness" is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(2) Independent Expert Witnesses. An "independent expert witness" is a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert. For each independent expert witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(3) Controlled Expert Witnesses. A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. ***Disclosures in substantial compliance with the subparagraphs below and production in compliance with Rule 214(f) will be presumed to be sufficient disclosure for the purposes of discovery and cross examination. Adverse parties may only request information in excess of that listed in the subparagraphs below and in Rule 214(f) related to controlled expert witnesses via written discovery by agreement of the parties or with leave of court upon a showing good cause***. For each controlled expert witness, the party must identify ***and produce***:

i. the subject matter on which the witness will testify;
ii. the conclusions and opinions of the witness and the bases therefor;
iii. the qualifications of the witness;
iv. any reports prepared by the witness about the case;
v. a list of all other cases where the expert provided testimony via deposition, trial or arbitration for

2 years preceding the disclosure of the witness;
vi. a statement of the compensation paid for the expert's involvement in the case.

Rule 214. Discovery of Documents, Objects, and Tangible Things– Inspection of Real Estate

(a) Any party may by written request direct any other party to produce for inspection, copying, reproduction photographing, testing or sampling specified documents.

***

(f) Controlled Expert Witness Production: Upon issuance of a request for production of documents pursuant to this section, a party disclosing a controlled expert as defined in Rule 213(f)(3) shall produce the items discussed in the subparagraphs below for each controlled expert witness disclosed. The production of documentation in substantial compliance with the subparagraphs below and Rule 213(f)(3) will be presumed to be sufficient disclosure for the purposes of discovery and cross examination. Adverse parties may only request information in excess of that listed in the subparagraphs below and in Rule 213(f)(3) related to controlled expert witnesses via written discovery by agreement of the parties or with leave of court upon a showing good cause:

i. a sworn statement of the expert's earnings obtained solely from work as a controlled expert witness in legal cases for the previous 2 calendar years prior to the date of disclosure;
ii. any reports prepared by the witness about the case;
iii. a list of all other cases where the expert provided testimony via deposition, trial or arbitration for 2 years preceding the disclosure of the witness;
iv. a statement of the compensation paid for the expert's involvement in the case;
v. copies of all invoices created and proof of payment received for the case in which the expert witness has been disclosed;
vi. copies of all correspondence between the witness and the disclosing party related to the case;
vii. copies of all documents, photographs, video, records, etc., provided to or reviewed by the expert in reaching their opinion(s);
viii. an up to date resume, curriculum vitea or description of the expert's qualifications to offer their opinions in the case.

***

Conclusion

We believe that plaintiff's counsel's actions in this case, including the overburdensome discovery, the invasion of our witnesses' privacy, and irrelevant requests within the discovery and subpoenas was directly meant to either drive the witnesses off or to set a trap that would lead to the plaintiff filing a motion to bar the witness for failure to fully comply with the subpoena. That is exactly what happened. These tactics clearly violated rules 3.4 and 4.4 of the Rules of Professional Conduct, cited above.

Discovery is supposed to allow the opposing party to investigate the other party's case. The purpose is not to set traps and make demands the opposing party cannot or will not be able to comply with in the hope of driving off the opposing party's experts or having them barred from testifying.

Discovery is supposed to allow the opposing party to investigate the other party's case. The purpose is not to set traps and make demands the opposing party cannot or will not be able to comply with in the hope of driving off the opposing party's experts or having them barred from testifying. It is time for Illinois Supreme Court Rule 213 and 214 to be updated to allow full and proper disclosure of relevant evidence while also deterring the type of sharp practices that occurred in this case.

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Insured Against Not Having Enough Insurance: Extension of the Adequate Reserves Exclusion for D&O Coverage

On October 20, 2023, the Illinois Appellate Court First District issued a ruling as to the application of an exclusion to coverage to a director and officer liability coverage policy. The subject exclusion precluded coverage for claims arising out of failure to establish or maintain adequate reserves. The insurer attempted to use this exclusion to preclude defense for a condominium association sued by its owners for not securing adequate insurance. The appellate court held that this exclusion did not preclude defense for the condominium association, and under the condominium association's D&O coverage, the insurer was required to defend the claim against the condo association for not purchasing enough insurance from the insurer.

The recent case is styled *Truck Insurance Exchange v. Marian Ulman, et. al.*, 2023 IL App (1st) 220804. In September of 2018, a fire destroyed "the Landings," a 35-unit condominium building in Des Plaines, Illinois. *Truck Insurance Exchange,* 2023 IL App (1st) 220804, ¶ 10. The Landings Condominium Association (condo association) had purchased an insurance policy from Truck Insurance Exchange (Truck) with a replacement cost policy limit of $5,858,300 and total coverage of $6,482,542. *Id*. ¶ 5. The condo association obtained an estimate to rebuild the building for $8.3 million dollars, almost $2 million more than the total coverage provided by the policy. *Id*. ¶ 10. In May of 2020, the owners filed a class action suit against the condo association directors, alleging a violation of the Condominium Property Act (765 ILCS 605/1, *et. seq.*) in that the condo association breached its fiduciary duty by failing to procure adequate insurance. *Id*. ¶ 12. The condo association tendered its defense to Truck.

Truck denied a duty to defend the condo association or its directors, and the parties both filed actions for declaratory judgment against each other on the issue of coverage for the underlying suit. *Id*. ¶ 14. On a cross motion for judgment on the pleadings, Truck made its three-fold argument: a) Truck had no duty to defend under the liability coverage under the policy as there was no "occurrence"; b) there was no duty to defend under the D&O coverage pursuant to "Exclusion 12," which precluded coverage where the injured party is an insured organization; and c) coverage is precluded for claims arising out of a failure to establish or maintain adequate reserves or to levy special assessments for the repair, replacement, improvement, or maintenance of any common area elements or property owned by the named insured (in the policy, referred to Exclusion 8(c)). *Id*. ¶ 15. The trial court held that Truck had no duty to defend under the liability coverage, a question of fact existed as to the application of "Exclusion 12," and Truck did not have a duty to defend under Exclusion 8(c) as the maintenance of insurance was functionally equivalent to the maintenance of reserves. *Truck Insurance Exchange,* 2023 IL App (1st) 220804, ¶¶ 18-20. The First District agreed with the first two points but reversed and remanded on the third, finding the Association was not precluded from coverage on the issue of not obtaining adequate insurance from its insurer. *Id*. ¶ 3.

The court's rational for its ruling on Exclusion 8(c) is based on an interpretation of the policy language. *Id*. ¶ 40. The policy specifically excluded coverage for claims arising from the insured's failure to "establish or maintain adequate reserves or levy special assessments" in connection with common area elements or collectively owned property. *Id*. ¶ 39. The trial court concluded that the term "reserves" was "functionally equivalent" to insurance. *Id*. ¶ 43. This interpretation was not held by the appellate court. *Id*. The appellate court noted that the Policy did not contain a definition for the term "reserve" and thus turned to dictionary definitions. *Truck Insurance Exchange,* 2023 IL App (1st) 220804, ¶ 41. In making its ruling, the appellate court turned to the common understanding of the term

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Effectively, by ruling that Exclusion 8(c) did not preclude coverage, the appellate court required Truck to defend its insured for not purchasing adequate insurance from Truck.

"reserves," which included "something held back for future use or special use." *Id*. ¶¶ 40-41. Notably, the appellate court also examined the Black's Law dictionary definition of the term, which defined reserve as "something retained or stored for future use; esp., a fund of money set aside by a bank or an insurance company to *cover future liabilities*." *Id*. (emphasis added). The appellate court did not consider either of these definitions as including insurance in the common definition for "reserve." *Id*. By equating reserves and insurance, the appellate court ruled that the trial court was inserting language not included in the policy, and thus, did not interpret said policy correctly. *Id*. ¶ 43. The appellate court also noted that the allegations of the underlying complaint alleged the condo association failed to obtain competitive bids, manage the project, or keep detailed or accurate records. *Id*. ¶ 44. These also led to the potential of coverage, outside of the insurance issue. *Truck Insurance Exchange,* 2023 IL App (1st) 220804, ¶ 44.

Effectively, by ruling that Exclusion 8(c) did not preclude coverage, the appellate court required Truck to defend its insured for not purchasing adequate insurance from Truck. It could be argued that the purpose of an exclusion like Exclusion 8(c), especially in the D&O policy context, is to prevent this absurd result. Insurance for an organization generally acts as a fund used to "cover future liabilities." Purchasing insurance for an organization that would benefit from D&O insurance would fall in line with the typical business decisions made by directors and officers, similar to decisions to maintain adequate reserves.

Interestingly, the condo association switched providers for a lower policy limit mere months before the fire. *Id.* ¶ 5. The condo association made the affirmative decision to take more risk at the expense of a lower premium, and the fire happened quickly thereafter. *Id*. Underfunding, or leaving an organization overly exposed to liability, is discouraged at law and would be behavior that an insurer would not consider a covered activity.

At any rate, it is safe to assume that it was not Truck's intent to insure the condo association for not obtaining more insurance. Not only is Truck not fairly compensated for this additional risk through a premium that contemplates the possibility of defending such a suit, but now, it is required to expend defense costs for the underlying suit if the declaratory action is unsuccessful. Although there are other issues in this particular case, it does create a new issue with regard to this particular exclusion, one that may or may not have been anticipated by Truck or other insurers. It will be interesting to see if this issue is addressed in the future.

The appellate court based its decision on the plain language of the policy; one would think that this is an easy correction to the policy language in the future. The prevalence of this issue is unknown. How many times are organizations getting sued for not having enough insurance, and how often do these suits get tendered to insurers? This particular suit arose from a statute that required condominium associations to maintain a certain level of insurance. While not a typical cause of action, one could foresee inadequate insurance being the basis for a derivative corporate suit, applied in a wider context and involving similar language in other D&O policies. A shareholder could proceed with a cause of action for over-exposing an organization—would such a suit be something an insurer would have a duty to defend?

Even if insurers consider amending the language, what impact will this have on the value of these policies, and would amendments be effective? Insurers could possibly amend the policy to include a definition for reserves which may address the issue. Whether such a definition could include obtaining adequate insurance is left to be seen. Insurers may even consider adding a separate exclusion for failure to obtain adequate insurance all together. The outcome of defending such a suit is so unsavory it is not unforeseeable for insurers to explicitly exclude coverage. It will be interesting to see what avenue insurers take to correct this issue. Until fixed, any similar language in policies will be interpreted against insurers. Insurers may be required to pick up the tab for the insured's failure to buy more insurance from them.

Evidence and Practice Tips

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Last Minute Pleadings in the Age of E-Filing

During the age of remote and virtual interaction within the legal profession, the majority of state and federal courts now rely more than ever on technology, including for electronic filings. While electronic filing is generally a much more convenient method than physically going to the courthouse, there are certain important caveats that a prepared litigant should be ready to address.

A litigant must be careful in catching errors in their filings that may cause the court to reject an electronically-filed pleading. The clerk's office may reject an attempted filing after the deadline, and, even if an error is easily fixed and the attempted filing was timely, which could result in an untimely filing. After all, an electronic submission is often not reviewed right away and the litigant may not become aware of the error that caused the rejection until after the last day to bring a claim within the statute of limitations or to file a pleading within an ordered briefing schedule.

Illinois Supreme Court Rule 9(d)(2) provides relief for certain untimely filings, stating "[i]f a document is rejected by the clerk and is therefore untimely, the filing party may seek appropriate relief from the court, upon good cause shown." Ill. S. Ct. R. 9(d)(2) (eff. Feb. 4, 2022). Thus, Rule 9(d) allows a certain degree of flexibility to litigants and the courts to address problems with e-filing "upon good cause shown." *See Kilpatrick v. Baxter Healthcare Corp.*, 2023 IL App (2d) 230088, ¶ 14, citing *Davis v. Village of Maywood,* 2020 IL App (1st) 191011, ¶ 18. As the Second District recognized in *Kilpatrick*, "[t]he broad language of Rule 9(d)(2) indicates that a court must consider the totality of the circumstances in assessing good cause. *Kilpatrick*, 2023 IL App (2d) 230088, ¶ 14.

To obtain relief pursuant to Rule 9(d)(2), a litigant bears to burden to prove that good cause exists, which is a highly fact-specific inquiry. Courts will consider various factors, including how recently the court has transitioned to e-filing, the substance of the attorney's error, whether the error could be attributed to an imperfection in the filing system, and how early in the day the defective filing is submitted. *See Davis v. Village of Maywood,* 2020 IL App (1st) 191011. For instance, in *Davis*, the First District found the attorney in question showed good cause to backdate the filing of a complaint on the last date of the limitations period, which was rejected because he failed to enter his Cook County attorney code into a third section of the e-filing envelope. *Davis*, 2020 IL App (1st) 191011, ¶ ¶ 5, 31. In concluding that the rejection was a "minor, understandable error," the court noted that: (1) the mistake was made less than two-weeks from paper filing in Cook County; (2) the original submission was nearly identical; (3) the error was of form rather than substance in that the attorney omitted a second duplicative entry; (4) the envelope was "for the most part, correct and complete;" (5) the error was attributed to an "imperfection in the e-filing system" that required the same number twice in one form; and (6) the filing was submitted mid-morning rather than late at night in the final hours of the limitations period. *Id*., at ¶¶21-32.

In contrast, the court in *Kilpatrick* affirmed the trial court's denial of relief under Rule 9(d)(2), noting that the e-filing system had been in place for over four years, and the attorney had failed to enter his proper attorney registration number, which was an entirely avoidable attorney error not attributable to the

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filing system. *Kilpatrick*, 2023 IL App (2d) 230088, ¶ 23. The court also noted this was a late filing, and the system's automated response warns litigants that it takes 24-48 hours for the court to notify them whether a filing is rejected. *Id.*, at ¶ 24; *see also*, *O'Gara v. O'Gara*, 2022 IL App (1st) 210013 (court affirmed rejection of relief under Rule 9(d)(2) where counsel attempted to file a motion to reconsider at 11:52 pm on the last day for filing a post-judgment motion but failed to do so before midnight).

Prepared litigants must understand how a plaintiff's late filing could impact a case, such as supporting a motion to dismiss similar to *Kilpatrick*. The issue of late filings applies to both plaintiffs and defendants, as defense counsel also use electronic filing to submit filings. Thus, litigators should understand some of the potential pitfalls with electronic filing, and if possible, should not wait until the last day to attempt to file. Furthermore, litigants should understand that, if they are seeking relief pursuant to Rule 9(d)(2), they bear the burden to prove good cause, which means using affidavits and other admissible evidence.

As shown by the opinions above, as e-filing becomes more normalized and attorneys are expected to be familiar with the technical filing requirements, courts are less lenient to forgive attorney errors which cause a filing to become untimely In addition, courts are more likely to empathize with litigants who do not wait until the final hours to attempt to submit a filing which may not go through in time. All of which goes to show that while Rule 9(d)(2) provides a mechanism for relief from imperfections in e-filing systems, courts will not broaden it to excuse late filings due to mistakes that were within the attorney's control.

Employment Law

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An Adverse Employment Action in Discrimination Cases May Encompass More than Employers Expect

Employees who file suits claiming discrimination by their employer must show that they suffered what is known as an "adverse employment action." When the employer has terminated, demoted, or suspended the employee, the employee can easily meet that threshold. But what about lesser actions, such as an oral or written reprimand or a change in the employee's work schedule? Most federal courts had previously found that such actions taken by the employer did not rise to the level of an adverse employment action. The Fifth Circuit Court of Appeals recently broadened the categories of acts by an employer that may rise to the level of an adverse employment action to be more in line with other circuits.

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Courts, including the Seventh Circuit, have created a shorthand for this standard to require that employees show that they suffered an "adverse employment action." The Seventh Circuit has repeatedly held that a number of measures taken by an employer that do not affect the employee's compensation or ability for advancement do not meet the standard of an adverse employment action. For example, oral or written reprimands received by an employee under an employer's progressive discipline system do not implicate job consequences tangible enough to establish an independent basis for Title VII liability. *Oest v. Illinois Dep't of Corr.*, 240 F.3d 605, 613 (7th Cir. 2001), rev'd on other grounds, *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016). The Seventh Circuit has also found that the ability to have weekends and holidays off falls short of an adverse employment action. *O'Neal v. City of Chicago*, 392 F.3d 909, 913 (7th Cir. 2004).

The Fifth Circuit Court of Appeals has been even more limiting, finding that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably may be some tangential effect upon those ultimate decisions." *Dollis v. Rubin,* 77 F.3d 777, 781-82 (5th

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Cir. 1995)(per curiam). While *Dollis* was a Title VII retaliation claim, subsequent decisions in the Fifth Circuit applied the "ultimate employment decision" requirement to disparate-treatment cases too. All of this recently changed following the en banc decision by the Fifth Circuit in *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023).

In *Hamilton,* nine female corrections officers filed suit claiming sex-based discrimination after the Sheriff's Department changed its scheduling from a seniority-based system to a sex-based scheduling policy under which "only male officers are given full weekends off." *Hamilton*, 79 F.4th at 497. Female employees could only receive weekdays and/or partial weekends off. *Id.* The female employees complained that weekend days are preferred days off and the schedules were sex-based even though all corrections officers perform the same tasks. *Id.* Even though the County admitted that the scheduling policy was sex-based, the district court granted the County's Rule 12(b)(6) motion to dismiss on the basis that under Fifth Circuit precedent, "[c]hanges to an employee's work schedule, such as denial of weekends off, are not an ultimate employment decision." 2020 WL 7047055, at *2 (N.D. Tex. Dec. 1, 2020).

The female corrections officers appealed and a panel of the Fifth Circuit affirmed for the same reasons. *Hamilton*, 42 F.4th 550, 553 (5th Cir. 2022). However, the panel urged the full court to "reexamine our ultimate-employment-decision requirement" in light of the deviation from Title VII's plain text. *Id.* at 557. The full Fifth Circuit Court of Appeals then granted rehearing en banc to do so.

> The Fifth Circuit Court of Appeals recently broadened the categories of acts by an employer that may rise to the level of an adverse employment action to be more in line with other circuits.

Fifth Circuit En Banc Opinion in Hamilton

Initially, the court focused on the actual text of Section 703(a)(1) of Title VII and concluded that "[n]owhere does Title VII say, explicitly or implicitly, that employment discrimination is lawful if limited to non-ultimate employment decisions." *Hamilton*, 79 F.4th at 501. While the statute does prohibit discrimination in hiring, refusing to hire, discharging, and compensation, it also makes it unlawful for an employer "otherwise to discriminate against" an employee "which respect to [her] terms, conditions, or privileges of employment." *Id.* The court recognized that this statutory phrase is broad, but noted that the Supreme Court's interpretation of the statute was "not limited to 'economic' or 'tangible' discrimination," and, "it covers more than 'terms' and 'conditions' in the narrow contractual sense." *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998)(internal quotation marks omitted).

Under this standard, the Fifth Circuit concluded that the female corrections officers plausibly alleged discrimination "with respect to [their] . . . terms, conditions, or privileges of employment" because "[t]he days and hours that one works are quintessential 'terms or conditions' of one's employment." *Hamilton*, 79 F.4th at 503. In making this decision, the court acknowledged that Title VII "does not permit liability for de minimus workplace trifles." *Id.* at 505. However, the court found that "requiring female officers to work weekends but not male officers is a 'tangible,' 'objective,' and 'material' instance of sex discrimination in the terms, conditions, or privileges of employment—and far more than 'de minimus.'" *Id.*

Contrast with the Seventh Circuit Approach

The *Hamilton* decision puts the Fifth Circuit more in line with existing case law from the Seventh Circuit. The Seventh Circuit defines an adverse employment action as "a materially adverse change in the terms and conditions of employment [that is] more disruptive than a mere inconvenience or an alteration of job responsibilities. . . . [such as] (1) diminishing an employee's compensation, fringe benefits, or other financial terms of employment, including termination; (2) reducing long-term career prospects by preventing him from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted; and (3) changing the conditions in which an employee works in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration

in his workplace environment." *Alamo v. Bliss*, 864 F.3d 541, 552 (7th Cir. 2017) (internal citations and quotation marks omitted); *Smithson v. Austin*, No. 23-1306, 2023 WL 6211110, at *2 (7th Cir. Sept. 25, 2023). Under this standard, the Seventh Circuit continues to reject claims of discrimination where the employee was not subject to an adverse employment action. For example, "[p]erformance improvement plans, particularly minimally onerous ones ... are not, without more, adverse employment actions." *Abebe v. Health & Hosp. Corp. of Marion Cnty.*, 35 F.4th 601, 607 (7th Cir. 2022). The Court also found that "[s]cheduling decisions without 'material consequences' generally are not adverse employment actions." *Smith v. Chief Judge of Cir. Ct. of Cook Cnty.*, No. 21-1544, 2022 WL 1238449, at *2 (7th Cir. Apr. 27, 2022). The Court rejected an employee's claim that a school district's refusal to designate him as a Social Work Lead or a Social Work Field Instructor was an adverse employment action, even if such titles were more prestigious than his title of School Social Worker. *Williams v. Bd. of Educ. of City of Chicago*, 982 F.3d 495, 507 (7th Cir. 2020).

Practice Pointers

Employers seeking to make changes to an employee's work duties, schedule, or work conditions should consider first reaching out to their employment attorneys for guidance to ensure the proposed changes do not run afoul of employment discrimination laws. Since courts hold that non-economic changes may violate Title VII, employers must proceed with caution.

Trucking and Transportation

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Determining Whether a Freight Broker Can be Held Vicariously Liable as the Principal of a Trucking Company

In *Francine Cornejo, Individually and as Mother and Friend of Gustavo Cornejo Jr., v. Dakota Lines Inc., Gordon Lewis, and Alliance Shippers, Inc.*, 2023 IL App (1st) 220633, the Appellate Court First District examined an issue often litigated in trucking cases—under what circumstances can a trucking company be considered the agent of a freight broker so as to impose vicarious liability on the freight broker? Under the facts of this case, the court held that the evidence presented at trial overwhelmingly favored the conclusion that the trucking company and its driver were not the agents of the freight broker. *Cornejo,* 2023 IL App (1st) 220633. The plaintiff was severely injured when he was struck by an 18-wheeler while standing on the shoulder of a highway near his family's vehicle. *Id.* ¶ *1. The 18-wheeler was driven by Gordon Lewis*, who was employed by the carrier, Dakota Lines, Inc. (Dakota). *Id.* Alliance Shippers had entered into an agreement with Dakota whereby Dakota would transport automotive parts on behalf of Alliance's client Fiat Alpha Romero Chrysler. *Id.* ¶ 2.

At the time of the accident, Lewis was driving his truck and trailer under Dakota's operating authority and was towing an empty shipping container owned by J.B. Hunt Transport, Inc. (J.B. Hunt). *Id.* ¶ 9. Alliance had an interchange agreement with J. B. Hunt to use only J. B. Hunt trailers for transporting goods at an agreed-upon rate. *Id.* Alliance did not own any tractors or trailers. *Id.*

The agreement between Dakota and Alliance required Alliance to notify Dakota that a shipment of parts was ready for transport via an electronic data interchange (EDI). *Id.* ¶ 10. Once notified, a driver employed by Dakota traveled to a railyard and retrieved an empty cargo container owned by J. B. Hunt. *Id.* If a J.B. Hunt trailer was unavailable, Dakota was required to obtain a J.B. Hunt trailer from another location at Dakota's expense. *Id.* ¶ 10. The driver then hauled the empty container to another location. The empty container was exchanged for a container full of automotive parts. This was done as a part of Dakota's obligation

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to Alliance to meet "pool requirements" by ensuring that Alliance had a steady supply of empty containers for loading cargo. *Id.* The driver then hauled the loaded container to a Fiat delivery point in Detroit. *Id.*

In her seventh amended complaint, the plaintiff alleged: (1) negligence on the part of Alliance and that Lewis was an actual, implied and/or apparent agent, servant and/or employee of Alliance at the time of the accident, (2) negligence on the part of Dakota, in that Lewis was an actual, implied, and/or apparent agent, servant, and/or contractor of Dakota at the time of the accident, and (3) Lewis's own negligence in regard to the accident. *Id.* ¶ 7.

The evidence showed that Dakota hired Lewis, trained him, gave him a driver's handbook, paid him, and withheld taxes from his paychecks. *Id.* ¶ 11. Lewis did not communicate with anyone employed by Alliance. *Id.* Alliance did not dictate what route Lewis had to take with his load, nor did Alliance provide Lewis with any tools, equipment, or materials. *Id.* Alliance did not have the power to hire or fire any Dakota drivers but could request that a driver be removed from a route. *Id.*

The contract between Alliance and Dakota specified that Dakota was an independent contractor, that one would not be considered the agent of the other, and that Dakota was solely responsible for its employees and agents. *Id.* ¶ 12. Another provision required Dakota to list Alliance as an additional insured on Dakota's auto and comprehensive general liability policies and to indemnify, defend and hold Alliance harmless from all claims for death or injury arising out of the transportation of property. *Id.* If Dakota subcontracted or delegated any work that was given to it by Alliance, the contract would be voided. *Id.*

Alliance had the authority to tell Dakota when and where to pick up goods, how long Dakota had to deliver them, and whether the delivery had to be on a flatbed or a container. Alliance did not require Dakota to use particular tools, but it specified the type of container and chassis to use. If a shipment was delayed, Dakota was to notify Alliance immediately and typically would need to send another driver to "rescue the load." *Id.* ¶ 13.

The contract also required Dakota to maintain a satisfactory rating with the Federal Motor Carrier Safety Administration, and it was required to notify Alliance if that rating fell to a "conditional" or "unsatisfactory." Dakota was further required to provide an explanation to Alliance of how it planned to change that rating. *Id.* ¶ 14. Alliance had requirements for Dakota regarding seal integrity, freight bills, and cargo security for drivers pulling loaded containers. *Id.* Alliance scored Dakota on how frequently it picked up and delivered a shipment on time, and Dakota was required to maintain an on-time percentage of 98.7% to avoid jeopardizing its relationship with Alliance. *Id.*

Alliance presented a motion for a directed verdict at the close of the evidence. In denying the motion, the trial court relied on the evidence of Alliance's marketing material that mentioned timely deliveries and its ability to request another Dakota driver as evidence of the control that Alliance had over the driver, even though Alliance had no authority to fire any Dakota driver. *Id.* ¶ 17.

The jury found that Lewis, as Dakota's admitted agent, was negligent, and it answered a special interrogatory that found that Dakota was Alliance's agent. Judgment was entered against Lewis, Dakota and Alliance in the amount of $18,150,750, which was later increased by $466,161.20 in prejudgment interest. *Id.* ¶ 20. Alliance appealed, arguing that it was entitled to a judgment notwithstanding the verdict because, as a matter of law, Dakota was an independent contractor, and neither Lewis nor Dakota were agents of Alliance. *Id. ¶ 3.*

In reversing the trial court's judgment, the appellate court found that the arguments raised by the plaintiff failed to demonstrate the degree of control over the work performed (hauling loads) that Illinois courts have required when finding that an agency relationship exists. *Id.* ¶ 29. The court turned to *Sperl v. C. H. Robinson Worldwide, Inc.,* 408 Ill. App. 3d 1051 (3d. Dist. 2011), as an example of a fact pattern that would warrant a jury's finding of an agency relationship due to the high degree of control the broker exerted over the driver. In *Sperl*, the broker was the one that hired, paid and dispatched the driver and directed delivery to the broker's own warehouse. *Sperl*, 408 Ill. App. 3d at 1053-55. Furthermore, the broker also specified the trailer length, required the driver to take the trailer temperature regularly, required the driver to stay in constant communication with the broker, and imposed delivery times on the driver that were enforced by fines that the broker directly imposed on the driver. *Id.* at 1053-55, 1058. The driver testified that the broker imposed an impossible fine,

enforced schedule, and that she had to violate federal hours-of-service regulations to deliver the load on time and avoid the fines. *Id.* at 1055, 1058.

The appellate court held that the relationships of Lewis and Dakota were akin to the relationships found in *Shoemaker v. Elmhurst-Chicago Stone Co.,* 273 Ill. App. 3d 916, 917 (1st Dist. 1994). In that case, the plaintiff sued the shipper, which sold construction material, the carrier, Lawrence Trucking, Inc., and the truck driver who owned the truck involved in the accident but had leased it to Lawrence Trucking. Lawrence Trucking entered into equipment leases with drivers so it could service customers when its own truck drivers were busy. Lawrence Trucking did not have physical possession of the equipment. *Shoemaker,* 273 Ill. App. 3d at 918. Lawrence Trucking obtained hauling jobs from the shipper and 5% of the total compensation, while the remainder went to the driver who did not receive employment benefits from Lawrence Trucking. *Id.* The driver would go to jobs as directed by Lawrence Trucking, but he had no agreement with the shipper. The shipper never provided the driver with any rules about how his truck was to be driven. *Id.* The shipper could not terminate the driver's arrangement with Lawrence Trucking. *Id.* Employees of the shipper might help drivers load the truck, but after the truck departed, the shipper had no contact with the drivers and did not dictate routes or the manner in which the truck was driven. *Id.* at 919.

The appellate court stressed that, like the shipper in *Shoemaker,* Alliance had no contact with the carrier's drivers and did not dictate routes or the manner in which the truck was driven. Alliant specified only the particular hauling task (the mere result), rather than controlling the manner in which the work was done. "Even if an entity requires an exclusive relationship with the driver, has the power to fire the driver, and set rules governing the manner of loading the trucks, no agency relationship exists if that entity does not have the power to control the details of the manner of the hauling work performed." *See Dowe v. Birmingham Steele Corp.*, 2011 IL App (1st) 091997, ¶ 31 (ruling that no agency relationship existed between the shipper and the driver of the tractor-trailer who was employed, paid and insured by the carrier trucking company, where the driver chose his own route, controlled his own hours, performed his job according to the rules he received from his carrier employer, and provided and maintained his own equipment). *Cornejo,* 2023 IL App (1st) 220633, ¶ 42.

The court noted that "Alliance exercised little, if any control over Dakota's and its drivers' performance of the transportation work, as opposed to control over the result of the assigned task or matters ancillary to the work to be performed."

The appellate court in *Cornejo* held:

> Here, the fact that Alliance gave Dakota directions concerning pickups and drops, daily status updates, seal integrity, cargo security and freight bills and that Alliance imposed fees on Dakota for late or damaged deliveries are insufficient to establish an agency relationship because those directions pertained to ancillary aspects of the transportation itself.

Id. ¶ 49. The court noted that "Alliance exercised little, if any control over Dakota's and its drivers' performance of the transportation work, as opposed to control over the result of the assigned task or matters ancillary to the work to be performed." *Id. ¶ 51.*

It is clear that when litigating the issue of whether a trucking company or its driver can be considered the agent of a freight broker to impose vicarious liability on the broker, defense counsel must build his or her case around the degree of control that the broker exercises over the driver or the trucking company in the actual details of the manner of the hauling work performed and discount many of the ancillary details such as specification of the location of the pickup, the time of delivery, the rules governing the loading of the trucks, and the details of the specifications of the trailer.

Supreme Court Watch

John C. Hanson
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Illinois Supreme Court to Decide Whether Illinois Human Rights Act Extends to Private Organizations that Use Public Facilities?

In *M.U., a minor, by and through her parents, Kelly U. and Nick U. v. Team Illinois Hockey Club, Inc., an Illinois not-for-profit corporation, and the Amateur Hockey Association of Illinois, Inc., an Illinois not-for profit corporation*, the Illinois Supreme Court will consider if section 5 of the Illinois Human Rights Act ("the Act"), 775 ILCS 5/6-*101 et. seq.*, applies to otherwise private organizations that make use of places of public accommodation.

Section 5 of the Act provides that discrimination in the use and enjoyment of facilities, goods, and services of any "public place of accommodation" is unlawful. 775 ILCS 5/5-102(A).

The petitioners, Team Illinois Hockey Club, Inc. ("Team Illinois") and the Amateur Hockey Association of Illinois, Inc. ("AHAI") were granted a dismissal by the circuit court. *M.U., a minor, by and through her parents, Kelly U. and Nick U. v. Team Illinois Hockey Club, Inc., an Illinois not-for-profit corporation, and the Amateur Hockey Association of Illinois, Inc., an Illinois not-for profit corporation*, 2022 IL App (2nd) 210568. Subsequently, the Illinois Appellate Court, Second District reversed and remanded in favor of Plaintiffs, holding that the Act is applicable. *Id*. the Second District based much of their analysis on the United States Supreme Court opinion in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), where the Court held the definition of a "place of public accommodation" need not be available to the general public to be a place of public accommodation. *Id*. The Second District found both Team Illinois and AHAI to be in violation of the Act and remanded the case. *Id.* at ¶ 5.

While a private organization, Team Illinois makes use of an ice arena that is a place of public accommodation. *Id.* at ¶ 5. The ice arena, leased and operated by Team Illinois is otherwise open to the public for spectators. *Id.* at ¶ 5.

Plaintiff *M.U.* participated in public tryouts and joined the youth hockey team for Team Illinois. *Id.* at ¶ 4. Shortly after Plaintiff's disclosure of a mental health condition, Plaintiff was prohibited from participating in Team Illinois activities and from contact with other Team Illinois players, and advising other players and their parents not to have contact with the Plaintiff. *Id*. at ¶ 8. These restrictions were removed after the Plaintiff's parents threatened litigation. *Id.* at ¶ 9. Following Plaintiff's reinstatement with the team, Plaintiff filed a charge of discrimination with the Illinois Department of Human Rights ("the Department"), that was subsequently dismissed for lack of substantial evidence. *Id.* at ¶ 9. Following the dismissal by the Department, Plaintiff alleged discrimination under the Act and sought review of the Department's decision. *Id.* at ¶ 11.

AHAI, a not-for-profit, that is an affiliate of USA Hockey, which regulates and controls youth hockey teams throughout Illinois, including co-petitioner, Team Illinois. *Id.* at ¶ 4. A director and board member of AHAI subsequently reiterated the Plaintiff's suspension from Team Illinois activities and affirmed agreement with Team Illinois' suspension of the Plaintiff. *Id.* at ¶ 7.

In their motion to dismiss the circuit court complaint, the petitioners did not dispute that the ice arena was a place of public accommodation. *Id.* at ¶ 13. The circuit court found that "[t]he leasing of a, or for a specific amount of time, and ice rink, does not convert a private organization into a place of public accommodation." *Id*. at ¶ 14.

Petitioners claim the Second District's decision expands the scope of the Act beyond the Act's statutory language and cite a number of Illinois authorities where Illinois courts have not applied the Act to portions of a public facility used by a private party and that portion is not open to the general public. Petitioners further argue that unlike the statutory of the language of the Act itself, by applying the Act to Team Illinois, the Second District is making the Act applicable to clubs, organizations, teams, and events, where the statutory language

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is based upon physical locations. The Act prohibits discrimination at places of public accommodation including "a gymnasium, health spa, bowling alley, gold course, or other place of exercise or recreation." 775 ILCS 5/5-101(13). Petitioners also argue that Plaintiff, while prohibited from team activities by Team Illinois, was not prohibited the accommodations of the ice arena, and could make use of the public accommodations not related to playing for the private team, such as skating during open skate, viewing games, or eating at the restaurant.

Petitioners further argue that a long line of Illinois cases predating the United States Supreme Court decision in *Martin*, that directly interpret section 5 of the Act are applicable, beginning with the Illinois Supreme Court's interpretation of section 5 of the Act in, *Board of Trustees of Southern Illinois University v. Department of Human Rights et al.*, 159 Ill.2d 206, directing an interpretation based in doctrine of *ejusdem generis*. "Where general words follow an enumeration of two or more things, they apply only to persons or things, they apply only to persons or things of the same general kind or class specifically mentioned (*ejusdem generis*)." Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Text*, 199 (2012). Section 5 of the Act is comprised of 13 distinct classes, each with multiple distinct locations. 775 ILCS 5/5-101(A).

Petitioners highlight the legislature's intention that some organizations that would otherwise be governed by the Act not be included, and that private clubs or other establishments not open to the public are exempt under the Act. 775 ILCS 5/5.

Defense attorneys should monitor the Court's decision as affirming the Second District's finding may greatly expand the potential pool of Plaintiffs bring forth actions under the Act.

Municipal Law

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Drones as First Responders

In Illinois, we have a statute called the Freedom from Drone Surveillance Act, which generally provides that law enforcement agencies are precluded from using drones to gather information and provides certain exceptions for drone use. 725 ILCS 167/1, 10, 15. Some exceptions include using drones "[t]o counter a high risk of a terrorist attack," to "locate a missing person," "for crime scene and traffic crash scene photography," or with "reasonable suspicion," to use "swift action . . . to prevent imminent harm to life, or to forestall the imminent escape of a suspect or the destruction of evidence." 725 ILCS 167/15(1), (3), (4), (5).

Effective June 16, 2023, Public Act 103-0101 (HB 3902), the Drones as First Responders Act amends the Freedom from Drone Surveillance Act. Under the Drones as First Responders Act (the "Act"), law enforcement agencies may now use drones for additional limited purposes. In addition to using drones to "locate a missing person," law enforcement agencies may now also use drones to "engag[e] in search and rescue operations or [to] aid[] a person who cannot otherwise be safely reached." 725 ILCS 167/15(4).

Also under the Act, law enforcement agencies may now use drones "[t]o conduct an infrastructure inspection of a designated building or structure at the express request of a local government agency." 725 ILCS 167/15(7). When conducting such an inspection of a building, the law enforcement agency is required to "make every reasonable attempt to photograph only the building or structure and to avoid other areas." *Id.* Law enforcement agencies may now use drones to "demonstrate the capabilities and functionality of a police drone for public relations purposes, provided that no information is collected or recorded by the drone during such demonstrations." 725 ILCS 167/15(8).

Perhaps most importantly, law enforcement agencies may now use drones at parades, routed events, and special events. A "parade" is defined as "a march, procession, or other similar activity consisting of persons, animals, vehicles or things, or any combination

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> Law enforcement agencies may now use drones to "demonstrate the capabilities and functionality of a police drone for public relations purposes, provided that no information is collected or recorded by the drone during such demonstrations."

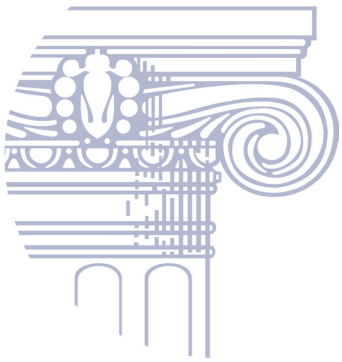
thereof, upon a public street, sidewalk, alley, or other public place, which requires a street closing or otherwise requires stopping or rerouting vehicular traffic because the parade will not or cannot comply with normal and usual traffic regulations or controls." 725 ILCS 167/5. A "routed event" is defined as "a parade, walk, or race that: (1) is hosted by the State of Illinois or a county, municipality, township, or park district; (2) is outdoors and open to the public; and (3) has an estimated attendance of more than 50 people." *Id.* A "special event" is defined as "a concert or food festival that: (1) is hosted by the State of Illinois or a county, municipality, township, or park district; (2) is outdoors and open to the public," and has attendance of a minimum number of people based on the municipality's population. *Id.* "Parades," "routed events," and "special events" do not include "any political protest, march, demonstration, or other assembly protected by the First Amendment." *Id.*

If law enforcement is going to use drones for a parade, routed event, or special event, the agency is required to post a written notice at the event location, at "major entry points", "for at least 24 hours before the event" notifying the public that drones may be used at the upcoming event "for the purpose of real-time monitoring of participant safety." 725 ILCS 167/15(10)(A and B). Also, the drone must be "flown in accordance with Federal Aviation Administration safety regulations." 725 ILCS 167/15(10)(C).

The Act further provides limitations on the purposes for which a drone may be used at a parade, routed event, or special event. A drone may be used "in advance of an event, before event participants have begun to assemble, for the sole purpose of creating maps and determining appropriate access routes, staging areas, and traffic routes." 725 ILCS 167/15(10)(C)(i). A drone may be used during the event, but only to: (1) "detect a breach of event space, including a breach by an unauthorized vehicle, an interruption of a parade route, or a breach of an event barricade or fencing," (2) "evaluate crowd size and density," (3) "identify activity that could present a public safety issue for the crowd as a whole, including crowd movement," (4) "assist in the response of public safety personnel to a real-time public safety incident at the event," and (5) "assess the traffic and pedestrian flow around the event in real time." 725 ILCS 167/15(10)(C)(ii).

When using drones in these ways, law enforcement is precluded from using facial recognition software or weapons. 725 ILCS 167/17, 18. The law enforcement agency is required to destroy any information and data gathered by drone in these ways, for parades, routed events, and special events, within 24 hours. 725 ILCS 167/20(a)(2). All information and data gathered by drone for purposes of countering a terrorist attack, locating a missing person, or photographing a crime or traffic scene must be destroyed within 30 days. 725 ILCS 167/20(a)(1). All information and data gathered in this way "shall be turned over to the requesting local government agency as soon as practicable, and all gathered information shall be destroyed immediately after the information has been turned over." 25 ILCS 167/20(a)(3). And finally, "[r]ecords of drone usage, including flight path data, metadata, or telemetry information of specific flights, if available, may be disclosed subject to the Freedom of Information Act and rules adopted under that Act." 725 ILCS 167/25(b).

While the Act allows law enforcement agencies additional opportunities to use drones for law enforcement purposes, such agencies need to be aware of the restrictions and requirements of the Act for such drone usage.



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Where Are We? Where are We Going? And What Does the Prudent Defense Counsel Do Now? Status of Immunity for Healthcare Workers and Institutions for Negligence Claims that Arose During the COVID-19 Pandemic

In 2020, the unimaginable occurred. The outbreak of a novel virus, COVID-19, led to the all-out war fought inside of hospitals, long term care facilities, and other healthcare institutions by doctors, respiratory therapists, nurses, CNAs, and other care providers. Interviews, statements, and articles have tried to capture what these practitioners experienced providing care to waves of patients battling a previously unseen disease with a high degree of morbidity and mortality. Regardless of what healthcare setting they practice in, each have described the overwhelming nature of battling COVID-19 and caring for patients in that setting.

On April 1, 2020, after only a few weeks of COVID-19 cases in Illinois hospitals, Governor Pritzker recognized the unprecedented nature of the challenges posed by a novel disease and the rising wave of infections. In turn, Governor Pritzker issued Executive Order 2020-19 declaring that "in a short period of time, COVID-19 has rapidly spread throughout Illinois, necessitating updated and more stringent guidance from federal, state, and local public health officials" and that "eliminating obstacles or barriers to the provision of supplies and health care services is necessary to ensure the Illinois healthcare system has adequate capacity to provide care to all who need it." Executive Order 2020-19 also recognized that less than a month before, on March 9, 2020, he had declared all counties in Illinois a disaster area in response to the spread of COVID-19 and that it was of critical importance to "ensur[e] the State of Illinois has adequate bed capacity, supplies, and providers to treat patients afflicted with COVID-19, as well as patients afflicted with other maladies." Exec Order No. 2020-19 (2020).

The Executive Order directed healthcare providers, facilities, and volunteers to render assistance to the State's response to the COVID-19 disaster. Rendering assistance involved different actions depending upon whether a healthcare provider, facility, or volunteer was involved.

For a Health Care Facility, rendering assistance must include "cancelling or postponing elective surgeries and procedures, as defined in DPH's COVID-19 – Elective Surgical Procedure Guidance, if elective surgeries or procedures are performed at the Health Care Facility." Additional ways for a Health Care Facility to render assistance can include "measures such as increasing the number of beds, preserving personal protective equipment, or taking necessary steps to prepare to treat patients with COVID-19." Ill. Exec Order No. 2020-19. However, this is not an exhaustive list.

For Health Care Professionals, however, the requirement for rendering assistance is different. Executive Order 2020-19 provides that rendering assistance is synonymous with "providing health care services at a Health Care Facility in response to the COVID-19 outbreak" or by "working under the direction of IEMA" or Department of Public Health in response to the proclamation of disaster in response to COVID-19. *Id.*

For the third category of individuals covered by Executive Order 2020-19, the "Health Care Volunteer," rendering assistance takes the form of "providing services, assistance, or support at a Health Care Facility" in response to COVID-19 outbreak but must be "authorized to do so" or by "working under the direction of IEMA" or Department of Public Health in response to the proclamation of disaster in response to COVID-19.

Subsequently, on May 13, 2020, Governor Pritzker issued Executive Order 2020-37 which renewed the request for assistance from Health Care Facilities, Health Care Providers, and

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volunteers to "render assistance" to the State's efforts to address the pandemic. The difference between Executive Order 19 and 37 is the examples of rendering assistance. In EO 2020-37 examples of rendering assistance for health care facilities included measures such as:

- increasing the number of beds;
- preserving and properly employing personal protective equipment;
- conducting widespread testing; and
- taking necessary steps to provide medical care to patients with COVID-19 and prevent further transmission of COVID-19.

If the healthcare facility is a hospital, Executive Order 2020-37 includes additional considerations:

- If the hospital performs elective surgeries or procedures, those surgeries and procedures must also include compliance with IDPH's current guidance on conducting elective surgeries and procedures; and
- Accepting a transfer of a COVID-19 patient from another Hospital or State-operated entities that lack capacity or capability to provide treatment.

For healthcare facilities, EO 2020-37 must also include:

- Widespread testing of residents and widespread and regular testing of staff for COVID-19 consistent with IDPH guidelines; and
- Accepting COVID-19 patients upon transfer or discharge from a Hospital or other Health Care Facility.

Where We Began

The Executive Order sets forth provisions of the Illinois Emergency Management Agency Act, 20 ILCS 3305/15 (hereinafter IEMA Act), a statute enacted by the Illinois legislature in 1988, years before the COVID-19 emergency, which provides the Governor with emergency powers in times of crisis. The same statute provides the Governor with the authority to "make, amend, and rescind all lawful necessary orders, rules, and regulations" to carry out the provisions of the IEMA Act. *See* 20 ILCS 3305/6(c)(1); Exec. Order 2020-19. Executive Order 2020-19 grounds the immunity provided therein with the identical provisions found in the IEMA Act:

> Neither the State, any political subdivision of the State, nor, except in cases of gross negligence or willful misconduct, the Governor, the Director, the Principal Executive Officer of a political subdivision, or the agents, employees, or representatives of any them, engaged in any emergency management response or recovery activities while complying with or attempting to comply with this Act or any rule or regulation promulgated pursuant to this Act is liable for the death of or any injury to persons, or damage to property, as a result of such activity.

20 ILCS 3305/15 & Ill. Exec. Order 2020-19

And furthermore:

> Any private person, firm or corporation and employees and agents of such person, firm or corporation in the performance of a contract with, and under the direction of, the State, or any political subdivision of the State under the provisions of this Act shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of willful misconduct.

20 ILCS 3305/21(b) & Ill. Exec. Order 2020-19.

In addition to drawing from the immunity provisions of the IEMA Act, the Executive Order also cites to those provisions of the Good Samaritan Act, 745 ILCS 49/1, and the Emergency Medical Services System Act, 210 ICLS 50/3.150, to further bolster the immunity provided to individuals and entities who are responding to a crisis. Ill. Exec. Order 2020-19.

Executive Order 2020-19 affords immunity from liability for all allegations *other than claims of willful and wanton or gross negligence* for those people or entities who meet the criteria set out in the Executive Order:

> During the pendency of the Gubernatorial Disaster Proclamation, [Health Care Facilities, Health Care Professionals, any Health Care Volunteers] shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by such [Health Care Facilities, Health Care

Professionals, any Health Care Volunteers].

Application of Immunity

Many personal injury attorneys began filing lawsuits alleging claims for injury and death as a result of COVID-19 as early as May 2020. Since then, hundreds of lawsuits for death and injury as a result of COVID-19 have been filed. However, these are not the only lawsuits against which the immunity can be asserted. As a result, most personal injury attorneys have filed lawsuits asserting both negligence and willful and wanton claims.

For those of us who have spent the last three years defending these lawsuits, we have consistently filed Motions for Involuntary Dismissal pursuant to 735 ILCS 5/2-619(a)(9), asserting that the claim asserted is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." As the question of whether or not a Health Care Facility, Health Care Professional, or Health Care Volunteer was rendering assistance lies squarely within the knowledge of that person/entity, discovery from any plaintiff will not assist in the determination. Typically, the motion for involuntary dismissal is supported by an affidavit crafted with representatives of the Health Care Facility, Health Care Professional, or Health Care Volunteer to identify and attest to the specific ways in which assistance was rendered to the State of Illinois consistent with the provisions of the Executive Order.

Under Illinois law, the movant who files a motion for involuntary dismissal "has the burden of proof on the motion and the concomitant burden of going forward." *Reynolds v. Jimmy John's Enterprises, LLC,* 2013 IL App. (4th) 12039 at ¶37. Once the defendant meets the initial burden, as when an affidavit is filed supporting the ways in which a Healthcare Institution or Healthcare Provider was rendering assistance to the state, "the burden then shifts to the plaintiff, who must establish that the affirmative matter asserted either is unfounded or requires the resolution of an essential element of material fact before it is proven." *Reynolds v. Jimmy John's Enterprises, LLC,* 2013 IL App. (4th) 12039 at ¶37.

It was at this junction that most trial courts evaluated the motions to dismiss and concluded that a question of fact existed regarding whether the defendant was rendering assistance. However, this is a premature conclusion. In fact, Illinois law is clear: "By presenting adequate affidavits supporting the asserted defense, the defendant satisfies the initial burden of going forward on the motion and that the burden immediately shifts to the plaintiff to submit "counter-evidentiary materials refusing the movant's affirmative defense." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). Illinois law is also clear that when "supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted." *Zedella v. Gibson*, 166 Ill. 2d 181, 195 (1995). A plaintiff must file a counter affidavit to respond. A plaintiff's failure to do so will result in the facts of an affidavit are deemed admitted. *Piser v. State Farm Mut. Auto. Ins. Co.*, 405 Ill. App. 3d 341, 353 (1st Dist. 2010). Since any evidence regarding the number of beds available in a facility, actions taken to preserve and protect the availability of PPE, and whether or not elective surgeries and procedures were cancelled or postponed will only be in the hands of the Health Care Facility, it should be difficult for a plaintiff to obtain and file a counter affidavit.

Where We Are: The *James* Decision

One early decision on the question of application of immunity under Executive Order 2020-19 is *James v. Geneva Nursing & Rehabilitation Center, LLC*, 2023 IL App (2d) 220180, where a motion for involuntary dismissal was filed to dismiss the negligence claims contained in the plaintiffs' complaints supported by an affidavit of the nursing home administrator setting out actions taken by the facility consistent with rendering assistance. After briefing, the Kane County Circuit Court denied the motion to dismiss, finding that a question of fact existed regarding whether the facility had rendered assistance. The trial court granted a request for certified question pursuant to Supreme Court Rule 308. The certified question submitted was: whether Executive order No. 2020-19 provides "blanket immunity for ordinary negligence [claims] to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic." *James v. Geneva Nursing & Rehabilitation Center, LLC*, 2023 IL App (2d) 220180 at ¶2.

The Second District revised the certified question, noting that blanket immunity is not available under the provisions of the IEMA Act and Executive Order because it excludes willful and wanton actions on the face of the order. *See id.* at ¶13. However, the Second Circuit Appellate Court went on to evaluate the breadth of immunity provided under Executive Order 2020-19 and the IEMA Act.

The *James* decision makes clear that the immunity provided is a product

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of the IEMA Act as announced by the Executive Order. "Executive Order No. 2020-19 invoked the Governor's authority under section 21(c) of the Act [Illinois Emergency Management Agency Act, 20 ILCs 3305/1 et seq (West 2020)] to extend ordinary governmental tort immunity" to Health Care Facilities and Health Care providers "during the Governor's disaster declaration. *Id.* at ¶7. The Appellate Court noted that immunity "would derive from the Illinois Emergency Management Act, not the executive order invoking that Act" because all the Executive Order did was "invoke the Governor's authority to declare a public health emergency, triggering a preexisting, potential statutory immunity for health care facilities under the Act." *Id.* at ¶17.

The Second District Appellate Court rejected any challenge to the constitutionality of Executive Order 2020-19, once again noting that because the immunity derives from the provision of the IEMA and was not "inconsistent with the relevant portion of the Act." *Id.* at ¶18. It should be noted that the IEMA has been in existence and invoked previously without question of constitutionality.

The Appellate Court next addressed the relevant grant of immunity within Executive Order 2020-19 contained within Section 3:

> [D]uring the pendency of the Gubernatorial Disaster Proclamation, Health Care Facilities . . . shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by the Health Care Facility, which injury or death occurred at a time when a Health Care Facility was engaged in the course of rendering assistance to the State by providing health care services in response to the COVID-19 outbreak.
>
> EO 20-19 Section 3.

The plaintiffs in *James* made many arguments that the Executive Order (and therefore the source of the Governor's power, the IEMA) does not provide immunity, either because there must be "real assistance" to the State for immunity to apply. (James Response brief at 10-11). Essentially, the *James* Plaintiffs argued for either a threshold finding of "enough" assistance rendered to the State or evidence of a causal link between the assistance rendered to the State with the injury to the plaintiff or plaintiff's decedent.

The Appellate Court rejected this line of argument. "We need not parse the executive order's language too closely—particularly its use of the phrase 'at a time'—as the parties have." *James*, at ¶19. The Appellate Court found no ambiguity in section 21(c) of the IEMA. "The statutory authority is clear that, except for willful misconduct, any 'private person, firm or corporation' who renders assistance or advice at the request of the State *** *during* [a] *** disaster [ ] shall not be civilly liable for causing the death of, or injury to, *any person*." *Id.* at 20 (emphasis in the original).

Having found that EO 2020-19 exists as an expression of the immunity available through the IEMA, and that there are no questions of constitutionality, the Appellate Court went on to note that what rendering assistance means "is apt to be a fact-found question not easily disposed of through preliminary pleadings and process." *Id.* at ¶22.

Asserting Immunity

For those of us who spend our legal careers defending medical providers and healthcare institutions, the idea of an immunity available for any of the care that we defend is a *rara avis* situation—reminiscent of the lyrics of Alice Coopers' classic. "I'm always chasing rainbows waiting to find the little bluebird in vain." However, consistent with the decision in *James*, for the period of time that Governor Pritzker issued a proclamation declaring that an emergency exists, immunity should be available. *See* IEMA §21(c) ("Any private person, firm or corporation and employees . . . who renders assistance or advice at the request of the State . . . shall not be liable for causing the death or, or injury to, any person . . . except in the event of willful misconduct."); and EO 20-19 ("During the pendency of the Gubernatorial Disaster Proclamation, [Health Care Facilities, Health Care Professionals, any Health Care Volunteers] shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by such [Health Care Facilities, Health Care Professionals, any Health Care Volunteers]"). Governor Pritzker issued the first emergency proclamation on March 9, 2020, and continued to renew the proclamation until expiration on May 11, 2023. Arguably, if a Healthcare Facility or Healthcare Provider rendered assistance to the State of Illinois in the ways outlined in the Executive Order, they should be entitled to immunity for allegations of negligence.

The prudent practitioner should assert immunity under the IEMA and Executive Orders as an affirmative defense while filing an answer to the complaint. The affirmative defense

need not set out specific actions taken to render assistance, but a statement positively asserting each of the declared definitions of what rendering assistance was, considering the time frame of the alleged care at issue.

With respect to the timing of filing a motion, some courts may take the language in *James* literally, that a motion for summary judgment or partial summary judgment should be the vehicle to assert immunity. *See James*, 2023 IL App (2d) at ¶22. However, a motion for involuntary dismissal pursuant to 735 ILCS 5/2-619(a)(9) supported by an affidavit affords the opportunity for discovery. This addresses the Appellate Court's concern regarding the need for a "fact-bound" analysis in evaluating the application of immunity.

Plaintiffs' Current Response

The typical arguments raised by personal injury attorneys in responding to a claim of immunity (other than to argue that EO 20-19 does not provide immunity) is to attack on the issue of causal connection. If the *James* decision is the controlling decision, the language of the IEMA controls, which does not include any causation requirement, and any assertion for the need of causality should be dismissed.

Litigants should be aware of a decision issued by Judge Angelo Kappas of the DuPage County Court in *Ware v. Butterfield Health Care, Inc.*, No. 2021 L 001185 (18th Jud. Cir.). Judge Kappas issued an opinion on a motion to dismiss one week before the *James* decision was released. The decision in *Ware* compared the language of the Executive Order 2020-19 with that of 2020-37 in addressing causation. The language in Executive Order 2020-37 "clearly incorporates a causal connection requirement in that it states that hospitals are immune 'from civil liability for any injury or death *relating to* the diagnosis, transmission, or treatment of COVID-19." *Ware* at 12. The *Ware* Court went on to deduce: "By looking at EO 2020-37, it is clear that Governor Pritzker knew how to use precise language to incorporate a causal connection requirement, indicating that, if he wanted such a requirement in EO 2020-19, he would have explicitly added one to the plain language." *Id.*

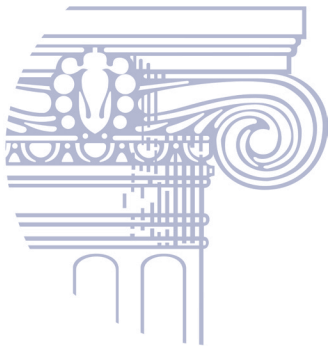
Similarly, many personal injury attorneys attempt to minimize the efforts of the healthcare industry in responding to the COVID-19 pandemic. Arguments such as the Healthcare Facility "keeping a face mask or two in a closet constituting preserving PPE" or that accepting residents from the hospital setting into the facility was nothing more than "business as usual" all speak to the argument that there is a threshold before immunity applies. This argument also fails because there is no language in either the IEMA or Executive Order establishing what threshold assistance is required prior to immunity being available.

Current Status

As of the drafting of this article, the plaintiffs in *James* have filed a petition for leave to appeal to the Illinois Supreme Court, which has not been decided. *See James v. Geneva Nursing & Rehab Center, LLC*. (No. 130042) (filed Sept. 21, 2023). As such, at this time *James* is the controlling decision. Practitioners defending healthcare providers and institutions should use the IEMA as jumping off point for asserting immunity for negligence allegations.

Nothing within the Executive Orders or IEMA limits the application of immunity to only COVID-19 claims. There is also no question that the impact of COVID-19 addressed many aspects of the delivery of healthcare, including the availability of beds, increase in the demands placed upon nursing staff, and so on. All of which should be covered by the immunity provision.

In addition to filing an affirmative defense asserting immunity pursuant to the IEMA and Executive Orders, a prudent practitioner should issue written discovery to confirm the plaintiff's lack of knowledge of those issues that form the basis of rendering assistance—number of beds available, policies on extended PPE usage, knowledge of steps to purchase and acquire PPE, inservices to inform staff and providers about COVID-19 and the current information and precautions, and when necessary steps to cancel elective surgeries and/or conduct COVID-19 testing. Armed with discovery answers that establish the plaintiff's lack of knowledge on issues that would contradict the affidavit of a knowledgeable representative of a Healthcare Facility or Practitioner in support of either a motion for involuntary dismissal or motion for summary/partial summary judgment, the prudent practitioner will set opposing counsel on their heels.



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The Rise of Ransomware

Lately, there's been frequent news coverage of businesses being hit with ransomware attacks by hackers. Ransomware is a malicious software that threat actors use to prevent users from accessing their own systems or files unless the users pay the ransom demand. *NIST Releases Tips and Tactics for Dealing With Ransomware*, NIST, (May 13, 2021), https://www.nist.gov/news-events/news/2021/05/nist-releases-tips-and-tactics-dealing-ransomware. In 2022 alone, the FBI received 2,385 complaints relating to ransomware and losses of more than $34.3 million. Federal Bureau of Investigation Internet Crime Report 2022, Federal Bureau of Investigation, (2022), https://www.ic3.gov/Media/PDF/AnnualReport/2022_IC3Report.pdf. A well-known example of ransomware occurred on September 11, 2023, when MGM Resorts, a prominent casino chain, disclosed to the public that it was hit with a "cybersecurity issue" that affected its systems, which the company shut down to protect its systems and data. Sara Morrison, *The chaotic and cinematic MGM casino hack*, explained, Vox, (Oct. 6, 2023), https://www.vox.com/technology/2023/9/15/23875113/mgm-hack-casino-vishing-cybersecurity-ransomware. Unfortunately, ransomware will continue to rise, and although there is no indication that it will slow down, there are a few steps that businesses can take to lower their chances of being the next victim of ransomware.

What is Ransomware?

There are a variety of ransomware that businesses may face. One common type of ransomware is one that encrypts data and demands payment in exchange for a decryptor key. Usually, cybercriminals will demand payment in the form of digital currency such as Bitcoin. *See* Kurt Baker, *Types of Ransomware*, CrowdStrike, (Jan. 30, 2023), https://www.crowdstrike.com/cybersecurity-101/ransomware/types-of-ransomware/. Hackers may simply lock a business out of their own system and display a ransom demand on a screen demanding payment in exchange for access to the business's system. *Id*. Another type of ransomware is called "scareware," which is a fake software that claims to have detected a virus or issue on a computer and demands payment to solve the issue. *Id*. A cybercriminal may also claim that they stole a company's sensitive data and threaten to release the data if the company does not pay. *Id.*

Although there are risks associated with paying a cybercriminal, some businesses may deem it necessary to pay. Some companies may have to pay because restoration to full operation may be too slow or even impossible without a decryption tool. Edward Segal, *Why Experts Disagree On Whether Businesses Should Pay Ransomware Demands,* Forbes, (Jul. 29, 2022), https://www.forbes.com/sites/edwardsegal/2022/07/29/why-experts-disagree-on-whether-businesses-should-pay-ransomware-demands/?sh=4ad888ad4fca. Some businesses may consider paying if the hackers stole sensitive or proprietary information that could potentially be damaging to the business if the information was released. *Id.* Days before MGM's cyberattack, Caesars, another prominent casino chain, was also hit with ransomware and paid half of the $30 million ransom demand. Rohan Goswami and Contessa Brewer, CNBC (Sept. 15, 2023), https://www.cnbc.com/2023/09/14/caesars-paid-millions-

About the Author

Catherine Geisler is an associate of *Constangy, Brooks, Smith & Prophete, LLP* and is based in Chicago. She assists clients in responding to various data security incidents such as ransomware, business email compromises, and other types of cyberattacks. Through her daily work helping to manage responses to data security incidents, she stays abreast of the evolving legal landscape regarding privacy and cybersecurity issues to better serve clients. She also has substantial experience providing clients with advice on the development of policies and procedures for data privacy and security to ensure compliance with all U.S. laws, such as the California Consumer Privacy Act (CCPA) and Health Insurance Portability and Accountability Act (HIPAA), and international privacy laws, such as the General Data Protection Regulation (GDPR).

Ms. Geisler worked as an associate in an insurance practice group prior to joining Constangy, where she represented insurance carriers in a variety of insurance coverage disputes. Her experience included analyzing insurance coverage issues, assessing insurance carriers' risks, preparing coverage opinions and position letters, and handling all aspects of insurance coverage litigation in state and federal courts. Ms. Geisler has written extensively on data privacy and security matters, and she serves as the technology columnist for Illinois Defense Counsel. She also holds the Certified Information Privacy Professional/United States (CIPP/US) credential from the International Association of Privacy Professionals (IAPP).

in-ransom-to-cybercrime-group-prior-to-mgm-hack.html.

Can you prevent ransomware attacks?

Unfortunately, there's no guarantee that businesses can completely protect themselves against cyberattacks such as ransomware. However, there are a few key measures that businesses can take to make it more difficult for a hacker to gain access to a business's systems and data.

Businesses should consider investing in an arsenal of cybersecurity tools to protect their IT environment from cyberattacks. For example, businesses should implement a good endpoint detection and response tool, which is a cybersecurity tool that continuously monitors, detects, and kills any threats in a business's network. *See What are EDR (Endpoint Detection and Response) Solutions?*, Gartner, (last accessed on Nov. 27, 2023) https://www.gartner.com/reviews/market/endpoint-detection-and-response-solutions. This tool will not only detect threats but will also offer solutions on how to remediate infected systems. *Id*.

Another important tool is a firewall that can prevent unauthorized access to a business's network. A firewall acts as a filter that monitors and blocks unwanted or unknown traffic or outside resources from gaining entry into a business's network. Clare Stouffer, *What is a firewall? Firewalls explained and why you need one*, Norton, (July 12, 2023), https://us.norton.com/blog/privacy/firewall. Having a firewall in place will ensure that only legitimate traffic flows through a business's network.

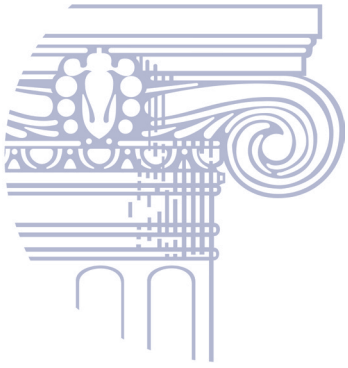
Businesses should implement and enforce multifactor authentication ("MFA") for all its users. MFA requires users to provide two or more factors to verify their identity when logging into an account. Kevin Poireault, *#CyberMonth: Is MFA Enough to Protect You Against Cyber-Attacks?*, Infosecurity Magazine, (Oct. 17, 2023), https://www.infosecurity-magazine.com/news-features/cybermonth-mfa-enough-otect/#:~:text=Multi%2Dfactor%20authentication%20(MFA),from%20cyber%2Dattacks%20in%202023. Implementing MFA will ensure that only legitimate users have access to a business's network and sensitive data.

Businesses should also consider investing in a good backup solution for all its data. The National Institute of Standards and Technology recommends not only securing your backup data but also ensuring that it is isolated in order to prevent ransomware from reaching it. *NIST Releases Tips and Tactics for Dealing With Ransomware*, NIST, (May 13, 2021), https://www.nist.gov/news-events/news/2021/05/nist-releases-tips-and-tactics-dealing-ransomware. One of the worst things that could happen to a business during a ransomware event is to have their business operations completely halted because their critical infrastructure is locked up. As discussed above, many hackers will encrypt a business's entire environment and will provide a decryption tool to unlock the environment in exchange for a ransom payment. Even if a business pays for the decryption tool, it is not guaranteed that the tool will work and even if it did work, the process to decrypt the environment is not done instantaneously. The business must first validate that the tool does not contain any malicious code and then unlock and restore each system, which is a time-consuming process. At that point, a business may have lost a considerable amount of revenue during that time. For example, MGM reported that the cyberattack disrupted its operations causing it to lose about $100 million to its third-quarter results. *Casino giant MGM expects $100 million hit from hack that led to data breach*, CNN Business, (Oct. 5, 2023), https://www.cnn.com/2023/10/05/business/mgm-100-million-hit-data-breach/index.html.

No matter how good a business's technological defenses are, they are meaningless if a business does not train their employees to detect cyberattacks like ransomware. Businesses should consider having regular training sessions that focus on identifying suspicious and malicious activities within their network and reporting them to the proper team for further investigation.

Key Takeaways

Due to the rise of these types of attacks, businesses that heavily rely on technology must be more vigilant and committed to investing in vital tools that prevent cybercriminals from easily accessing a business's network and data. Hackers have become more sophisticated in their cyberattacks, and as a result, businesses need to strengthen their defenses to mitigate risks.



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Voluntary Arbitration: Section 19(p) of the Illinois Workers' Compensation Act

Section 19(p) has been a part of the Illinois Workers' Compensation Act ("Act") for decades but has rarely been used by parties to resolve issues within a claim. Recently, there has been a resurgence in use of this little-known section of the Act, leaving many veteran practitioners to ask the question: what is section 19(p) and how may I use it to move my claim toward resolution? Voluntary arbitration under section 19(p) of the Workers' Compensation Act and section 19(m) of the Occupational Disease Act essentially serve the same function: expedited final decision related exclusively to temporary total disability, permanent partial disability, and/or medical expenses. *See* 820 ILCS 305/19(p); 820 ILCS 310/19(m).

Relevant Statutes and Administrative Codes

Section 19(p) provides as follows. It begins by stating:

> (p) After filing an application for adjustment of claim, but prior to the hearing on arbitration, the parties may voluntarily agree to submit such application for adjustment of claim for decision by an arbitrator under this subsection where such application for adjustment of claim raises only a dispute over temporary total disability, permanent partial disability, or medical expenses. Such agreement shall be in writing in such form as provided by the Commission.

Section 19(p) provides for the Commission to establish rules, stating:

> Applications for adjustment of claim submitted for decision by an arbitrator under this subsection shall proceed according to rule as established by the Commission. The Commission shall promulgate rules including, but not limited to, rules to ensure that the parties are adequately informed of their rights under this subsection and of the voluntary nature of proceedings under this subsection.

It further provides:

> The findings of fact made by an arbitrator acting within his or her powers under this subsection in the absence of fraud shall be conclusive. However, the arbitrator may on his own motion, or the motion of either party, correct any clerical errors or errors in computation within 15 days after the date of receipt of such award of the arbitrator and shall have the power to recall the original award on arbitration, and issue in lieu thereof such corrected award.

The post-decision standard of review is also provided by Section 19(p):

> The decision of the arbitrator under this subsection shall be considered the decision of the Commission and proceedings for review of questions of law arising from the decision may be commenced by either party pursuant to subsection (f) of Section 19.

Section 19(p) also states:

> The Advisory Board established under Section 13.1 shall compile a list of certified Commission arbitrators, each of whom shall be approved by at least 7 members of the Advisory Board. The chairman shall select 5 persons from such list to serve as arbitrators under this subsec-

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Amber D. Cameron is a partner at *Heyl, Royster, Voelker & Allen, P.C.*, working out of the firm's Edwardsville and St. Louis offices, where she focuses her practice on workers' compensation and toxic tort litigation. A seasoned trial attorney, Ms. Cameron represents employers of all sizes throughout southern Illinois and Missouri. Regularly providing educational seminars to insurance companies, third-party administrators, and self-insured employers, she has a keen eye for detail and a tactical approach, working diligently with her clients to develop creative resolution strategies for her claims. Before joining Heyl Royster, Ms. Cameron gained advanced knowledge of Illinois workers' compensation law while working as a staff attorney at the Illinois Workers' Compensation Commission. She earned her law degree and a certificate in dispute resolution from the University of Missouri-Columbia School of Law, where she excelled in legal writing.

> tion. By agreement, the parties shall select one arbitrator from among the 5 persons selected by the chairman except that if the parties do not agree on an arbitrator from among the 5 persons, the parties may, by agreement, select an arbitrator of the American Arbitration Association, whose fee shall be paid by the State in accordance with rules promulgated by the Commission. Arbitration under this subsection shall be voluntary.

820 ILCS 305/19(p).

The Rules Governing Practice Before the Workers' Compensation Commission give additional direction on the use of voluntary arbitration under section 19(p) of the Workers' Compensation Act and section 19(m) of the Workers' Occupational Disease Act. Ill. Admin. Code tit. 50, § 9030.100 (2016). Section 9030.100 outlines the process for selection of arbitrators chosen to hear voluntary arbitration cases, how to request a voluntary arbitration before the Commission, the conduct of hearings, and option for using the services of an outside arbitrator with the American Arbitration Association if the parties are unable to agree on one of the Commission certified arbitrators.

Procedural Issues of Importance

Voluntary arbitration under section 19(p) of the Workers' Compensation Act or section 19(m) of the Occupational Disease Act (herein after "voluntary arbitration") allows the parties to proceed before a chosen arbitrator for a final decision on the issues of temporary total disability (TTD), permanent partial disability (PPD), and/or medical expenses. All parties to the claim, including the petitioner, respondent, and their counsel, must agree to proceed with a voluntary arbitration. The parties must all sign the voluntary arbitration form (IC36) and file the form with the Commission. The form indicates that the parties all understand it is a voluntary choice to proceed, and by doing so the parties are waiving certain rights; most importantly, the right to appeal the decision of the chosen arbitrator.

Decisions under voluntary arbitration are binding on the parties and are a final decision of the Commission. The decision cannot be appealed to the Commission like those under section 19(b) of the Act.

Decisions under voluntary arbitration are binding on the parties and are a final decision of the Commission. The decision cannot be appealed to the Commission like those under section 19(b) of the Act. If the parties agree to move forward with voluntary arbitration on one or more of the limited issues allowed, the parties must also agree on one of the five (5) designated arbitrators selected by the Chairman of the Commission from a list compiled by the Workers' Compensation Advisory Board to conduct the voluntary arbitration. Ill. Admin. Code tit. 50 § 9030.100 (a). As of the date of this publication, the five designated arbitrators include: Arbitrator Paul Cellini, Arbitrator Stephen Friedman, Arbitrator Gerald Granada, Arbitrator Gerald Napleton, and Arbitrator Dennis O'Brien. There is no set term for the chosen arbitrators, and if a vacancy occurs among those selected, the Chairman shall select an arbitrator from the Advisory Board list to fill the vacancy. Ill. Admin. Code tit. 50 § 9030.100 (a). If the parties are unable to agree upon one of the five certified arbitrators, the parties may select an arbitrator from the American Arbitration Association to conduct the hearing with the fee for the arbitrator to be paid by the State. Ill. Admin. Code tit. 50 § 9030.100 (a),(d).

Once the parties have signed and filed the voluntary arbitration form, the Commission assigns the claim to the chosen arbitrator and the hearing may proceed in any venue where the arbitrator is assigned. Therefore, if the parties choose an arbitrator who is currently assigned to Zone 4, they must appear at one of the Zone 4 venues before that arbitrator for the hearing. However, it is possible for any of the parties to testify by evidence deposition or submit a stipulated Statement of Testimony in lieu of appearance at the hearing. Since the issues are limited and the facts are usually uncontroverted, testimony by deposition or affidavit is often used when travel is inconvenient. If a Statement of Testimony is submitted, it is important to remember it is not a Statement of Facts that must be accepted by the arbitrator, rather the arbitrator still has the duty to review the evidence and testimony and make a finding of facts based upon the same.

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A decision pursuant to voluntary arbitration allows the parties to quickly obtain a final decision on the reasonableness, necessity, causal connection, and liability for prior and future medical expenses, and the parties may then proceed with settlement of all other issues in the claim.

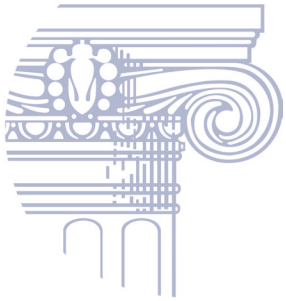
Given the voluntary arbitration decisions are not appealable as to questions of fact, there are no reported decisions. However, it is clear the most common reason parties choose to procced with voluntary arbitration is to facilitate a quick and efficient means of resolving issues with medical bills prior to the ultimate settlement of the claim on all other issues. A growing number of workers' compensation claims involve payments by Medicare, ERISA plans, and retirement system group health plans which will not negotiate payment of bills and require reimbursement for payment of any expenses related to a workers' compensation injury. Due in part to more employees deferring retirement, parties are more frequently tasked with protecting Medicare's interests pursuant to the Medicare Secondary Payer (MSP) laws when settling a workers' compensation claim with a Medicare eligible (or soon to be Medicare eligible) employee. All parties in a workers' compensation case have significant responsibilities under the MSP laws to protect Medicare's interests when resolving cases that include future medical expenses. If there are future treatment recommendations on the table at the time of settlement, the options available to the parties in the workers' compensation claim are to leave medical benefits open in a contract for settlement, obtain a Medicare Set-Aside (WCMSA), or proceed with hearing for a final decision on the issues of future medical expenses. A decision pursuant to voluntary arbitration allows the parties to quickly obtain a final decision on the reasonableness, necessity, causal connection, and liability for prior and future medical expenses, and the parties may then proceed with settlement of all other issues in the claim.

When submitting evidence for voluntary arbitration, the parties usually stipulate to submission of excerpts of medical and other evidence necessary for the arbitrator to make a finding of fact on the issues. The parties may also submit a joint proposed voluntary arbitration decision. In this manner, the arbitrator does not have to sift through documents irrelevant to the issues at hand and can expedite the decision. However, it is important to ensure the arbitrator has enough evidence available in the record to make his or her findings.

To proceed with the voluntary arbitration before an arbitrator for which the claim was not previously assigned, the Commission reassigned the claim to the parties' chosen arbitrator for the hearing. Once the voluntary arbitration decision is issued, that arbitrator retains jurisdiction for a limited period of 30 days. Therefore, if the parties have been able to reach a compromised settlement on all other issues within that time, the parties will submit the settlement contract for approval with that arbitrator.

Take-Aways

As interest by arbitrators and practitioners in voluntary arbitration proceedings continue to grow, it's important for defense counsel to understand the advantages and risks in order to advise their clients appropriately. It can be an efficient way by joint effort of the parties to obtain a final decision of the Commission when required for limited issues, especially medical bills. Both the petitioner and respondent, as well as their counsel, must affirmatively agree to proceed with the voluntary arbitration and certify on Commission form their joint agreement as to the issue(s) in dispute, the designated arbitrator to assign the claim, and their understanding that the decision of the chosen arbitrator as to all issues of fact is final and unappealable. By proceeding with voluntary arbitration though, the parties may be able to streamline the hearing issues, obtain a decision quickly, and then proceed with closure of all other issues through a negotiated settlement contract.



Civil Practice and Procedure

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Browning v. Advocate: Many Lessons to be Learned

"A mockery of a form of trial." That is how, at oral argument, Justice Lavin described the trial in *Browning v. Advocate Health and Hospital Corp.*, 2023 IL App (1st) 221430.

In a case that is either an anomaly or which portends the conduct of future trials, plaintiffs' counsel used a pre-trial ruling finding that certain treating physicians were the agents of the defendant hospital to have read large portions of those doctors' discovery depositions read as evidence pursuant to Ill. R. Evid. 801(d)(2)(D) and Ill. S. Ct. R. 212(a)(2). The defendants were not able to call those doctors live to explain their deposition testimony until weeks later. A unanimous panel of the Illinois Appellate Court, First District found the trial court erred in finding agency such that the discovery deposition testimony should not have been admitted as admissions. However, the majority of the court, in an opinion written by Justice Hyman, ruled that there was no prejudice to the defendant based upon the delay in presenting live testimony and allowed the $49 million verdict to stand. In dissent, Justice Lavin stated "[t]he majority's conclusion that this was not sufficient evidence of prejudice is disingenuous at best." *Browning*, 2023 IL App (1st) 221430, ¶ 94.

Proceedings in the Trial Court

In February 2015, Joseph Browning was admitted to Advocate Lutheran General Hospital ("Advocate") after medical imaging revealed an inflamed gallbladder. *Browning v. Advocate Health and Hosp. Corp.*, 2023 IL App (1st) 221430, ¶ 8. Dr. Resnick, an Advocate employee, removed the gallbladder. *Id*. After the surgery, Browning developed various symptoms and was taken to the ICU for a suspected sepsis infection, where several specialists treated him. Browning remained in the ICU for almost two weeks and doctors disagreed about the source of the sepsis. *Id*. ¶¶ 9-10. Eventually, a CT scan revealed a hole in the abdomen, requiring surgery. *Id*. ¶ 13. The surgery revealed that much of the small bowel needed to be removed as it was ischemic and necrotic. *Id*. ¶ 14. Browning underwent surgeries in the following weeks performed by Dr. Resnick and eventually underwent a bowel transplant at a non-Advocate hospital. *Id*. ¶¶ 15-16.

In 2016, the Brownings sued Advocate, Dr. Resnick and another physician, alleging medical negligence and loss of consortium claims. *Id*. ¶ 18. The Brownings asserted that the defendants should have known that the infection was a known postoperative complication and should have taken measures to prevent it. *Id*. Moreover, the Brownings alleged that the standard of care was violated by waiting eleven days before the second surgery, as the bowel was damaged beyond repair by that point. *Id*. The Brownings amended their complaint to add the treating physicians and their respective employers, alleging that those physicians acted as Advocate's agents or apparent agents when treating Browning. *Id*. ¶ 20.

Between January 2018 and March 2019, the physicians who treated Browning at Advocate were presented for their discovery depositions. The physicians were not represented as a consequence of the rule in *Petrillo v. Syntex Labs., Inc.*, 148 Ill. App. 3d 581 (1986) (barring *ex parte* communications between a plaintiff's treating doctor and defense counsel as a violation of the doctor-patient relationship.") *Id*. ¶¶ 21, 94. Following those depositions, Advocate amended its answer, admitting that four treating physicians were apparent agents, but denying agency as to the other physicians. *Id*. ¶ 21. Plaintiffs subsequently

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About the Authors

Donald Patrick Eckler is a partner at *Freeman Mathis & Gary LLP*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

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dismissed all named physicians except Dr. Resnick. *Id*.

In December 2018, plaintiffs issued a deposition request seeking to depose individuals knowledgeable about the relationship between Advocate and Advocate Physician Partners (APP) to determine whether APP controlled treatment decisions at Advocate. *Id*. ¶ 23. Advocate moved to strike the rider and refused to respond to it. After several extensions, the Brownings moved for discovery sanctions. *Id*. ¶ 24.

In June 2020, the Brownings filed a third amended complaint to allege that certain treating physicians and Advocate belonged to APP. *Id*. ¶ 25. The Brownings also moved for partial summary judgment that certain physicians were Advocate's apparent agents. *Id*. The motion judge granted the motion for sanctions against Advocate, "debarred" Advocate from "maintaining any defense or argument" about the apparent agency of non-employee doctors, and, after initially denying the motion for summary judgment finding a question of fact, the court then granted summary judgment on the issue of agency as now required by the sanctions order. *Id*. ¶¶ 25-26.

Before trial, the Brownings moved *in limine* to have portions of the discovery depositions of ten of the physicians read to the jury as admissions of a party's agent. *Id*. ¶ 28. Advocate did not object to the testimony of three of the physicians, but objected to the other seven on grounds of inadmissible hearsay, as they were not agents of Advocate at the time of the deposition. The trial judge granted the Brownings' motion. *Id*.

At trial, the defendants objected to the use of physicians' discovery depositions as substantive evidence. *Id*. ¶ 32. The objections were overruled and the jury found for plaintiffs. *Id*. ¶ 35. The jury awarded the plaintiff $49.25 million. *Id*. The defendants moved for a new trial, arguing that the court abused its discretion in imposing the discovery sanction and that the sanction turns inadmissible testimony into admissible testimony. *Id*. The trial court denied the motion and the defendants appealed. *Id*. ¶ 36.

Majority Decision

On appeal, defendants argued that the discovery deposition testimony of seven physicians was inadmissible hearsay because it did not fall within a hearsay exception for a discovery deposition because the physicians were not Advocate's agents at the time of the deposition. *Id*. ¶¶ 52-53. All three justices agreed, finding that summary judgment did not apply to the discovery depositions as the sanctions order was inapplicable, that the depositions did not take place during the agency relationship, Advocate did not give the physicians permission to speak on its behalf and that the Illinois Rules of Evidence would not allow the physicians' testimony to be admitted. *Id*. ¶¶ 55-56, 88. The majority held that because the defendants did not appeal from the sanctions order it was not reviewable because it was "not a step in the procedural progression leading to the judgment against defendants." *Id*. ¶ 57

The majority of the First District affirmed the denial of a new trial because, despite the error in allowing the improper deposition testimony, it did not find prejudicial error in admitting the inadmissible testimony or the error to have affected the outcome. *Id*. ¶ 64. The First District held that since the defendants called the treating physicians as witnesses at trial, the testimony would still have been elicited and the defendants do not identify what testimony would have changed the outcome. *Id*. ¶ 75.

The Dissent

The dissent agreed that the testimony was inadmissible, but stated that the sanctions order was reviewable and that the defendants were prejudiced by the inadmissible testimony. *Id*. ¶ 88. The dissent asserts that the sanctions order was a step in the procedural progression and that the primary issues on appeal stem from that order. *Id*. ¶ 91. The dissent further argues that the inadmissible testimony was prejudicial because many of the depositions occurred without the doctors having counsel present, defendants were unable to call the treating physicians until weeks after the Brownings presented their testimony, and allowing the testimony would blur the line between evidence depositions and discovery depositions. *Id*. ¶¶ 94-96.

Takeaways

Despite the unusual pre-trial procedural history, the lessons from this case are numerous. First, in cases where a possible agent is to be deposed, it is critical for them to have counsel to prepare them for their testimony and review any records with them. Recognizing the complication that *Petrillo* can present, this lesson applies whether the witness is a medical professional or any other witness. This is especially so in light of the decision in *McQueen v. Green*, 2022 IL 126666, in which the Illinois Supreme Court held that a defendant employer could be held liable in negligence for the conduct of an employee, even though the jury found the employee free of negligence.

Second, this case must be kept at the ready by trial counsel where the

plaintiff is going to be reading excerpts of testimony from discovery depositions. Clearly delineating which defense witnesses are agents, and which are not, and when the agency relationship existed can be used to prevent this tactic.

Third, if the reading of discovery depositions is allowed, it should be done in a coherent fashion and, if it is not, an objection should be made. As set forth by the dissent, the deposition testimony presented was cobbled together thusly:

> [T]he manner in which Rabinak [the reader] read the discovery depositions to the jury in a cut-and-paste fashion was clearly prejudicial to the defense. For example, when Rabinak read Dr. Stone's discovery deposition to the jury, he began reading from page 5 of the discovery deposition, then jumped to page 17, then back to page 10, before skipping ahead to pages 42-43 of the deposition, and so forth. Rabinak read the other discovery depositions to the jury in the same manner. While Rabinak was only doing his job, the jury was presented with an inaccurate and misleading view of the evidence.

Id. ¶ 98. Though not found to be prejudicial by the majority, this issue should be preserved because, under other circumstances, it could get traction.

Fourth, an argument that does not seem to have been made was that Ill. S. Ct. R. 212(c) provides: "[i]f only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him or her to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used." This brings us back to the first point above: to have testimony from the discovery deposition to be read it is likely necessary to have the witness represented by counsel who can prepare for such rehabilitation questioning. It is unlikely that favorable rehabilitation testimony, pursuant to Rule 212(c), following testimony introduced by the plaintiff will have been elicited at the deposition absent representation of the witness.

Fifth, and though an extension of Ill. S. Ct. R. 212(c), when faced with a plaintiff's lawyer employing this tactic, and where favorable deposition testimony is not available, defense counsel should ask, and be prepared to call, the witness live immediately after the read portions so that the jury can promptly hear the testimony. This request should at least be made to preserve the issue as it comports with the spirit of Rule 212(c), as there is at least one appellate court justice that appreciates the prejudice in having to wait weeks to rehabilitate a witness.

Finally, it is critical that all orders that are potentially appealable be included in the notice of appeal. As the dissent noted, the sanctions order was a step on the way to the erroneous evidentiary decision, but that was rejected by the majority. It is unlikely the outcome would have been different had the sanctions order been appealed, but it would have squarely put the issue before the appellate court.

The distinction between discovery and evidence depositions is fundamental to Illinois civil trial practice and it should be maintained. The unanimous decision of the First District held that it was improper to allow the testimony in this case, but not because rules do not allow it, but because the sanctions order did not permit its use.

Epilogue

This is a trial and a ruling that is notable because of the size of the verdict, the manner in which it was tried, and the blistering dissent by Justice Lavin. Not only in his dissent, but at oral argument, he expressed incredulity to plaintiffs' counsel about trying a case using a reader and extensive excerpts of deposition testimony. The distinction between discovery and evidence depositions is fundamental to Illinois civil trial practice and it should be maintained. The unanimous decision of the First District held that it was improper to allow the testimony in this case, but not because rules do not allow it, but because the sanctions order did not permit its use. The defense bar must be vigilant to resist attempts to further erode the distinction between these two kinds of depositions, as justice is best served by the distinction.

This may not be the last of this case. As of this writing, a petition for leave to appeal has been filed and is pending before the Illinois Supreme Court.

Legal Ethics

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ABA Formal Opinion 508 and Improper Methods of Preparing and Presenting Witnesses

Consistent with the duty to provide competent and diligent representation, a lawyer must prepare witnesses before presenting them for examination. *See* Illinois Rules of Prof'l Conduct R. 1.1, 1.3 (2020) [hereinafter Rules]. In Formal Opinion 508, *The Ethics of Witness Preparation*, the American Bar Association ("ABA") examined the various types of attorney misconduct that can occur while preparing and presenting clients and witnesses. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 508 (Aug. 5, 2023) [hereinafter Formal Op. 508]. In this issue, we will review the opinion and distill practical tips from it.

Formal Opinion 508 begins with the proposition that lawyers "must respect the important ethical distinction between *discussing* testimony and *seeking improperly to influence* it." Formal Op. 508, pp. 2–3 (*quoting Geders v. United* States, 425 U.S. 80, 90 n.3 (1976)) (emphasis added). But that is a bit of a non sequitur. Witness preparation, or what the ABA called "effective preparatory guidance," involves more than just "discussing" testimony. Indeed, a lawyer can help a witness rehearse testimony and even "suggest choice of words that might be employed to make the witness's meaning clear." Restatement (Third) of the Law Governing Lawyers § 116 cmt. b [hereinafter Restatement]. It is therefore inevitable that "effective preparatory guidance" will have some degree of "influence" on the sworn testimony. The question therefore becomes, "when does a lawyer *improperly* influence it?"

Relevant to this discussion are Rules 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.4 (Respect for Rights of Third Persons), and 8.4 (Misconduct). In essence, a lawyer's conduct will be improper when the conduct interferes with the integrity of the justice system or obstructs another party's access to evidence. Formal Op. 508, p. 11. Such misconduct can occur before, during, and after examination.

Improper Conduct Before Examination

As an initial matter, a lawyer generally cannot act outside the available procedural mechanisms to interfere with the process obliging a witness to testify. *See* Rule 3.4(b)–(c), (f); Rule 3.5(d); Rule 4.4(a). This means, for example, a lawyer may not tell someone to ignore or evade a subpoena or help them be "unavailable" to testify. *See* Restatement § 116(3) ("A lawyer may not unlawfully induce or assist a prospective witness to

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> [A] lawyer's conduct will be improper when the conduct interferes with the integrity of the justice system or obstructs another party's access to evidence.

evade or ignore process . . ."); *see also* Formal Op. 508, p. 6 n. 26 (noting the disbarment of a Washington attorney who gave a witness $3,000 and a one-way bus ticket Oklahoma to ensure the witness would not testify against the defendant). In short, a lawyer may not unlawfully obstruct the other party's access to a witness. Restatement § 116(2).

The more common form of pre-examination misconduct is that which interferes with the integrity of the justice system. Under Rule 3.4(b), "a lawyer shall not . . . counsel or assist a *witness* to testify falsely." Rule 3.4(b) (emphasis added); Restatement § 120(1)(a). Notably, Rule 3.4(b) applies to any *witness* and does not require the lawyer to be acting with knowledge. If the witness is a *client* and the lawyer possesses actual knowledge that the testimony will be false, the lawyer also violates Rule 1.2(d) (prohibiting counseling or assisting a *client* with "conduct that the lawyer *knows* is criminal or fraudulent") because perjury is a felony. Rule 3.3 cmt. 3; 720 ILCS 5/32-2.

Any affirmative suggestion to testify falsely, no matter how subtle, will violate these rules. Formal Op. 508, p. 5 (noting the disbarment of a New York attorney who "[told] a witness to 'downplay' the number of times a witness and a lawyer met to prepare for trial."). For example:

> Telling a witness that a truthful answer of "I do not recall" is an acceptable response and ethically distinguishable from telling a witness, "The less you recall the better." The latter is a statement that affirmatively encourages a witness to "forget" information, i.e., to lie under oath about what is remembered. It is the ethical equivalent of telling a witness affirmatively to testify to something that is contrary to fact.

Formal Op. 508, p. 3 n. 10. Another distinction to be made is that, while a lawyer may not help a client engage in criminal conduct, a lawyer "may discuss the legal consequences of any proposed course of conduct." Rule 1.2(d). Other pre-examination misconduct can include witness programming, violating sequestration orders, and allowing a witness to present fabricated testimony. *Id*. at p. 5, n. 19–21. However, none of the above-mentioned misconduct should even be necessary. There are numerous permissible ways a lawyer can develop someone into an effective witness. *See, e.g.*, Formal Op. 508 pp. 3–4, Restatement § 116 cmt. b.

Ethically permissible conduct will generally fall into one of three categories: conduct that provides the witness with background knowledge, conduct that explains the technique of answering questions, and conduct that explores what the substance of the witness's testimony will be. A lawyer can and should provide enough background information such that the witness understands the deposition process and the legal significance of his or her testimony. As such, it is permissible to:

- Explain the nature of the testimonial process;
- Provide initial factual context;
- Discuss the applicability of law to the events in issue;
- Explain the case strategy and procedure; and
- Identify the specific purpose of the deposition or proceeding.

Moreover, a lawyer can and should arm the client or witness with the tools to be an effective witness, and can therefore:

- Discuss the role of the witness and what will be an effective demeanor;
- Suggest proper attire and appropriate decorum;
- Remind the witness that they will be under oath;
- Emphasize the importance of telling the truth;
- Explain that telling the truth can include a truthful answer of "I do not recall;"
- Tell the witness not to guess or speculate, and only testify about what they know;
- Familiarize the witness with the idea of focusing on answering the question, i.e., not volunteering information;
- Tell the witness not to answer a question until it has been completely asked; and
- Emphasize the importance of remaining calm and not arguing.

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Finally, a lawyer can explore the substance of the testimony and how it can be improved to be more effective:

- Identify lines of questioning and potential cross-examination;
- Inquire into the witness's recollection and probably testimony;
- Review documents or physical evidence;
- Use documents to refresh a witness's recollection of the facts;
- Identify other testimony and other factual context that is expected to be presented and explore the witness's version of events in light of that testimony;
- Suggest choice of words that might be used to make the witness's meaning clear;
- Invite the witness to provide truthful testimony favorable to the lawyer's client; and
- Rehearse testimony.

Improper Conduct During and After Examination

Additional issues can crop up during the examination if the deponent ultimately does provide false testimony. Rule 3.3 "sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process" and "also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." Rule 3.3 cmt. 1–2. Under Rule 3.3(a)(3), a lawyer that knows a witness provided false testimony has a duty to take reasonable remedial measures, including disclosure to the tribunal if necessary. *See* Rule 3.3(a)(3), cmt. 1; *see also* Rule 4.1(b) (making it a violation to "*knowingly* . . . fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, unless disclosure is prohibited by Rule 1.6"). One possible remedial measure would be ask the witness to "correct an inadvertent misstatement when the witness obviously misunderstood a question or simply misspoke." Formal Op., p. 7 n. 29; Rule 3.3 cmt. 10. However, overtly trying to manipulate testimony-in-progress will likely be considered "conduct prejudicial to the administration of justice" in violation of Rule 8.4(d).

Speaking objections and other classic types of "coaching"—passing notes, whispering, winking, and coughing—are all considered impermissible attempts to influence a witness's in-progress testimony. Modern technology and remote proceedings provide additional opportunities for coaching.

Speaking objections and other classic types of "coaching"—passing notes, whispering, winking, and coughing—are all considered impermissible attempts to influence a witness's in-progress testimony. Formal Op. pp. 6–7. Modern technology and remote proceedings provide additional opportunities for coaching. *Id.* at pp. 8–9. The Committee Comments to Illinois Supreme Court Rule 206(h) explain that some of these issues can be addressed by asking the deponent to identity of all persons in the room during the testimony and having all persons in the room participate in the videoconference separately. Ill. Sup. Ct. R. 206, Committee Comments, Par. (h) (Sept. 29, 2021). Counsel presenting the deponent should also instruct the witness that (a) he or she may not communicate with anyone during the examination other than the examining attorney or the court report and (b) he or she may not consult any written, printed, or electronic information during the examination other than information provided by the examination. *Id.*

A lawyer that is faced with impermissible conduct during the deposition should not, however, threaten disciplinary action against the offending attorney, which in and of itself would be violative of Rule 8.4(g). Such misconduct can instead be addressed through skillful cross-examination or by moving to limit or termination a deposition for sanctions. Formal Op. 508 pp. 9–11. The ABA noted that the practice of continuously emphasizing the importance of telling the truth, and that truthfully and accurately recounting facts is ultimately the witness's responsibility, is also a useful guardrail. *Id.* at p. 2 n. 5. If such issues are expected prior to the start of the deposition, one can obtain a court order to address remote protocols and direct uninterrupted testimony.

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Public Adjuster Misappropriation of Claim Proceeds – A Cautionary Tale

In the face of large and often complex property insurance losses, many insureds engage the services of a public adjuster. These insurance professionals, who are licensed by the state of Illinois, are retained directly by an insured and serve as advocates for policyholder's interest throughout the adjustment and presentation of a claim. The Illinois Public Adjusting Act, and ensuing case law make clear that public adjusters have a statutory lien on claim proceeds, and as a practical matter, insurers will schedule a public adjuster as a co-payee, along with an insured, on any check for claim proceeds. *See* 215 ILCS 5/1501; *Golub and Associates, Inc. v. State Farm Fire and Cas. Co*., 406 Ill. App.3d 1195 (5th Dist. 2011)

An issue with sparse legal authority is what duties if any, the insurer has when it issues payment on a claim, and the draft, which is jointly payable to the insured and its public adjuster, is misappropriated by the public adjuster. In a recent opinion, the U.S. Court of Appeals, Seventh Circuit relied on the Illinois Commercial Code, which provides in relevant and pertinent part:

> If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained. 810 Ill. Comp. Stat. 5/3-414(c)
>
> Acceptance means the drawee's signed agreement to pay a draft as presented. 810 Ill. Comp. Stat. 5/3-409.

This article provides an overview of a recent case limiting an insurer's exposure where a public adjuster violates Illinois law and falsifies an endorsement on a payment draft. It also provides guidance for coverage practitioners on counseling their carrier-clients on not bearing the risk of a drawee bank's (here, an insurer's bank) from possible negligence in distributing funds without ascertaining proper endorsement by joint co-payees.

Insurer Discharged Upon Check Endorsed and Acceptance from Insurer's Bank

In a recent and well-reasoned decision, the Seventh Circuit ruled on a question of Illinois law not yet addressed by the state's supreme court. In *Thirteen Inv. Co. v. Foremost Ins. Co. Grand Rapids Mich.*, No. 22-2203 (7th Cir. May. 2, 2023), the court addressed whether a contract obligor's delivery of a check to a joint co-payee, who then cashes the check, discharges an obligor's performance in the amount of the check. *Id*. at *4. Given the court was faced with unresolved issues of state law, the court predicted how the relevant highest state court would rule. *Sanchelima Int'l, Inc. v. Walker Stainless Equip. Co., LLC*, 920 F.3d 1141, 1145 (7th Cir. 2019). Applying the sparse applicable law, specifically the Illinois UCC, the Northern District held that an insurer was discharged under its contractual obligations with its insured when the insured's public adjuster cashed the settlement checks received by the insurer. *Thirteen Investment Co.*, No. 22-2203 at *6.

The policyholder, Thirteen Investment Company, Inc. ("Thirteen") sued its insurer, Foremost Insurance Company ("Foremost"), alleging that the insurer wrongfully refused to indemnify the policyholder for a fire loss covered under a policy of commercial property insurance. *Id*. at *2. There was no dispute, however, that Foremost had in fact paid

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> The Illinois Public Adjusting Act, and ensuing case law make clear that public adjusters have a statutory lien on claim proceeds, and as a practical matter, insurers will schedule a public adjuster as a co-payee, along with an insured, on any check for claim proceeds.

the loss, and issued settlement checks jointly payable to the insured and its public insurance adjuster, Paramount Restoration Group, Inc. ("Paramount"), which unilaterally endorsed the checks and kept the proceeds. *Id*. The essence of Thirteen's position was that Foremost breached the insurance contact when it refused to issue a second round of duplicative settlement funds following the public adjuster's misappropriation of the original claim proceeds paid by Foremost.

Thirteen retained Paramount as its public adjuster and general contractor for fire damage repairs. *Id*. at *5. Under their agreement, Thirteen hired Paramount "to be [Thirteen's] agent and representative to assist in the preparation, negotiation, adjustment, and settlement" of the fire loss. *Id*. Thirteen also "direct[ed] any insurance companies to include Paramount… on all payments on" the fire loss claim. *Id*. Paramount negotiated the fire loss, and Foremost delivered two settlement checks to Paramount. *Id*. at *2. The checks named Thirteen, its mortgagee, and Paramount as co-payees. Paramount then endorsed the checks. *Id*.

The district court granted summary judgment for Foremost because when Paramount received and cashed the checks, it effectively discharged the insurer's performance obligation under the policy. *Id*. Thirteen offered three reasons for reversal, two of which the court proficiently denied. *Id*. 4. The merits of the case hinged on the effect of Paramount, designated as Thirteen's public adjuster, act of cashing in the settlement checks. *Id*. at *4-5

The court noted nothing in the policy indicated checks were to be sent from Foremost to Thirteen. However, the court explained how Foremost's delivery to Paramount was, by law, delivery to Thirteen. *Kelly v. Parker*, 54 N.E. 615, 619 (Ill. 1899) ("A delivery to an agent is a delivery to the principal.") The court then shifted to the legal effect of Paramount unilaterally cashing the checks and relied on Illinois's version of the Uniform Commercial Code. The Commercial Code says: "If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained." 810 ILCS 5/3-414(c). Further, "Acceptance means the drawee's [(here, Foremost's bank)] signed agreement to pay a draft as presented." 810 Ill. Comp. Stat. 5/3-414(c). Similarly, the court relied on 810 Ill. Comp. Stat, 5/3-310(b)(1), that states if a check is taken for an obligation, "[p]ayment or certification of the check results in discharge of the obligation to the extent of the amount of the check."

Here, the court ascertained that Paramount was Thirteen's agent and joint co-payee, authorized to receive the checks. *Id*. at *6. Therefore, under Illinois's statutes and its version of the UCC, Foremost's performance obligation regarding the fire loss was discharged when the checks endorsed by Paramount were accepted by Foremost's bank. *Id*.

The court also addressed Paramount's conduct of retaining the proceeds. The court relied on Illinois regulatory authority for public adjusters. *See generally* 215 Ill. Comp. Stat. 5/art. XLV. The court reasoned that public adjusters must be bonded to provide recovery "on behalf of any person to whom the public adjuster has been found to be legally liable as the result of erroneous acts, failure to act, fraudulent acts, or unfair practices in her or her capacity as a public adjuster." 215 Ill. Comp. Stat. 5/1560(a)(1)(B), (2)(B). The court refused to require an insurer to bear the costs of a public adjuster's violation of statutory standards. More specifically, for an insured to pursue an insurer- who had no participation in the selection of the public adjuster/agent- for the agent's alleged wrongs. *Thirteen Investment Co.*, No. 22-2203 at *10. In addition, the court refused for an insurer to bear a drawee bank's possible negligence in disbursing funds without ascertaining proper endorsement by joint co-payees. *Id*.

Here, the insured sought to impose monitoring duties upon the insurer far beyond their insurance contract. *Id*. at *10-11. While the insurer agreed to provide coverage and payment for negotiated claims, it did not take responsibility for the actions of the public adjuster hired or to ensure the bank performed proper diligence before paying a draft. *Id*. at *11. In other words, nothing in the policy agreement between Thirteen and Foremost required Foremost to pay settlement amounts to exclusively to

Thirteen. *Id*. Foremost's delivery of the checks to Paramount constituted delivery to Thirteen under an agency theory, and when Paramount cashed the checks, that discharged Foremost's payment obligations under the policy. *Id*.

Conclusion

The decision in *Foremost* reiterates the importance of scheduling both the policyholder and statutory lienholders, like public adjusters, as joint payees on drafts for policy proceeds. While the *Foremost* decision turned on the language of the underlying public adjusting contract, which designated the public adjuster as the insured's "agent" for purposes of the loss, oftentimes public adjusting contracts lack any such agency language and simply instruct carriers to schedule the public adjuster as a payee on drafts for claim proceeds. The court did not address what the insurer's liability would have been, if any, if the public adjusting contract failed to include such "agency" language. In the absence of such "agency" language in a public adjusting contract, it is best practice for coverage practitioners to counsel their carrier clients to transmit policy proceeds directly to the policyholders, being sure that all payment drafts are jointly payable to both the insured and the public adjuster. Notwithstanding, *Foremost* reiterates the commonsense position that the insurer's burden is to timely issue policy proceeds, and to properly schedule all payees on the payment, and that the policyholder has the duty to police the conduct of its public adjuster in the negotiation and disbursement of drafts for policy proceeds.

Welcome

We are thrilled to announce the latest additions to our association. Welcoming these new members brings a fresh wave of talent and expertise that promises to enrich our community and drive us toward new heights. As we continue to expand our horizons, the diverse backgrounds and unique perspectives of our new members will undoubtedly contribute to the dynamic tapestry of ideas that defines our association. Together, we look forward to achieving even greater accomplishments, sharing knowledge, and building lasting connections. Please join us in extending a warm welcome to these exceptional individuals as they embark on this exciting journey of mutual growth and achievement within our association.

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Index of IDC Monograph and Feature Articles Volume 33

The *IDC Quarterly* continues its legacy of delivering insightful, timely, and educational content to the Illinois defense bar. As a distinguished legal journal, it stands as a prominent fixture in the legal realm of Illinois and the nation, earning recognition for its excellence. The journal's esteemed reputation is a testament to the outstanding contributions from our members. Explore the latest Feature Articles and Monographs from the past year in the index below, and access all submissions on our website, www.IDC.law.

We are fortunate to have had the opportunity to present these pieces, and many others, to you over the years. We offer our sincere thanks to the many editors and authors who have made this journal what it is today.

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THE IDC MONOGRAPH:

Diversity, Equity, and Inclusion: Past, Present, and Future

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Diversity, Equity, and Inclusion: Past, Present, and Future

Introduction

Diversity, equity, and inclusion efforts across America have garnered the attention of American courts, politicians, government leaders, organizations, and businesses. Presently, there exists an ongoing debate between proponents and critics of such efforts, with the former contending that DEI programs create a fair environment for people of different backgrounds, and the latter averring that these programs violate anti-discrimination laws. This article focuses on the history and purposes of DEI and affirmative action initiatives, and seeks to shed light on current impediments to their continued existence based upon legal developments at state and federal levels.

Historical Background of DEI and Affirmative Action Programs

Slavery and segregation resulted in various discriminatory systems that impacted the welfare of black Americans. This included substantial differences in the unemployment rates of black and white Americans and wide disparities in median family income.[1] The civil rights movement emerged following World War II to combat such inequality. The movement culminated in the enactment of the Civil Rights Act of 1964 which was the "**most sweeping civil rights legislation since [the] Reconstruction" era** and is "the nation's benchmark civil rights legislation."[2] However, efforts were made even before then to prohibit discrimination in employment. These included efforts to provide black Americans with an opportunity to participate in the war-related employment boom of World War II.[3]

Federal Fair Employment Efforts Before the Civil Rights Movement

The first federal fair employment practices bill was introduced to Congress on March 13, 1941, by former Representative Vito Marcantonio (NY). Representative Marcantonio introduced another fair employment practices bill to Congress the following year. Both of his bills died in committee. There were many similar bills that followed and failed.[4]

On June 25, 1941, on the eve of World War II, President Franklin D. Roosevelt signed Executive Order No. 8802, "the first presidential action

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ever taken to prevent employment discrimination by private employers holding government contracts."[5] The executive order prohibited government contractors in defense industries from engaging in employment discrimination based on race, creed, color or national origin "primarily to ensure that there [were] no strikes or demonstrations disrupting the manufacture of military supplies" for the war.[6]

On July 26, 1948, President Harry S. Truman signed two executive orders towards eradicating discrimination in federal government. The first was Executive Order No. 9980 which required that "[a]ll personnel actions taken by Federal appointing officers . . . be based solely on merit and fitness" and without "discrimination because of race, color, religion, or national origin."[7] The second was Executive Order No. 9981 which called for the desegregation of the Armed Forces.[8]

Brown v. Board of Education

In 1954, in the consolidated cases of *Brown v. Board of Education of Topeka*, the United States Supreme Court held that racial segregation in public schools was unconstitutional.[9] After further briefing and argument, the Supreme Court issued a second opinion in the case the following year, in which it remanded the consolidated cases to the district courts to issue decrees for desegregation "with all deliberate speed."[10]

There was great resistance to desegregation, and it proceeded very slowly.[11] By the end of the 1950s, fewer than 10 percent of black children in the South were attending integrated schools.[12]

On June 11, 1963, President Kennedy asked Americans through a televised speech, to end racism: "One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free."

The Civil Rights Movement and the Enactment of the Civil Rights Act of 1964

Brown encouraged calls for additional desegregation that shaped the civil rights movement. Notably, on December 1, 1955, in Montgomery, Alabama, Rosa Parks refused to give up her seat to a white man on a bus and was arrested.[13] "[W]ord of her arrest ignited outrage and support" and inspired the Montgomery Bus Boycott by the Montgomery Improvement Association, led by Baptist minister Dr. Martin Luther King Jr.[14] Additionally, on September 4, 1957, nine black students, known as the Little Rock Nine, went to Central High School to begin desegregated classes as mandated by *Brown*. They were met by the Arkansas National Guard and a mob and violence later ensued. President Dwight D. Eisenhower had federal troops escort the Little Rock Nine to their classes.[15]

Around that time, the Civil Rights Act of 1957 was enacted to prevent intimidation, threats, and coercion that black Americans often faced, particularly in the South, when voting.[16] The statute also established a Commission on Civil Rights for the executive branch to study equal protection.[17] The reports of that commission further publicized the plight of minorities.[18]

Civil rights demonstrations and protests continued. The Congress of Racial Equality organized Freedom Rides, in May 1961, to defy segregation in interstate transportation. A riot, in 1962, broke out over the desegregation of the University of Mississippi for which President Kennedy mobilized the National Guard. In the spring of 1963, Dr. King and Reverend Fred Shuttlesworth launched a campaign of mass protests in Birmingham, Alabama that resulted in the jailing of Dr. King during which he wrote the famous "Letter from Birmingham Jail." There were attacks on black youths marching in the streets of Birmingham City, in May of 1963. The desegregation of the University of Alabama was met with resistance as well for which President Kennedy mobilized the National Guard.[19]

President Kennedy further assisted the civil rights movement by proposing a comprehensive civil rights bill.[20] On June 11, 1963, President Kennedy asked Americans through a televised speech, to end racism: "One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs,

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their grandsons, are not fully free."[21] On June 19, 1963, President Kennedy addressed Congress with a proposed bill.[22] He pleaded that Congress enact legislation to address the "racial strife" that was resulting in "hate and violence, endangering domestic tranquility, retarding [the] Nation's economic and social progress and weakening the respect with which the rest of the world [regarded America]."[23]

A couple of months later, Dr. King delivered his famous "I Have a Dream" speech. On August 28, 1963, the March on Washington for Jobs and Freedom took place with "an interracial and interfaith crowd of more than 250,000 Americans" demonstrating in Washington D.C.[24] It was, at this demonstration, that Dr. King delivered his speech from the steps of the Lincoln Memorial.

Almost two months later, on November 22, 1963, President Kennedy was assassinated.[25] Thereafter, President Lyndon Johnson pressed hard for passage of the President Kennedy's proposed civil rights bill. He urged Congress that it was the time "to write the next chapter [on equal rights] in the books of law."[26] On July 2, 1964, the Civil Rights Act of 1964 was enacted, but not without substantial resistance.[27] There were 500 amendments and 534 hours of debate before the Act passed.[28]

Early Legal Development of DEI

Equal Treatment and Equal Opportunity Under Title VII

Title VII of the Civil Rights Act of 1964 ("Title VII") made it unlawful for private employers to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin."[29] Discrimination was not defined in the statute, and no reference was made to intent in this statutory language. Nonetheless, the prohibition on discrimination was interpreted by courts as prohibiting only intentional discrimination, because adverse employment decisions are only prohibited by the statute if made "because of" a protected characteristic. This interpretation reflects the most traditional theory of employment discrimination: disparate treatment which merely calls for equal treatment.[30] When enacting Title VII, Congress likely only contemplated such intentional discrimination.[31]

Title VII also made it unlawful for private employers "to limit, segregate, or classify [their] employees in any way which would deprive or tend to deprive [them] of employment opportunities or otherwise adversely affect [their employment status], because of [an] individual's race, color, religion, sex, or national origin."[32] Even though this statutory provision contains the same "because of" language relied upon by the disparate treatment theory to require a showing of intentional discrimination, this statutory provision has been relied upon for the development of the "less traditional and much more controversial" disparate impact theory of employment discrimination which does not require a showing of intent.[33] Instead, the theory focuses on the impact of employment practices—even those that are facially-neutral—to determine whether they disproportionately disadvantage members of a protected group. In this way, the disparate impact theory calls for equal opportunity.[34] There has been substantial debate about whether the theory is consistent with the language of Title VII and the intent of Congress; however, there was legislative recognition of a need for equal employment opportunities.[35]

Title VII included exceptions for bona fide seniority or merit systems and professionally developed ability tests. Differences based on bona fide seniority or merit systems are permissible if they are not the result of "an intention to discriminate because of race, color, religion, sex, or national origin."[36] Professionally developed ability tests are permissible if they are not "designed, intended or used to discriminate because of race, color, religion, sex, or national origin."[37] However, the disparate impact theory, limited employers' use of tests and other employment criteria as discussed further below. The theory applied to not only objective tests, but also subjective criteria used to make employment decisions.[38]

Affirmative Action in Private Employment

In 1979 in *United Steelworkers of America v. Weber*, the United States Supreme Court considered whether affirmative action plans are illegal under Title VII. The affirmative action program in that case was developed to provide black individuals with equal employment opportunities at the employer's plant that hired as craftworkers only persons who had had prior craft experience. "Because blacks had long been excluded from craft unions, few were able to present such credentials."[39] The employer, therefore, "established a training pro-

gram to train its production workers to fill craft openings. Selection of craft trainees was made on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black skilled craftworkers" at the plant "approximated the percentage of blacks in the local labor force."[40] The Supreme Court held that the affirmative action program was not unlawful under Title VII.[41]

In reaching its holding, the Supreme Court analyzed the legislative intent of Title VII. It observed that the purpose of the law was to open employment opportunities for black Americans.[42] The Supreme Court believed that Congress could not have "intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve."[43]

The decision did not legalize all affirmative action. The Supreme Court merely held that the affirmative action program in that case was permissible as the purpose of the program was to break down old patterns of racial segregation and hierarchy like Title VII. The Supreme Court also noted that the program was a temporary measure that did not violate the interests of white employees. The Supreme Court refused to draw a "line of demarcation between permissible and impermissible affirmative action plans."[44]

The United States Supreme Court further developed the framework for assessing the validity of affirmative action under Title VII in *Johnson v. Transportation Agency*. The Supreme Court explained that the analysis should start with the burden on the plaintiff to establish a prima facie case of discrimination. Once the plaintiff establishes that a protected characteristic was taken into account in the employment decision, the burden then shifts to the employer to articulate a nondiscriminatory rationale for its decision. "The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid."[45] The employer may present evidence in support of its plan, but the burden ultimately rests on the plaintiff to prove the plan's invalidity.[46]

To determine whether an affirmative action plan is invalid, the Supreme Court instructed courts to "first examine whether that decision was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber*."[47] In particular, courts are to consider if the plan was "justified by the existence of a 'manifest imbalance' that reflected underrepresentation . . . in 'traditionally segregated job categories'" as to ensure that the plan is consistent with Title VII's purpose.[48] Second, courts must determine whether the effect of the plan on the aggrieved parties is comparable to the effect of the plan in *Weber*.[49] This includes consideration of whether the plan unnecessarily trammels on the rights of the aggrieved parties or creates an absolute bar to the aggrieved parties' advancement.[50] Courts may also examine whether the plan is temporary to attain a balanced work force as opposed to a more permanent goal to maintain balance.[51]

In *Connecticut v. Teal*, the United States Supreme Court considered whether an affirmative action program could rescue the employer from a finding of disparate impact discrimination.[52] The Supreme Court answered in the negative, explaining that Title VII cannot be overcome except by a showing that a test was related to a job as further explained below.[53] "The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."[54] Therefore, the benefit afforded to a group as a whole through an affirmative action program cannot justify discrimination that an individual employee may have suffered.[55]

Disparate Impact Theory Jurisprudence

The disparate impact theory can be traced back to the United States Supreme Court's 1971 opinion in *Griggs v. Duke Power Co.*[56] That case involved a class action by thirteen black employees who worked for the defendant's plant that was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. The plaintiffs were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other departments, in which only white individuals were employed. Although black employees were not explicitly limited to the Labor Department following the enactment of the Civil Rights Act of 1964, the defendant maintained a policy that required a high school education to transfer from the Labor Department to any other department.

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Additionally, following the enactment of the Civil Rights Act of 1964, the defendant required that employees register satisfactory scores on two professionally prepared aptitude tests to qualify for placement in any department other than the Labor Department and to qualify for transfer to Operations, Maintenance, and Laboratory and Test Departments. Neither test was directed or intended to measure an employee's ability to perform the applicable job.[57] The defendant's requirements had a disproportionate effect on black employees who had "long received inferior education in segregated schools."[58]

The Supreme Court held that the defendant's requirements were unlawful under Title VII. Its holding was predicated on the following: (a) neither requirement was shown to be significantly related to successful job performance, (b) both requirements operated to disqualify black employees at a substantially higher rate than white employees, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[59]

In reaching that holding, the Supreme Court found that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation," unless "related to job performance" and, therefore, justified by "business necessity."[60] The Supreme Court observed that Congress's objective in enacting Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[61] Therefore, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[62]

In 1975, the United States Supreme Court clarified the "appropriate standard of proof for job relatedness" in *Albemarle Paper Co. v. Moody*.[63] If the plaintiff makes out a prima facie case of disparate impact discrimination by showing that a given employment practice has a significantly discriminatory pattern, then the burden shifts to the employer to prove that the practice has a manifest relationship to the employment in question. Once the employer meets its burden of proving job relatedness, the complainant is granted the opportunity to show that other practices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest.[64]

In 1989, the United States Supreme Court expounded upon the disparate impact standard of proof in *Wards Cove Packing Co. v. Atonio*. The Supreme Court explained, in order to establish the prima facie case of disparate impact discrimination, the plaintiff must identify a specific or particular employment practice that caused the alleged disparate impact. A showing of a racial imbalance alone, would not meet the plaintiff's burden of proof.[65]

The Civil Rights Act of 1991 was enacted, in part, "to codify the concepts of 'business necessity' and 'job related'" from *Griggs* and *Wards Cove Packing Co.* and "to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits" under Title VII.[66] The statute amended Title VII to include a provision stating that "[a]n unlawful employment practice based on disparate impact is established

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… only if": (a) the complainant "demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;" or (b) the complainant makes the demonstration discussed in the aforementioned cases "with respect to an alternative employment practice and the respondent refuses to adopt [the] alternative employment practice."[67]

Hostile Work Environment

In 1986, in *Meritor Savings Bank, FSB v. Vinson*, the United States Supreme Court found that Title VII's prohibition on disparate treatment "is not limited to 'economic' or 'tangible' discrimination," but rather extends to "'the entire spectrum of disparate treatment.'"[68] The Supreme Court, therefore, went on to recognize discrimination that arises from harassing conduct that "'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'"[69] Such discrimination may be asserted as a claim alleging a hostile or abusive work environment.[70]

For such harassment to be actionable, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[71] More specifically, it must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—" and subjectively hostile or abusive as to actually alter the conditions of the victim's employment.[72] Courts should consider all circumstances in making that assessment. "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[73]

Employers can be held vicariously liable for hostile or abusive work environments created by supervisors but have limited liability for such harassment by co-workers. Employers are "only liable for a hostile work environment created by a co-worker if the employer was negligent in discovering or remedying the harassment."[74] The plaintiff must then show, for the employer's negligence, that the employer knew or should have known about the harassment.[75]

Equal Rights Under 42 U.S.C. § 1981

The Civil Rights Act of 1991 also resulted in the enactment of 42 U.S.C. § 1981. That statute provides all individuals within the United States with an equal right "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."[76] Equal rights under the statute extend not only to public but private employment as well.[77] "Most of the core substantive standards that apply to claims of discriminatory conduct in violation of Title VII, are also applicable to claims of discrimination in employment in violation of § 1981."[78] This includes the standard for proving hostile work environment claims.[79]

However, there are several notable differences between the two statutes. First, claims asserted under 42 U.S.C. § 1981 need not comply with Title VII's shorter time limits.[80] Second, Title VII claims cannot be asserted against individuals while claims pursuant to 42 U.S.C. § 1981 can. Third, for a claim under 42 U.S.C. § 1981 against a municipality or an individual sued in his official capacity, the plaintiff is required to show that the challenged acts were performed pursuant to a municipal policy or custom for which the plaintiff need not identify an express rule or regulation. Rather, it is sufficient for the plaintiff to show that a discriminatory practice of municipal officials was so "'persistent or widespread'" as to constitute "'a custom or usage with the force of law,'" or that a discriminatory practice of subordinate employees was "'so manifest as to imply the constructive acquiescence of senior policy-making officials.'" [81] A policy, custom, or practice may also be inferred where training was so inadequate that it displayed a deliberate indifference to the constitutional rights of those within its jurisdiction. Thus, proof for claims under 42 U.S.C. § 1981 may vary from that of Title VII. Fourth, a plaintiff must show that discrimination was intentional for claims under 42 U.S.C. § 1981, although that is not always required under Title VII.[82]

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Impact of Recent Events Upon DEI

Recent racial, economic, and political challenges have also impacted DEI initiatives across the country. The U.S. has long struggled with issues of race, dating back to slavery, the civil rights movement in the 1950s and 1960s, and racial justice protests.[83] More recently, for example, the murder of an African American man named George Floyd in Minneapolis, Minnesota, on May 25, 2020, by a law enforcement officer sparked racial protests with demands for change.[84] This event resulted in the rapid hiring of chief diversity officers and other similar roles, and DEI related job postings increased by ninety-two percent from July 2020 to July 2021.[85]

The surge in DEI-related recruitment came under attack by legal activists who averred that DEI programs are tantamount to racial discrimination.[86] Thus, as quickly as DEI efforts in the workplace soared due to racial challenges, such efforts stalled due to economic hurdles. Particularly with the rise and fall of COVID-19 cases, companies throughout the U.S. encountered an uncertain economy, resulting in mass layoffs.[87] Notably, many of these terminated workers were only hired to implement DEI strategies, and since July 2023, DEI job postings have declined by thirty-eight percent.[88]

DEI efforts have come under harsh criticism because they are considered expensive, performative, and even a source of division.[89] In agreement with the latter critique, the U.S. Supreme Court recently rejected the use of race-conscious admissions in higher education.[90] On June 29, 2023, the Court struck affirmative action programs at Harvard University and the University of North Carolina (UNC) that were used to raise the number of underrepresented minority students.[91] According to the Court, these programs violate the Constitution's promise of equal protection by considering an applicant's race.[92]

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In the majority opinion, the conservative justices agreed with a group called Students for Fair Admissions in the appeal of lower court rulings that upheld DEI efforts implemented to nourish a diverse student population.[93] Harvard and UNC representatives indicated "they used race as only one factor in a host of individualized evaluations for admission without quotas" and anticipate "a significant drop in enrollment of students from under-represented groups" with the elimination of this consideration.[94] Chief Justice John Roberts explained in pertinent part that applicants 'must be treated based on . . . experiences as individual[s] not on the basis of race.'[95] In failing to do so, '[m]any universities . . . concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.'[96]

Many institutions of higher education, corporations and even the U.S. military have supported affirmative action and DEI strategies not simply to remedy racial inequity, but to create a talent pool consisting of a range of perspectives in the workplace and the armed forces.[97] Liberal Justice Ketanji Brown Jackson, the first Black woman appointed to the Court, dissented from the majority opinion writing that the Court "pulls the ripcord and announces colorblindness for all by legal fiat. But deeming race irrelevant in law does not make it so in life."[98] Liberal Justice Sonia Sotomayor, the first Hispanic jurist, similarly expressed that the ruling "subverts the constitutional guarantee of equal protection and further entrenches racial inequality."[99] Justice Sotomayor

added, '[t]oday, this court stands in the way and rolls back decades of precedent and momentous progress.'[100] President Joe Biden, in addition, strongly disagreed with the ruling and opined that the commitment to fostering diversity should not be abandoned.[101]

Some predict corporate DEI policies will experience a similar result as the affirmative action programs at Harvard and the UNC.[102] As it currently stands, however, the decision appears to apply only to affirmative action in higher education, not to an employer's pursuit to foster diversity in the workplace.[103] Charlotte Burrows, chair of the Equal Employment Opportunity Commission, stated, "It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."[104]

By contrast, Justice Neil Gorsuch's concurring opinion provides 'the court's rule . . . now applies with equal force to employers.'[105] To this end, Stephen Miller, the former adviser to President Donald Trump has asked the Equal Employment Opportunity Commission to investigate hiring practices aimed at increasing minority representation at numerous companies, including Kellogg's, Hershey, and Alaska Airlines.[106] Moreover, in recent years, eliminating DEI programs has been an integral theme of conservative political messaging.[107] Following the Court's ruling, Miller stated, "This ruling means we can strike hard legally in our courts now and win major victories. Now is the time to wage lawfare against the DEI colossus."[108]

Alvin Tillery, a political science professor at Northwestern University, who also operates a consulting firm that pushes DEI-related initiatives with companies, such as Google, agrees conservative groups will now use the Supreme Court's ruling to focus their efforts on race-conscious programs in the workplace.[109] Tillery warns "businesses will have to be prepared for that."[110] Despite these various challenges, diversity advocates continue to encourage entities to view these various setbacks and developments as opportunities to reset.[111] Janet Stovall, the global head of diversity for the NeuroLeadership Institute, a consulting firm focused on culture and leadership, advises companies committed to DEI endeavors to "[f]ocus on the rationale" and "[m]ake the business case for bringing on a diversity of backgrounds and experiences."[112]

Because DEI programs fall under Title VII of the Civil Rights Act, companies can maintain their programs by reframing their language and creating processes to ensure their structures do not violate Title VII's prohibition against discrimination.[113] Finally, in an effort to combat the decline of DEI programs, more than eighty major corporations and businesses, including Apple, General Electric, Google, and Johnson & Johnson, have filed three briefs with the Supreme Court arguing these policies help increase workforce diversity, improve company performance, and serve racially diverse customer bases.[114] In sum, the fate of DEI efforts is yet to be seen as the fight for the survival of such programs continues.

Potential Benefits to DEI Initiatives

The most salient purpose of DEI initiatives is to promote diversity among employees within the workplace. Over and above this primary benefit, the internet and social media are replete with commentators discussing the additional perceived benefits from DEI Initiatives.[115] These range from more ambiguous benefits such as encouraging "excellence," to more concrete benefits such as increased employee retention and achieving financial goals.[116]

Over and above these informal publications, researchers have concluded that diversity in the workplace leads to demonstrable and measurable outcomes. For example, one study employed computational mathematical models to demonstrate why diverse groups of problem solvers would be expected to outperform more homogenous groups of high-ability problem solvers.[117] Other studies have employed survey methodology within organizations and have concluded that diversity within the workplace leads to increased levels of trust and openness, job satisfaction, and knowledge sharing.[118]

Another study from the Journal of the National Medical Association provides evidence that diversity improves performance and outcomes in the health care setting.[119] That study employed a meta-analysis of medical and business research articles since 1999, relating diversity to a financial or quality outcome.[120] Only studies involving the healthcare industry, or a related skill such as innovation, communication and risk assessment were included.[121] The results

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of the studies demonstrated a positive association between diversity, quality, and financial performance.[122] Results also showed that patients generally fared better when care was provided by more diverse teams.[123]

A recent research paper by the Enterprise Strategy Group investigated correlations in the business sector between DEI and business outcomes.[124] This paper reports that 86% of survey respondents report their organization's DEI strategies deliver a positive or very positive investment return.[125] The paper reports that businesses categorized as leading DEI organizations reported they were 2.6 times more likely to have beaten revenue expectations by greater than 10%.[126]

Some commentators have also observed that more evidence-based studies of the DEI's implementation are needed.[127] In *Moving diversity, equity, and inclusion from opinion to evidence*, authors from within the medical research field observe that over the past decade, such institutions have earmarked more resources to DEI efforts.[128] They note that this movement has been the result of national standards set by accreditation bodies, research funding agencies (e.g., NIH) and other social pressures.[129] However, they argue that how organizations measure DEI to often focuses upon actual diversity, and ignores the effects of equity and inclusion.[130] They suggest more scientific approaches to better quantify the equity and inclusion effects of DEI programs.[131]

Potential Pitfalls to DEI Initiatives

The implementation of DEI within the workspace is not without potential risks. One such risk is demonstrated by an opinion from the United States District Court for the Northern District of Georgia.[132] In *DiBenedetto v. AT&T*, plaintiff was a 58-year old white man who was terminated by AT&T in 2020, in connection with a reduction in force.[133] Significantly, plaintiff alleged that throughout his career, and leading up to his position of assistant vice president within the tax department, he had consistently received positive feedback and performance evaluations.[134] Plaintiff alleged that his wrongful termination arose from AT&T's corporate wide "Diversity & Inclusion Plan," adopted two years prior to his termination.[135] According to the district court's opinion, "[t]he [Diversity & Inclusion Plan]'s stated goal was to increase and foster workplace diversity throughout the company . . . To that end, AT&T provided detailed workforce demographic information to its senior leaders—such as VP Johnson, SVP Stephens, and CFO Stephens—who, in turn, implemented the DIP through hiring and retention policies that altered the racial, ethnic, and gender composition of the company's workforce, especially in the leadership ranks like those occupied by Plaintiff."[136]

According to plaintiff, in 2020, AT&T terminated several positions across their finance department.[137] Plaintiff was told that the decision was not performance related, but rather "numbers related."[138] Within the tax department, a dozen employees were terminated.[139] Of those, nine were male, all were white, and all were over 50 years old.[140] Plaintiff also alleged that more senior individuals had commented to him during one meeting that "in these roles, you know, you've got to be able to adapt and move, and I'm not saying you can't, but a 58-year-old white guy, I don't know if that's going to happen."[141]

AT&T filed a motion to dismiss, arguing two basic points.[142] First, that plaintiff's claims must fail because

allegations of multiple bases of discrimination (i.e., race, age and gender) undercut the requirement that plaintiff's Section 1981 claims require "but for" causation.[143] Second, AT&T argued that plaintiff failed to plead sufficient facts to support the Title VII claims.

The court disagreed with AT&T on both counts. As to the claims brought under Section 1981 and the ADEA, the court noted that under the liberal pleadings standards of the Federal Rules of Civil Procedure Section 8(d), plaintiff may assert multiple, inconsistent claims.[144]

As for the Title VII claims, the *DiBenedetto* district court observed that:

> Title VII makes it unlawful for employers to discharge or otherwise discriminate against an employee because of his race or sex. 42 U.S.C. § 2000e—2(a)(1). A plaintiff raising a discrimination claim under Title VII may be entitled to relief if he shows that an illegal bias was "a motivating factor" for an adverse employment action, even if other factors also motivated the employer's decision. Notably, to show intentional discrimination under Title VII, a plaintiff need not prove that his employer "harbored some special 'animus' or 'malice' towards [his] protected group." In other words, ill will, enmity, or hostility "are not prerequisites of intentional discrimination"—instead, it is enough for the plaintiff to show that an adverse employment decision was consciously and deliberately motivated by a protected characteristic. Although a plaintiff need not plead a prima facie case of discrimination at the outset, the prima facie elements can nevertheless aid a reviewing court in organizing the allegations and identifying any material omissions at the pleading stage. With that said, a plaintiff can make out a prima facie case of disparate treatment by showing that he: (1) is a member of a protected class; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) was treated less favorably than a similarly situated individual outside his protected class.[145]

Having set out the applicable legal standard, the *DiBenedetto* court concluded that under these facts, plaintiff complaint was adequate to withstand a motion to dismiss: "[t]he upshot of Plaintiff's allegations is that AT&T implemented a company-wide employment policy that programmatically favored non-white persons and women for hiring and retention based solely or at least principally on internal company demographics."[146]

DiBenedetto provides an example of the types of claims an employer may face if implementing a DEI program in a way that illegally discriminates against non-diverse employees. However, implementation of DEI programs may lead to claims in other scenarios as well. The recent U.S. Supreme Court opinion in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[147] demonstrates problems that academic institutions may face when incorporating DEI initiatives into their admissions process.

In *Students for Fair Admissions*, the Court observed that Harvard College's application process explicitly considered race in its admissions criteria.[148] According to Harvard's director of admissions, race was considered in furtherance of the goal to make sure Harvard does not have a dramatic drop off in minority admissions from one year to the next.[149] Similarly, the University of North Carolina implements a highly-selective admissions process.[150] Like Harvard, the University of North Carolina's admissions process incorporates an applicant's race as a factor.[151]

The Students for Fair Admissions ("SFFA") is a nonprofit organization founded in 2014 whose purpose is to "defend human and civil rights secured by law, including the right of individuals to equal protection under the law."[152] In November of 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated Title VI of the Civil rights Act of 1964 and The Equal Protection Clause of the Fourteenth Amendment.[153] Both lawsuits proceeded to bench trials in separate federal district courts, and in both cases the district courts upheld the universities' use of race-based criteria.[154] The U.S. Supreme Court granted certiorari in both cases.[155]

In its analysis, the Court began with the fundamental premise that "[e]liminating racial discrimination means

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eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies 'without regard to any differences of race, of color, or of nationality'—it is 'universal in [its] application.' For '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.'"[156] From there, the Court observed that all exceptions to the equal protection clause must survive a strict scrutiny analysis.[157] Under that standard, the Court evaluates whether the racial classification is used to "further compelling governmental interests," and if so, whether the government's use of race is "narrowly-tailored"—meaning "necessary"—to achieve that interest.[158]

The *Students for Fair Admissions* majority noted that under the Court's precedent, only two compelling interests were allowed to justify race-based government action.[159] One was to remediate specific, identified instances of past discrimination that violated the Constitution or a statute.[160] The second was avoiding imminent and serious risks to human safety in prisons.[161]

Proceeding from these legal principles, the Court concluded that both the Harvard and University of North Carolina admissions programs violated the equal Protection Clause.[162] In reaching that conclusion, they noted the interests put forth by Harvard to justify their approach:

> Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.[163]

The Court noted that these were commendable goals, but that they were not sufficiently coherent for purposes of a strict scrutiny analysis.[164] First, it is unclear how courts would measure any of these goals.[165] Second, if a court could measure the goals could be measured, how would a court know when those goals have been reached?[166] The Court concluded that the programs also failed to articulate a meaningful connection between the means they employ and the goals they pursue.[167] The Court observed it was far from evident how pursuing racial quotas furthers the educational benefits that the universities claim to serve.[168]

The *Students for Fair Admissions* opinion will likely not resolve that controversy. The Court's majority cautioned against future attempts to subvert the rule through the use of application essays or other means.[169] The Court cautioned that a benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination, not simply the student's race, ethnicity or gender.[170]

Conclusion

Undoubtedly, DEI and affirmative action efforts dating back to as early as 1941 have combated discriminatory practices and racial imbalances in this country. While originally intended to remedy past injustices, the fate of these processes remains unclear and uncertain given the opposing viewpoints, laws, and court decisions that question the constitutionality of these structures. As a result, employers, institutions, and organizations must remain abreast of these developments and seek legal counsel as they pursue and promote diversity in the workplace.

(Endnotes)

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[2] *Civil Rights Act (1964)*, Nat'l Archives (Nov. 1, 2023), https://www.archives.gov/milestone-documents/civil-rights-act; *Legal Highlight: The Civil Rights Act of 1964*, U.S. Dep't Lab. (Nov. 1, 2023), https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964#:~:text=In%201964%2C%20Congress%20passed%20Public,hiring%2C%20promoting%2C%20and%20firing.

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[4] Francis J. Vaas, *Title VII: Legislative History*, 7 Bos. C. Law Rev. 431, 431 (1966).

[5] Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941); U.S. Equal Emp. Opportunity Commission, *EEOC History: The Law* (Nov. 1, 2023), https://www.eeoc.gov/history/eeoc-history-law.

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[8] Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948); *EEOC History: The Law*, *supra* note 5.

[9] *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493-95 (1954).

[10] *Brown v. Bd. of Ed. of Topeka*, 349 U.S. 294, 301 (1955).

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[13] *Civil Rights Movement*, *supra* note 3.

[14] *Id.*

[15] *Id.*

[16] *Id.*; Civil Rights Act of 1957, H.R. 6127, 85th Cong. (1957).

[17] H.R. 6127.

[18] Vaas, *supra* note 4, at 432.

[19] *Civil Rights Movement*, *supra* note 3; *The Modern Civil Rights Movement and the Kennedy Administration*, *supra* note 11; *John F. Kennedy's Address on Civil Rights*, PBS (Nov. 1, 2023), https://www.pbs.org/wgbh/americanexperience/features/president-kennedy-civil-rights/; *The Civil Rights Act of 1964*, UVA Miller Ctr. (Nov. 1, 2023), https://millercenter.org/the-presidency/educational-resources/the-civil-rights-act-of-1964.

[20] *Civil Rights Act (1964)*, *supra* note 2; *Legal Highlight: The Civil Rights Act of 1964*, *supra* note 2.

[21] *Life of John F. Kennedy*, *supra* note 23; *John F. Kennedy's Address on Civil Rights*, *supra* note 27.

[22] Vaas, *supra* note 4, at 432; *The Civil Rights Act of 1964*, *supra* note 27; *Special Message to the Congress on Civil Rights and Job Opportunities*, The Am. Presidency Project (Nov. 1, 2023), https://www.presidency.ucsb.edu/documents/special-message-the-congress-civil-rights-and-job-opportunities.

[23] *Special Message to the Congress on Civil Rights and Job Opportunities*, *supra* note 30.

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[25] *Id.*

[26] U.S. Senate, *Landmark Legislation: The Civil Rights Act of 1964* (Nov. 1, 2023), https://www.senate.gov/artandhistory/history/common/generic/CivilRights-Act1964.htm.

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[29] Civil Rights Act of 1964, H.R. 7152, 88th Cong. (1964).

[30] L. Caille Hebert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive Wards Cove and the Civil Rights Act of 1990*, 32 Bos. C. Law Rev. 1, 2 (1990); *see also Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 985 (1988).

[31] Hebert, *supra* note 30, at 13.

[32] H.R. 7152.

— Continued on next page

[33] Hebert, *supra* note 30, at 9-10. *See also Watson*, 487 U.S. at 987; *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n. 1 (1971); *Connecticut v. Teal*, 457 U.S. 440, 446, 448 (1982).

[34] Hebert, *supra* note 30, at 3.

[35] *Id.* at 13-29.

[36] H.R. 7152.

[37] *Id.*

[38] *Watson*, 487 U.S. at 989-90.

[39] *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 (1979).

[40] *Weber*, 443 U.S. at 199.

[41] *Id.* at 208.

[42] *Id.* at 203.

[43] *Id.* at 204.

[44] *Id.* at 208.

[45] *Johnson v. Transp. Agency*, 480 U.S. 616, 626 (1987).

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[47] *Id.* at 631.

[48] *Id.* at 631-32.

[49] *Id.*

[50] *Id.* at 637-38.

[51] *Id.* at 639.

[52] *Connecticut*, 457 U.S. at 443-44.

[53] *Id.* at 451-52.

[54] *Id.* at 453-54.

[55] *Id.*

[56] Hebert, *supra* note 30, at 4.

[57] *Griggs*, 401 U.S. at 426-28.

[58] *Id.* at 430.

[59] *Id.* at 425-26.

[60] *Id.* at 431.

[61] *Id.* at 429-30.

[62] *Id.* at 430.

[63] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 436 (1975).

[64] *Id.* at 425.

[65] *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989).

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[69] *Id.* at 65.

[70] *Id.* at 66.

[71] *Id.* at 67.

[72] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993); *see also Patterson v. Cnty. of Oneida, N.Y.*, 375 F.3d 206, 227 (2d Cir. 2004); *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 847 (7th Cir. 2008).

[73] *Harris*, 510 U.S. at 23. *See also Patterson*, 375 F.3d at 227; *Andonissamy*, 547 F.3d at 847.

[74] *Andonissamy*, 547 F.3d at 848.

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[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] Chung and Krusel, *supra* note 1.

[92] *Id.*

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[94] *Id.*

[95] *Id.*

[96] *Id.*

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[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

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[109] *Id.*

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[132] *DiBenedetto v. AT&T Servs.,* 2022 U.S. Dist. LEXIS 96012, 2022 WL 1682420.

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[145] *Id.* at **15-16.

[146] *Id.* at *20.

[147] *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.,* 143 S.Ct. 2141 (2023).

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— Continued on next page

[150] *Id.* at 2155-2156.

[151] *Id.*

[152] *Id* at 2156.

[153] *Id* at 2156-2157.

[154] *Students for Fair Admissions,* 143 S.Ct. at 2157.

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[165] *Id.*

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[170] *Id.*

Notice of Election

In accordance with the Illinois Defense Counsel's bylaws, an election must be held to fill the vacancies of the directors whose terms expire in 2024.

The following directors' terms will expire at the Annual Meeting in June 2024:

Jill Eckhaus
Hinshaw & Culbertson, LLP
John Eggum
Foran Glennon Palandech Ponzi & Rudloff, P.C.
Mark McClenathan
Heyl, Royster, Voelker & Allen, P.C.
Kimberly Ross
FordHarrison
Britta Sahlstrom
REV Group, Inc.
Holly Whitlock-Glave
HeplerBroom LLC

Recommendations for nominations of six (6) persons to be elected to the Board of Directors are now being solicited from the general membership.

Individual members of the IDC are eligible for election to the Board of Directors unless otherwise excluded by the bylaws. The bylaws declare that educators and law student members are ineligible to serve on the Board of Directors.

The bylaws declare that the Board of Directors shall be representative of all areas of the State of Illinois, and to this end, two Districts are declared: "Cook County" and for all remaining counties, "Statewide". No more than four of the six directors elected each year shall office within the same District, and regardless of votes cast, only the four persons receiving the most votes may be elected from within the District. If all individual members filing nominating Petitions are from the same District, only four shall be elected and the board shall seek out and appoint two directors from the other District.

In addition, no more than two voting members of the combined Executive Committee and Board of Directors shall be partners or associates or otherwise practice together in the same law firm.

A nomination for election to the Board of Directors is complete and filed only if it includes the following:

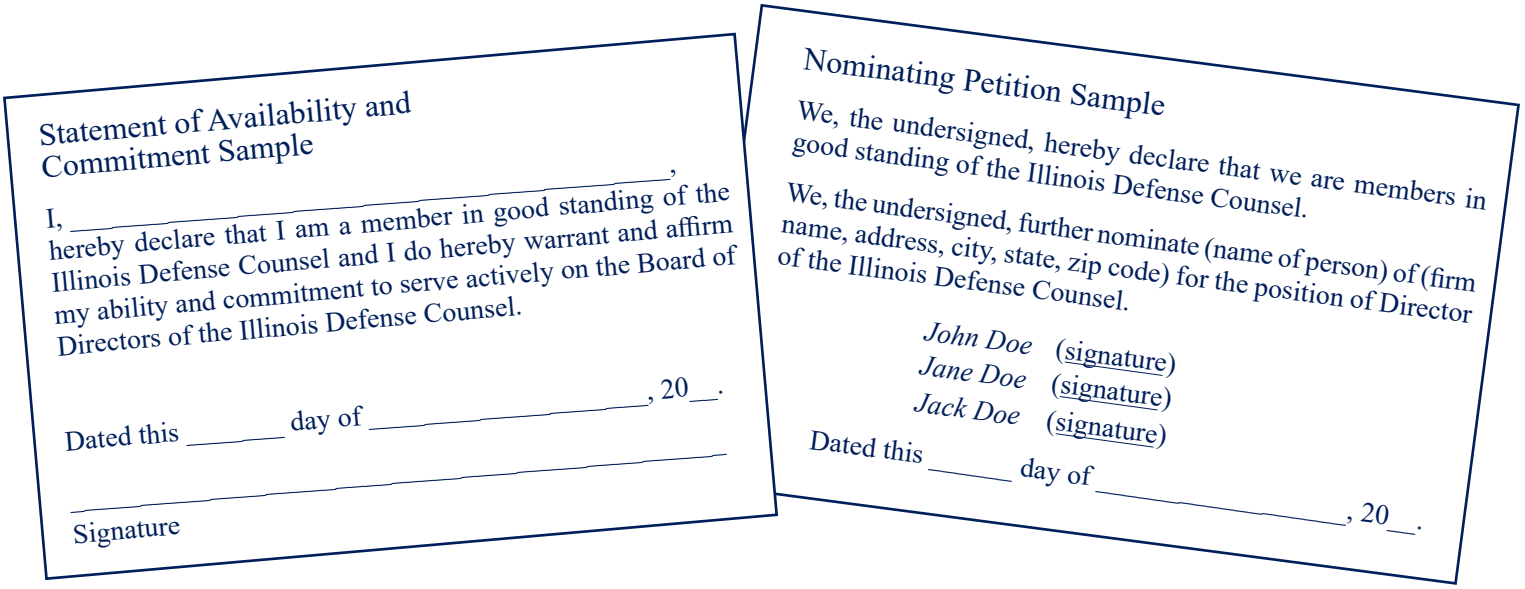
- The Nominating Petition. The signatures of three (3) members in good standing must support each individual nominated.
- A statement by that member of his availability and commitment to serve actively on the board.
- A head and shoulders picture (high-resolution, jpg format preferred).
- A short biography (1-2 paragraphs maximum).
- A statement from the member, not to exceed 200 words, stating why the member thinks they should be elected to the Board of Directors.

Below, please find a sample Nominating Petition and Commitment to Serve Statement.

Nominations must be sent electronically to IDC Secretary/Treasurer **Donald Patrick Eckler** at **patrick.eckler@fmglaw.com** and IDC Executive Director **Sandra J. Wulf, CAE, IOM** at **sandra@IDC.law**. Nominations must be accompanied by the five items listed above. All candidates will be featured with their biography, statement of candidacy, and picture in the *IDC Quarterly*. If more than six petitions are received, the feature will be sent to the membership.

All nominating petitions must be submitted no later than Friday, **April 5, 2024.**

All candidates who have filed a complete nominating petition are eligible to receive an electronic copy of the IDC membership listing, upon request.



Statement of Availability and Commitment Sample

I, _____, hereby declare that I am a member in good standing of the Illinois Defense Counsel and I do hereby warrant and affirm my ability and commitment to serve actively on the Board of Directors of the Illinois Defense Counsel.

Dated this _____ day of _____, 20__.

_____
Signature

Nominating Petition Sample

We, the undersigned, hereby declare that we are members in good standing of the Illinois Defense Counsel.

We, the undersigned, further nominate (name of person) of (firm name, address, city, state, zip code) for the position of Director of the Illinois Defense Counsel.

John Doe (signature)
Jane Doe (signature)
Jack Doe (signature)

Dated this _____ day of _____, 20__.

Association News

IDC Holiday Party & Spirit of the Season Fundraiser

We had a wonderful time gathering in Chicago for our Annual Holiday Party. Thank you to all who attended and to all who donated to the Spirit of the Season Fundraiser for Blessings in a Backpack.

The mission of Blessings in a Backpack is to provide food on the weekends for school-aged children across America who might otherwise go hungry. We are pleased to announce that we raised over $1,000 for Blessings in a Backpack. Learn more about Blessings in a Backpack at https://www.blessingsinabackpack.org/.

Thank you to everyone who donated and participated in the fundraiser!

Katie Aumiller | *Foran Glennon Palandech Ponzi & Rudloff PC*
Denise Baker-Seal | *Brown & James, P.C.*
Tammy Banasek | *HeplerBroom LLC*
Matt Brach | *ESi*
Bill Busse | *Busse & Busse, P.C.*
Chris Carr | *Schouest Bamdas Soshea BenMaier & Eastham*
Adam Carter | *Esp Kreuzer Cores LLP*
Matt Champlin | *HeplerBroom LLC*
Brian Christian | *MDD Forensic Accountants*
Greg Cochran | *McKenna Storer*
Mark Cosimini | *Rusin & Maciorowski, Ltd.*
Alex Cull | *Foran Glennon Palandech Ponzi & Rudloff PC*
Donald Patrick Eckler | *Freeman, Mathis & Gary, LLP*
Robert Elworth | *HeplerBroom LLC*
Kyle Fleck | *Nielsen, Zehe & Antas, P.C.*
Terry Fox | *Schouest Bamdas Soshea BenMaier & Eastham*
Howard Jump | *Board of Education of the City of Chicago*
Brad Krause | *Nielsen, Zehe & Antas, P.C.*
Matthew Lee-Own | *Foran Glennon Palandech Ponzi & Rudloff PC*
David Levitt | *Hinshaw & Culbertson, LLP*
Bill McVisk | *Tressler LLP*
Anne Oldenburg | *HeplerBroom LLC*
Rick Perez | *Subrosa Investigations*
Kimberly Ross | *FordHarrison LLP*
Drew Russo | *Nielsen, Zehe & Antas, P.C.*
Tracy Stevenson | *Law Offices of Tracy Stevenson, P.C.*
Michael Vranicar | *Hinshaw & Culbertson LLP*
John Watson | *Craig & Craig, LLC*
Sandra Wulf | *Illinois Defense Counsel*

Special Thanks to our Holiday Party Sponsors!

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Litigation Links Classic

Join IDC May 16 for the inaugural "Litigation Links Classic" at **Cog Hill Golf and Country Club**—a premier golf course in Lemont, IL. This exclusive event will seamlessly blend the precision of the legal profession with the finesse of golf, promising a day of strategic swings and fruitful connections.

Event Highlights

- **Afternoon Flight**—The Outing kicks off at 1pm with a thrilling round of golf on Cog Hill's meticulously maintained fairways. Enjoy the challenge of Jemsek-designed courses, offering an ideal backdrop for friendly competition and skillful play.
- **Cocktail Hour**—As the sun sets, transition to a vibrant cocktail hour. Reflect on the day's achievements, discuss legal strategies, and forge lasting connections with colleagues and clients alike.
- **Dinner & Awards Ceremony**—Conclude the day with a sumptuous dinner and celebrate the achievements of the day, acknowledge outstanding performances on the course, and build camaraderie within the civil litigation defense community.

Client-Attorney Golf Foursomes

Amplify your connections by bringing along a dynamic team—two attorneys and two clients—ensuring a mix of legal expertise and client insights. This approach will help your firm deepen the relationship with clients while fostering insightful conversations both on and off the course.

Registration

Full registration includes 18 holes of golf, golf cart, boxed lunch, and dinner. Register today at **www.IDC.law**.

- **Foursome – Attorneys/Insurance Professionals** $600
- **Foursome – Vendors**..... $1,250
- **Individual Golfer – Attorney or Insurance Professional** $175
- **Individual Golfer – Vendor** $350
- **Dinner Only**
  - **Attorneys or Insurance Professionals**..... $100
  - **Vendors**..... $200

Sponsorship Opportunities

Ample opportunities await you at the Litigation Links Classic. Contact the IDC today to reserve your sponsorship.

IDC Judicial Reception

Hon. Stephen Stobbs Presented with Distinguished Service Award

Members gathered in Edwardsville on October 5, 2023 for a Judicial Reception. Recognized at the event was **Hon. Stephen Stobbs**, Chief Judge of the *Circuit Court of Madison County*. Judge Stobbs was recognized with the IDC Distinguished Service Award in appreciation and recognition of his outstanding and devoted service to the citizens of Illinois.

Judge Stephen Stobbs was born and raised in Godfrey and is a life-long resident of Madison County. He earned his undergraduate degree from St. Louis University, graduating with honors in 1990 and his Juris Doctor from Thomas M. Cooley Law School, graduating with honors in 1994.

Upon graduating law school he practiced law in Alton with his Father, John Dale Stobbs (deceased) and Attorney Jim Sinclair. Judge Stobbs was elected three times to the Madison County Board, representing Godfrey from 1998-2006 when he was appointed Associate Judge.

Judge Stobbs served as an Associate Judge from 2006-2020, presiding over nearly every kind of case that entered the courthouse. In November 2020, he was elected as an At-Large Circuit Judge in Madison and Bond Counties.

Thank you to our Judicial Reception Sponsors

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Insurance Seminar

Illinois Defense Counsel MEMBERSHIP APPLICATION

Membership in the Illinois Defense Counsel is open to Individuals, Corporations, Educators, and Law Students. For a list of qualifications, visit www.iadtc.org or phone the IDC office at 800-232-0169. Applicants shall be admitted to membership upon a majority vote of the Board of Directors.

I am applying for membership as a(an) (Select Only One):

Private Practice Attorney, in practice:

- ❍ 0-5 years ($175)
- ❍ 6 or more years ($300)

Public Sector Attorney, in practice:

- ❍ 0-5 years ($125)
- ❍ 6 or more years ($150)

- ❍ **Claims Professional** ($125)
- ❍ **Corporation** or **Association Counsel** ($125)
- ❍ **Student** ($20)
- ❍ **Educator** ($75)

Applicant Information

Prefix____ First ____ Middle ____ Last ____ Suffix ____ Designation ____

Organization ____

Address ____

City ____ State ____ Zip ____ County ____

Phone ____ Email ____

Home Address ____

City ____ State ____ Zip ____ County ____

Phone ____ Alternate Email Address ____

IDC Sponsor ____

Attorneys

Area of Practice ____ # of Attorneys in Firm ____

Law School ____ Admitted to the Illinois Bar in (Year) ____ ARDC# ____

Educator and Law Student Applicant Information

Prefix ____ First ____ Middle ____ Last ____ Suffix ____ Designation ____

Law School ____ Anticipated Graduation Date ____

Address ____

City ____ State ____ Zip ____ County ____

Phone ____ Email ____

Biographical Information

IDC is committed to the principle of diversity in its membership and leadership. Accordingly, applicants are invited to indicate which one of the following may best describe them:

Ethnicity ____ Gender ____ Birth Date ____

(Application continued on next page)

IDC Illinois Defense Counsel

COMMITTEE INVOLVEMENT

All Substantive Law Committees are open to any IDC member. Event and Administrative Committees are generally small committees and members are often appointed by the Board of Directors. Substantive Law Committees are responsible for writing the Monograph for the *IDC Quarterly* and may submit other Feature Articles. Committees keep abreast of current legislation and work with the IDC Legislative Committee, as warranted. Committees also serve as a resource to seminar committees for speakers and subjects and, if and when certain issues arise that would warrant a specific "topical" seminar, the committee may produce such a seminar.

Please select below the committees to which you would like to apply for membership:

Substantive Law Committees

- ❍ Civil Practice Law
- ❍ Construction Law
- ❍ Employment Law
- ❍ Insurance Law
- ❍ Medical Malpractice & Healthcare Law
- ❍ Tort Law
- ❍ Toxic Tort Law
- ❍ Trucking & Transportation Law
- ❍ Workers' Compensation Law

Administrative & Event Committees

- ❍ Diversity Equity & Inclusion
- ❍ Practice Development
- ❍ Legislative
- ❍ Social Media

Membership Commitment

By providing a fax number and email address you are agreeing to receive faxes and emails from the association that may be of a commercial nature. I certify that:

- ❍ As a **Private Practice** or **Public Sector Attorney**, I am actively engaged in the practice of law, that at the present time a substantial portion of my litigation practice in personal injury and similar matters is devoted to the defense.
- ❍ As a **Claims Professional, Corporation** or **Association Counsel**, I will support the purpose and mission of the IDC.
- ❍ I am currently a **Professor** or **Associate Professor** of law at an ABA accredited law school.
- ❍ I am currently a **Student** enrolled in an ABA accredited law school.

Signed _____ Date _____

Membership Investment

Membership Dues ..... $ _____

Voluntary Political Action Committee Donation * ..... $ _____

Total Amount Due ..... $ _____

* **Recommended Amount:**
<3 years in practice..... $15
4-5 years in practice..... $25
6-9 years in practice..... $55
10+ years in practice..... $75

Please Note: IDC dues are not deductible as a charitable contribution for U.S. federal income tax purposes, but may be deductible as a business expense. The IDC estimates that 2% of your dues are not deductible because of the IDC's lobbying activities on behalf of its members.

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Thank you for your interest in joining the Illinois Defense Counsel. Your application will be presented to the Board of Directors for approval at their next regular meeting. Until that time, if you have any questions, please contact the IDC office at:

Illinois Defense Counsel
PO Box 588 • Rochester, IL 62563-0588 • 800-232-0169 • 217-498-2649 • www.IDC.law

ILLINOIS DEFENSE COUNSEL

The Voice of the Defense Bar in Illinois

Promoting a level playing field in civil litigation

Representing the interests of business and industry in Illinois

Dedicated to improving the quality of the legal profession

To learn more about the Illinois Defense Counsel, Visit us online at

www.IDC.law

What is the IDC?

We are the premier association of attorneys in Illinois representing business, corporate, professionals, and other individual defendants in civil litigation. The IDC is an exceptional community of defense attorneys dedicated to improving the judicial system and the practice of law.

The IDC is a reasoned and independent voice for fairness in the legal system. We work with the business, insurance, and medical communities to ensure a fair and equal justice system for all litigants.

The IDC is

- An advocate for the legal profession
- nearly 600 members strong
- Looked to for advice and support by the judiciary
- A resource for legislators

How is the IDC Making a Difference?

The IDC strengthens the practice of law and improves the skills of lawyers that defend individuals and businesses in Illinois. We enhance the knowledge of defense attorneys through our nationally respected publication the *IDC Quarterly* and the new *Survey of Law*, by our continuing legal education programs, and committees that focus on specialty practice areas like **Civil Practice**; **Construction Law**; **Employment Law**; **Insurance Law; Medical Malpractice & Healthcare Law, Tort Law**,**Toxic Tort Law, Trucking & Transportation Law and Workers' Compensation Law**.

The IDC is working to protect the Illinois legal system, demanding a level playing field and resisting attempts to dismantle the jury system. The IDC is a respected resource providing:

- Fact sheets on the impact of pending litigation
- Expertise to legislative committees and political leaders
- Amicus briefs on legal issues pending before the Illinois reviewing courts

IDC members are as diverse as the clients we represent

From big firms and small and all corners of the state, attorneys join the IDC based on our common issues and a common desire to improve our legal system.

Over the past five decades, we have grown from an organization of mostly insurance defense attorneys to a broad-based association of litigators who represent an entire range of business and industry throughout Illinois and the United States. The diversity of our membership and clientele informs our independent and balanced view of Illinois's judicial system and the litigation that affects it.

What are Our Core Values?

- To promote and support a fair, unbiased, and independent judiciary
- To take positions on issues of significance to our membership, and to advocate and publicize those positions
- To promote and support the fair, expeditious, and equitable resolution of disputes, including the preservation and improvement of the jury system
- To provide programs and opportunities for professional development to assist members in better serving their clients
- To increase its role as the voice of the defense bar of Illinois, and to make the IDC more relevant to its members and the general public
- To support diversity within our organization, the defense bar, and the legal profession

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IDC CALENDAR

- **April 4** A to Z Litigation Academy – Session 4 Watercooler
- **April 5** Webinar: The Heat of the Moment: Chemical Causes of Thermal Events
- **April 8** A to Z Litigation Academy – Session 5 Opens
- **April 9** Webinar: So You've Passed the Bar, Now What?
- **April 11** Executive Committee Meeting | *via Zoom*
- **April 12** Board Meeting | *via Zoom*
- **April 25** A to Z Litigation Academy – Session 5 Watercooler
- **April 29** A to Z Litigation Academy – Session 6 Opens
- **May 2** Medical Malpractice/Healthcare Law Committee Meeting | *via Zoom*
- **May 7** Trucking & Transportation Law Committee Meeting | *via Zoom*
- **May 16** A to Z Litigation Academy – Session 6 Watercooler | Golf Outing, Lemont
- **May 17** Executive Committee Meeting, Board Meeting | *Location TBA*, Chicago
  New Member Orientation | *via Zoom*
- **May 20** A to Z Litigation Academy – Session 7 Opens
- **June 6** A to Z Litigation Academy – Session 7 Watercooler; Executive Committee Meeting
  | *Brown & James, P.C.*, St. Louis
- **June 7** Board of Directors Meeting; Annual Business Meeting & Awards Presentation –
  Live! By Loews, St. Louis
- **June 10** A to Z Litigation Academy – Session 8 Opens
- **June 14** Committee Boot Camp | *via Zoom*
- **June 27** A to Z Litigation Academy – Session 8 Watercooler
- **June 28** 60th Anniversary Gala – Café Brauer, Lincoln Park Zoo, Chicago

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