

1 PUBLIC HEARING
 2 BEFORE THE SUPREME COURT RULES COMMITTEE
 3 STATE OF ILLINOIS
 4 June 19, 2019
 5 10:30 o'clock a.m.
 6
 7 Michael A. Bilandic Building
 8 160 North LaSalle Street
 9 Room C-500
 10 Chicago, Illinois
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 12
 13 STENOGRAPHIC REPORT OF PROCEEDINGS
 14 before the Illinois Supreme Court Rules Committee
 15 at the Michael A. Bilandic Building, 160 North
 16 LaSalle Street, Room C-500, Chicago, Illinois, the
 17 Hon. John C. Anderson, presiding.
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 22
 23 Reported by: Tracy Jones, CSR, RPR, CLR
 24 License No.: 084-004553

1 ATTENDEES:
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 3 ANTONIO M. ROMANUCCI, ESQUIRE, Vice Chair
 4 PROF. KEITH H. BEYLER, Reporter
 5 AMY S. BOWNE, Secretary
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 8
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 18 STEVE H. KIM, ESQUIRE
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 20 MICHAEL I. ROTHSTEIN, ESQUIRE
 21 STEVEN M. RUFFALO, ESQUIRE
 22 JONATHAN M. THOMAS, ESQUIRE
 23 STANLEY L. TUCKER, ESQUIRE
 24 * * *

1 (Call to order, 10:31 a.m.)
 2 JUDGE ANDERSON: Good morning, everybody.
 3 This is the Supreme Court Rules Committee hearing.
 4 We're going to hear from a number of speakers this
 5 morning, and I wanted to let you know in advance
 6 that Justice Kilbride could not be here this
 7 morning. Unfortunately, the Peoria County State's
 8 Attorney, Jerry Brady, passed away, and he is at
 9 the services for Mr. Brady today.
 10 Our first speaker is Seth Horvath from
 11 the Appellate Lawyers Association.
 12 And you're going to comment on 16-08,
 13 18-04, 18-12, and 19-02; is that right?
 14 MR. HORVATH: That is correct, your Honor.
 15 Thank you very much, and good morning to
 16 all of you, and thank you for allowing me to
 17 present this morning. I'm here on behalf of the
 18 Appellate Lawyers Association. We are always very
 19 enthusiastic to present our proposals to the
 20 Committee. And in the interest of time -- I only
 21 have ten minutes -- I'll give you a brief overview
 22 of the four proposals that are pending. Two of
 23 them have two different parts.
 24 Proposal 16-08 involves proposed

1 modifications to Rules 306 and 308 regarding
 2 petitions for leave to appeal to the Appellate
 3 Court, and we have proposed a rule modification
 4 that would require the Appellate Court to
 5 determine or decide those petitions within
 6 30 days, with the exception of good cause.
 7 Proposal 18-04 involves Rule 345
 8 pertaining to amicus briefs. We have proposed
 9 allowing the filing of amicus briefs in support of
 10 and in opposition to petitions for leave to appeal
 11 filed before the Illinois Supreme Court.
 12 Proposal 18-12 has two parts, both of
 13 which pertain to Supreme Court Rule 315. 315(d)
 14 is the section of 315 involving page and word
 15 counts for petitions for leave to appeal. We have
 16 proposed a clarifying amendment that indicates
 17 that certain material will be excluded from the
 18 page and word count under 315(d).
 19 315(h), the second component of
 20 Proposal 18-12, involves page and time limits for
 21 briefing in which arguments are raised regarding
 22 cross relief before the Supreme Court. We propose
 23 modifications to the timing and page limits under
 24 that Rule, which I'll go into in a bit more



<p>1 detail.</p> <p>2 And by way of overview, Proposal 19-02 is</p> <p>3 a proposal regarding Illinois Supreme Court</p> <p>4 Rule 342 that would allow an appellant to file a</p> <p>5 supplementary appendix in support of a reply brief</p> <p>6 as a matter of right.</p> <p>7 I'll circle back to Proposal 16-08, which</p> <p>8 addresses Rules 306 and 308. Obviously, I will</p> <p>9 address any questions the Committee may have as I</p> <p>10 walk through these various proposals in a bit more</p> <p>11 detail.</p> <p>12 The current structure of Rules 306 and</p> <p>13 308 is such that there is no mandatory deadline</p> <p>14 for the Appellate Court to determine whether it's</p> <p>15 going to take permissive appeals under Rule 306</p> <p>16 and permissive appeals by certified question under</p> <p>17 Rule 308, both of which are initiated by petitions</p> <p>18 to the Appellate Court. And so in the interest of</p> <p>19 expediting determinations by the Appellate Court</p> <p>20 on the question of whether the appeals are going</p> <p>21 to be taken, on the threshold question, we have</p> <p>22 proposed a 30-day time frame for the Appellate</p> <p>23 Court to adjudicate those petitions unless there</p> <p>24 is good cause for not doing so. We felt it was</p> <p style="text-align: right;">5</p>	<p>1 opposition to petitions for leave to appeal. We</p> <p>2 would ask the Committee to consider modifying the</p> <p>3 Rule to allow that type of briefing. It's our</p> <p>4 position that amicus briefs can be constructive in</p> <p>5 identifying important matters and would provide</p> <p>6 the Court with further guidance from the bar and</p> <p>7 from certain interest groups knowledgeable in</p> <p>8 certain areas of the law about cases that may have</p> <p>9 far-reaching implications and cases the Court may</p> <p>10 want to pay particular attention to. So we would</p> <p>11 ask for specific recognition in Rule 345 that</p> <p>12 amicus briefs be allowed in support of and in</p> <p>13 opposition to petitions for leave to appeal.</p> <p>14 Moving on to Proposal 18-12, the 315(d)</p> <p>15 component of that proposal is simply a clarifying</p> <p>16 amendment regarding the matter that is included in</p> <p>17 page limits for petitions for leave to appeal. I</p> <p>18 think it's fair to say that the -- the appellate</p> <p>19 bar is very familiar with this Rule and familiar</p> <p>20 with what is excluded and what is included. I</p> <p>21 would submit that this amendment is more for</p> <p>22 general practitioners who may not do a substantial</p> <p>23 amount of appellate work and who may be confronted</p> <p>24 with some confusion when they file petitions for</p> <p style="text-align: right;">7</p>
<p>1 prudent to include a good cause pressure valve</p> <p>2 because obviously cases arise in which a 30-day</p> <p>3 time line may not be able to be met.</p> <p>4 There is an analog to this procedure in</p> <p>5 terms of a mandatory time frame for determining a</p> <p>6 petition or resolving a matter under Rule 307(d).</p> <p>7 That's the Rule that pertains to appeals from the</p> <p>8 entry or denial or modification or dissolution of</p> <p>9 a temporary restraining order. The Appellate</p> <p>10 Court is currently required to resolve those</p> <p>11 matters within five business days of the</p> <p>12 completion of briefing on the underlying issues.</p> <p>13 And that aspect of 307 we feel provides some</p> <p>14 support for the proposed time frames that we would</p> <p>15 suggest would help expedite matters under</p> <p>16 Rules 306 and 308.</p> <p>17 That brings me to Proposal 18-04</p> <p>18 regarding amicus briefs in support of and in</p> <p>19 opposition to petitions for leave to appeal. The</p> <p>20 Rules currently do not prohibit the filing of such</p> <p>21 amicus briefs. However, it is our understanding,</p> <p>22 and the appellate bar's understanding, that the</p> <p>23 Supreme Court's general practice is not to allow</p> <p>24 the filing of amicus briefs in support of and in</p> <p style="text-align: right;">6</p>	<p>1 leave to appeal.</p> <p>2 As the Committee well knows, petitions</p> <p>3 for leave to appeal are not only filed by people</p> <p>4 who specialize in appellate practice, they're</p> <p>5 filed by lawyers who practice in all different</p> <p>6 areas and have all different specialties. So this</p> <p>7 amendment would be designed to clarify the matter</p> <p>8 that is subject to the Rule 315(d) page limit in a</p> <p>9 petition for leave to appeal.</p> <p>10 The 315(h) proposal is a proposal</p> <p>11 regarding cross relief requested in Supreme Court</p> <p>12 briefing. That proposal is limited to briefing in</p> <p>13 the Illinois Supreme Court. Currently, an</p> <p>14 appellant has 14 days to respond to cross relief</p> <p>15 that is requested by an appellee. But an appellee</p> <p>16 doesn't get additional pages for its request for</p> <p>17 cross relief, and the appellant doesn't get</p> <p>18 additional pages to respond to the request for</p> <p>19 cross relief or additional time to respond to the</p> <p>20 request for cross relief. So there's a lack of</p> <p>21 clarity in the time frame and in the page limits</p> <p>22 applicable to requests for cross relief under</p> <p>23 Rule 315(h).</p> <p>24 Under our proposal, we would ask the</p> <p style="text-align: right;">8</p>



<p>1 Committee to add extra pages explicitly for the 2 appellee to include in the appellee's request for 3 cross relief and then extra time and extra pages 4 for the appellant to respond to the appellee's 5 request for cross relief. In addition to that, as 6 already recognized by the Rule, the appellee who 7 makes the request for cross relief would have time 8 and pages to reply. We feel that modifying the 9 rule in that way would provide a more -- more 10 instructive roadmap for litigants who are involved 11 in Supreme Court briefing where requests for cross 12 relief arise.</p> <p>13 I see I'm reaching the end of my ten 14 minutes, so I'll briefly comment on Proposal 19-02 15 subject to any questions by the Committee. 16 Proposal 19-02 pertains to Illinois Supreme Court 17 Rule 342, and that is the Rule that governs 18 appendices to briefs. The Rule is currently set 19 up so that after an appellant files an appendix in 20 support of the appellant's brief, the appellee 21 may, as of right, file an appendix in support of 22 the appellee's brief. There are, however, 23 circumstances that have come to our attention 24 where there is a need for the appellant in</p> <p style="text-align: right;">9</p>	<p>1 opportunity to petition to file an amicus brief at 2 that time. So why does the benefit justify the 3 extra burden?</p> <p>4 MR. HORVATH: I acknowledge that additional 5 paperwork would likely be filed, and the Court 6 would have to decide more motions for leave to 7 file amicus briefs. However, in our reflection 8 over this proposal, it was our very strong belief 9 that by giving members of the bar an additional 10 opportunity to share their experience, 11 particularly in specific industries or in specific 12 areas of subject matter expertise, the added 13 benefit to the Court would outweigh any 14 administrative burden that is created by the Court 15 having to rule on additional motions for leave.</p> <p>16 Obviously, because this is structured in 17 such a way that it would allow the motion to be 18 filed for leave to submit the amicus brief, if the 19 Court were to find the requests uninformative or 20 unhelpful, it could always deny the motions. And 21 so though this may add to additional filings, it 22 seemed to us that the -- allowing members of the 23 bar the opportunity to highlight particularly 24 important matters to the Court would be a useful</p> <p style="text-align: right;">11</p>
<p>1 submitting the reply brief to add additional 2 material to the appendix for the Court's 3 consideration. This would not involve allowing 4 the appellant to insert non-record material into 5 the appellate record. This would simply be a 6 mechanism for the appellant to take material 7 that's already in the record and include that 8 material in an appendix in support of a reply 9 brief as needed. And so that is the justification 10 that we are offering up for the amendment to 11 Rule 342.</p> <p>12 If any Committee members have any 13 questions, I'm happy to do my best to address 14 those. Thank you very much.</p> <p>15 Yes?</p> <p>16 MR. ROTHSTEIN: I guess I'm just a little bit 17 concerned about the proposal regarding filings in 18 support of or in opposition to a petition for 19 leave to appeal. It's just going to be adding, at 20 least one of the public comments suggested, it's 21 just adding additional paper for the Court to 22 review. Maybe it slows down, marginally at least, 23 the process of resolving. And if the Court 24 decides to accept the case, then he'll have an</p> <p style="text-align: right;">10</p>	<p>1 addition to the Rules.</p> <p>2 VICE CHAIR ROMANUCCI: So kind of along those 3 lines, Mr. Horvath, how do you see this as being 4 efficient in terms -- Tell me a little bit more 5 about the efficiency value that you see here. 6 Because I don't quite see it yet.</p> <p>7 MR. HORVATH: I think that part of the 8 analysis here is in acknowledging that this will 9 involve additional paperwork for the Court. 10 However, I look at it as -- I look at the focal 11 point of this analysis as the added benefit for 12 the Court in being able to consider additional 13 briefing on issues of importance. So undoubtedly, 14 the court will be required to review more motions. 15 I would -- I would submit the court already has a 16 healthy motion practice. I don't know that the 17 burden, the incremental burden added by amending 18 the Rule in this way would have such a drag on the 19 court's ability to address its motion docket that 20 it would slow things down in a substantial way. 21 I'm not convinced that by amending the Rule in 22 this way it would have a meaningful negative 23 effect on the court's ability to address motions 24 that have been filed.</p> <p style="text-align: right;">12</p>



1 It's not our contemplation or
2 understanding that these motions would be filed as
3 a matter of due course. I think they would be
4 isolated to matters that were identified as
5 matters of high importance to the bar, and the
6 motion practice would be more limited in nature.
7 VICE CHAIR ROMANUCCI: So I guess let me ask
8 this in follow-up, because I do acknowledge what
9 Mr. Rothstein said about one of the public
10 comments. One of the other public comments was
11 that this would be an improvement in appellate
12 practice without giving any example at all. Can
13 you share in any way how this would be an
14 improvement in appellate practice?
15 MR. HORVATH: I believe the current statistics
16 on the Illinois Supreme Court's docket show that
17 the court takes between 2 and a half percent and
18 5 percent of civil matters that are put before it
19 and between 2 and a half to 5 percent of the
20 criminal matters that are put before it. And I
21 would submit that the court is already very
22 selective in the types of cases it takes. And
23 there may be other cases that are worthy of the
24 court's consideration that are somehow being

13

1 missed. And this proposal is designed to create a
2 situation offering the bar an opportunity to
3 further assist the court in identifying matters of
4 public importance that the bar feels strongly
5 ought to be resolved by the court. And the
6 incremental addition of cases taken as a result of
7 this type of advocacy I think would outweigh any
8 incremental burden in the motion practice of the
9 court.
10 PROFESSOR BEYLER: Do you have any rough
11 estimate of the numbers that we would be looking
12 at; that is, however many PLAS, petitions there
13 are per year, what percentage of them would lead
14 to requests for leave to file an amicus brief?
15 And, second, how long would these amicus
16 briefs be? I mean, I -- In a way, I sort of
17 thought, well, in terms of workload, you could
18 just say you've got two pages to tell me why this
19 is important, and if you can't tell me in two
20 pages, it probably isn't important. I mean, we
21 could reduce the court's load by being extremely
22 restrictive on how long you've got. But if there
23 isn't a restriction, what could the court expect?
24 MR. HORVATH: To your second point, Professor,

14

1 the current proposal, the page limits would be the
2 same as the page limits for petitions for leave to
3 appeal and answers to petitions for leave to
4 appeal --
5 PROFESSOR BEYLER: which is a lot more than
6 two pages.
7 MR. HORVATH: 20 pages. Ten times as much.
8 PROFESSOR BEYLER: That's why I'm wondering.
9 Granted, are you typically going to be looking at
10 18 to 20 pages? And, if so, what percentage -- I
11 know all you can do is roughly estimate -- of
12 their petitions are going to generate these sorts
13 of requests?
14 MR. HORVATH: It's difficult for me to do a
15 statistical estimate. I don't have the data to do
16 that. If I were to do some back-of-the-napkin
17 math as I stand here right now, if we estimate
18 that the court accepts 5 percent of its petitions
19 for leave to appeal, I think we can assume that
20 those are 5 percent of matters that are important
21 to the court. I think it would be safe to assume
22 that at least 5 percent of the matters before the
23 court would end up generating some type of amicus
24 briefing at the petition for leave to appeal

15

1 stage. And I think it's safe to say that the
2 percentage would end up being something above and
3 beyond 5 percent as other matters were identified
4 that were of importance. But that's purely --
5 purely a speculative estimate on my part.
6 I would be willing to say somewhere above
7 5 percent would generate this type of briefing,
8 but I can't be more specific than that.
9 CHAIRMAN ANDERSON: Any other questions from
10 anyone on the Committee?
11 MR. TUCKER: I have a question.
12 On the mechanics of this, do I understand
13 correctly the amicus request is due at the time
14 the petition for leave to appeal is due?
15 MR. HORVATH: That is correct. I believe that
16 is how we structured this proposal. It would be
17 identical.
18 MR. TUCKER: So the Amicus Committee is going
19 to have to be following the cases in the Appellate
20 Court and then inquire whether or not a petition
21 for leave is going to be filed?
22 MR. HORVATH: That is accurate. And I think
23 that actually lends to some self selection of what
24 cases are important for consideration. If the

16



<p>1 case is truly one that rises to the level of 2 importance that warrants an amicus in support of 3 or in opposition to a petition for leave to 4 appeal, I think it does stand to reason that the 5 bar would be following the case along with the 6 deadline for the amicus brief.</p> <p>7 CHAIRMAN ANDERSON: Thank you, Mr. Horvath. 8 MR. HORVATH: Thank you.</p> <p>9 CHAIRMAN ANDERSON: Our next speaker is the 10 most esteemed Timothy Eaton, and he'll also be 11 speaking on Proposal 16-08, 18-04, and 19-02. 12 Good morning, Mr. Eaton.</p> <p>13 MR. EATON: Good morning, Judge Anderson. 14 Good morning, members of the Committee. I guess 15 you become most esteemed when you get older. 16 I'm here to address actually two Rules, 17 one which you've just discussed and had a number 18 of questions on. On behalf of the Chicago Bar 19 Association, we strongly support the amendment to 20 Supreme Court Rule 345 which would allow amicus 21 briefs. And then I also am going to address the 22 other proposal dealing with the ability to file 23 appendices to reply briefs. And I think that 24 deals with 342.</p> <p style="text-align: right;">17</p>	<p>1 opinions. So there's naturally been some decline. 2 But I also attribute the decline in the 3 Illinois Supreme Court to perhaps the fault of 4 some of us in the appellate bar in not making our 5 case as to why this is an important case for them 6 to take. Not that the Appellate Court got it 7 wrong in terms of whether or not it should be 8 reversed or affirmed, but whether or not the 9 Supreme Court of the state should weigh in on that 10 particular topic when it affects title companies, 11 real estate companies. I don't think the burden 12 is going to be increased significantly at all. I 13 think there will be fewer cases.</p> <p>14 I agree with Mr. Horvath that there 15 probably would be just a slight percentage. But 16 they are missing cases, in my opinion, having 17 followed the court for years. The number of PLAS, 18 Professor Beyler, have decreased significantly as 19 well. It used to be that if you filed your PLA 20 and they already reached 500, that it rolled over. 21 I think now there are around 200. So that rule is 22 no longer in effect.</p> <p>23 In the March term of the Illinois Supreme 24 Court this year, I think they had four cases</p> <p style="text-align: right;">19</p>
<p>1 Let me respond to some of the questions 2 in terms of the workload and burden on the court 3 if they are allowed to have amicus briefs filed in 4 support of PLAS. First of all, in terms of the 5 burden and workload, I had the privilege almost 6 30 years ago to start reviewing the Illinois 7 Supreme Court opinions in the civil area both with 8 the Bar Journal and now through presentations we 9 make every year to the Appellate Lawyers 10 Association. When I started that in about 1992, 11 there were over 70 civil opinions that we had to 12 analyze and review and write about. This year, 13 we're looking at civil opinions in the Illinois 14 Supreme Court, there were 20. And that's where we 15 added a couple of juvenile cases to round out the 16 number. There's been a significant decline in the 17 number of civil cases that have been taken by the 18 court, and I attribute that to several things. 19 First of all, one obvious factor is there's fewer 20 filings in the Circuit Court. And those filings 21 are being made increasingly by self-represented 22 litigants, which is also going to cut down on the 23 number of appeals to the Appellate Court. And as 24 a result, there are fewer Appellate Court</p> <p style="text-align: right;">18</p>	<p>1 total. It used to be when I was there a number of 2 years ago, we would have four a day on Tuesday 3 through Friday. And for three weeks now, we have 4 one week, four cases.</p> <p>5 And I'm not being critical of the court. 6 I think what I'm suggesting is that in my opinion, 7 they need to take more cases of issues of 8 importance to the public where there's conflicts 9 in the Appellate Court, because the Appellate 10 Court sometimes disagree with one another, the 11 various districts. And those cases are not being 12 taken. I have -- I'm not going to name cases that 13 I've been involved in where I was very surprised 14 the court didn't take it, but I think we have 15 failed in our ability to persuade them why it's 16 important. And I think this amicus brief process 17 would really enhance our ability to suggest to 18 them, look, this doesn't just affect my client. I 19 believe I'm pretty good in convincing them as to 20 why my client was wronged. But I'm not so good in 21 suggesting to them why the public or a certain 22 industry has been affected.</p> <p>23 Now, the court may resist any proposal by 24 this Committee to do it, but I think it's worth</p> <p style="text-align: right;">20</p>



<p>1 making.</p> <p>2 And, by the way, the rule does not say</p> <p>3 they will not take amicus briefs on PLAs. But</p> <p>4 just in general, in about 2003, I believe, in the</p> <p>5 Northern denying a motion for leave to file an</p> <p>6 amicus brief, made it clear that the court was no</p> <p>7 longer going to be taking them on PLAs, even</p> <p>8 though the rule was never amended. And I</p> <p>9 personally have had a number of cases over those</p> <p>10 years where I've sought to have amicus briefs</p> <p>11 filed in a PLA, and they have said, wait. We</p> <p>12 don't deny it, but wait until the case is</p> <p>13 accepted.</p> <p>14 The U.S. Supreme Court, I think if you</p> <p>15 talk to any U.S. Supreme Court practitioner -- and</p> <p>16 I'm certainly not one of them; from what I've</p> <p>17 read -- that's the most important part of the</p> <p>18 process is signing petitions for leave of</p> <p>19 certiorari, and that's where the amicus brief is</p> <p>20 filed. Not that they don't get filed later, but</p> <p>21 they really tell the Court why this is so</p> <p>22 important to so many different people. And</p> <p>23 without that additional information, I think the</p> <p>24 Court is not able to really fully determine what</p> <p style="text-align: right;">21</p>	<p>1 particular point in the record is raised by the</p> <p>2 appellee that you've not focused on that would be</p> <p>3 helpful to the court that you actually have that</p> <p>4 pleading or that document attached in the appendix</p> <p>5 in the reply brief. Increasingly, more of us are</p> <p>6 relying on judicial notice of things that are</p> <p>7 happening at a rapid pace out in the public, and</p> <p>8 we want the court to consider something else in</p> <p>9 addition to something that's not in the record,</p> <p>10 and they can take judicial notice. And you have</p> <p>11 to then attach what you're asking them to take</p> <p>12 judicial notice of to an appendix. According to</p> <p>13 the way it works now, you can't do that in a reply</p> <p>14 brief. And sometimes those points, since the</p> <p>15 appellate brief was originally filed, arise a</p> <p>16 couple of days before your brief is due, and you</p> <p>17 can't use that option. So I think it's very</p> <p>18 important to at least give us, and hopefully give</p> <p>19 the courts, more information to decide the case.</p> <p>20 And I don't think this should be refused. And</p> <p>21 actually, I think it started as a court-made rule.</p> <p>22 So I think appendices should be filed.</p> <p>23 CHAIRMAN ANDERSON: Is there enough room in</p> <p>24 the existing Supreme Court Rules anywhere to file</p> <p style="text-align: right;">23</p>
<p>1 cases should be taken.</p> <p>2 So I feel very strongly that it would not</p> <p>3 impose too much of a burden. If it's a little bit</p> <p>4 more burden, just look at the number of cases</p> <p>5 they're considering now and the number of PLAs in</p> <p>6 terms of the decline. This may add a few more,</p> <p>7 Professor, in terms of the page line. As we all</p> <p>8 know, petitions for leave to appeal are not to</p> <p>9 suggest why the court -- the Appellate Court,</p> <p>10 rather, got it right or wrong; it's why this court</p> <p>11 should take it. Could it be done in ten pages?</p> <p>12 Absolutely. If you wanted to set a limit, the</p> <p>13 court does require you to spend a few pages on who</p> <p>14 you are and why you're filing; but on the merits,</p> <p>15 I think ten pages would be fine. But I think the</p> <p>16 court needs to have this additional information.</p> <p>17 I'd be happy to answer any questions on</p> <p>18 that.</p> <p>19 with respect to Supreme Court</p> <p>20 Rule 19-02 [sic], I'll be very brief on this.</p> <p>21 This just simply allows one to file an appendix</p> <p>22 with the reply brief. Currently, if you try that,</p> <p>23 your brief is rejected both when it used to be in</p> <p>24 nonelectronic form and now. And sometimes a</p> <p style="text-align: right;">22</p>	<p>1 a motion for a supplemental appendix? And</p> <p>2 wouldn't those kinds of motions be generally</p> <p>3 granted?</p> <p>4 MR. EATON: You would think. But the way it</p> <p>5 is now, your Honor, and I know it hasn't been all</p> <p>6 that long since you've practiced in the Appellate</p> <p>7 Court, usually if your reply brief is due in</p> <p>8 14 days, you have to think about filing a motion</p> <p>9 for leave to file an appendix within that first</p> <p>10 week. And, generally speaking, you're not</p> <p>11 focusing on it until the 12th, 13th, 14th day to</p> <p>12 file. So as a practical matter, what you'd have</p> <p>13 to do is attach it and then perhaps file a motion</p> <p>14 for leave to file the reply brief instanter with</p> <p>15 the appendix, or file the reply brief and then</p> <p>16 file a motion for leave to file the appendix</p> <p>17 later, and then amend your brief. I just don't</p> <p>18 see the reason why you can't be able to include</p> <p>19 something in a short appendix. It doesn't have to</p> <p>20 be very long. I think we all know the courts are</p> <p>21 not going to be -- shouldn't be burdened by a lot</p> <p>22 of material. But if it's important enough to</p> <p>23 include in the appendix, I think we ought to do</p> <p>24 it.</p> <p style="text-align: right;">24</p>



1 CHAIRMAN ANDERSON: But generally, everything
2 that goes into the record is what you're talking
3 about putting in the appendix, typically.
4 MR. EATON: Yes.
5 CHAIRMAN ANDERSON: And I can pull up an
6 entire record now on my computer. So if I were on
7 the Supreme Court -- which I'm not -- but if I
8 were, I could pull up whatever document you
9 reference in your brief.
10 I'm an analog man in a digital world. I
11 get it. So I would rather see it attached to my
12 brief as an appendix. But it's out there now, is
13 it not?
14 MR. EATON: It is, but not necessarily,
15 though, if you were going to be taking judicial
16 notice of an occurrence, a document, an article
17 that's not part of the record now. And that's a
18 legitimate purpose for doing it.
19 Sometimes I think it's just a matter of
20 convenience for the court. If they have a hard
21 copy right there that they can look at, it's a
22 pleading or something they can read, it's much
23 easier than having to pull it up on the computer.
24 VICE CHAIR ROMANUCCI: Mr. Eaton, thank you

25

1 for your explanation. That was helpful.
2 kind of picking up a little bit on what
3 Professor Beyler was saying, I like empirical
4 studies. I like to be able to compare and
5 contrast. Are there other states that you can
6 cite to that have this type of rule that you're
7 proposing under 18-04, and is there a percentage
8 difference that you can compare Illinois Supreme
9 Court and the number of PLAs that they accept
10 versus another state that accepts the amicus
11 briefs at the PLA level? As you said, the United
12 States Supreme Court, they rely on these.
13 Anything that we can balance this with?
14 MR. EATON: Unfortunately, my answer is going
15 to be more anecdotal than it is going to be
16 empirical. In other states that I've practiced
17 in, to my knowledge, we're the only one that does
18 not allow these types of amicus briefs to be filed
19 at the discretionary stage, at the PLA stage. I
20 can name maybe two or three jurisdictions where
21 that has been the case.
22 And, by the way, speaking of Illinois, it
23 hasn't been all that long since this so-called
24 de facto rule, I guess, took place. I remember in

26

1 the early '90s before Justice Fitzgerald's
2 admonition that they would not take it as part of
3 the PLA that we were doing it here. I'm not sure
4 why the change; but I also know at that time, they
5 had a very, very busy caseload, and that may have
6 been the reason. All I can say is it's clear that
7 that's not the case now. And I think they would
8 have the opportunity to review more briefs in
9 making decisions as to which cases to take.
10 MR. TUCKER: What are the current statistics
11 on the criminal caseload, Mr. Eaton? I haven't
12 looked at them recently, and they're usually two
13 or three years behind. But they do -- compared to
14 the civil, they do an enormous number of criminal
15 opinions.
16 MR. EATON: They do.
17 MR. TUCKER: Isn't that correct?
18 MR. EATON: Yes.
19 MR. TUCKER: Is that perhaps a factor in the
20 limited number of civil opinions that they can
21 actually do?
22 MR. EATON: It is true that there were
23 criminal cases that they can take in most of the
24 discretionary -- well, I should say all

27

1 discretionary, unless there's a constitutional
2 issue involved. It's not that much higher than
3 the civil cases. Their overall opinions are down
4 dramatically from where they used to be.
5 And the other thing that's changed that
6 has had a, I hate to use the word dramatic, but I
7 think it's true, that's affected their workload
8 has been the elimination of the death penalty in
9 Illinois. Those death penalty cases used to take
10 months, years, obviously. Someone's life is at
11 stake. And the court no longer has that burden.
12 And at the time when, as I recall, when they had
13 death penalty cases, they were still allowing some
14 briefs in support of PLAs until the early 2000s.
15 MR. TUCKER: In connection with the
16 supplementary appendix on the reply brief, in
17 thinking about the waiver the appellant is making
18 when he files his brief of all other theories, do
19 you see any opportunity for mischief if the
20 supplemental appendix with the reply brief is
21 available, just uniformly available?
22 MR. EATON: You know, I can't say that there
23 may not be somebody sometime that would take
24 advantage of that. But for the most part, I would

28



1 say no because I know a lot of my friends that
 2 practice in the appellate bar I think are aware of
 3 the fact that the court doesn't want a lot of
 4 volume of paper or hard copies. So I think we all
 5 respect the fact that we would have to be
 6 judicious in what we would put in the appendix.
 7 But I do think it would be helpful.
 8 MR. TUCKER: Thank you.
 9 CHAIRMAN ANDERSON: Any other questions for
 10 Mr. Eaton?
 11 (No response.)
 12 MR. EATON: Thank you very much.
 13 CHAIRMAN ANDERSON: Thank you.
 14 Our next speaker is Bruce Pfaff. I hope
 15 I pronounced it properly. He will be speaking on
 16 Proposal 17-03, 18-01, and 18-04.
 17 Good morning, sir.
 18 MR. PFAFF: Good day. Thank you for
 19 understanding that I am significantly younger than
 20 Mr. Eaton.
 21 CHAIRMAN ANDERSON: I think we all are.
 22 I love Mr. Eaton. He knows that.
 23 MR. PFAFF: As do I. He deserves the honor.
 24 I'm Bruce Pfaff, and I'm here as an

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1 asks the court to take it. And we will seek --
 2 And the association would seek leave of court to
 3 file an amicus brief if the PLA is granted. So
 4 that's not adding to the burden of the court, and
 5 I think it serves the same purpose.
 6 I hate for us to do anything to add to
 7 the burden of the court because we do have low
 8 output opinions.
 9 17-03 is important for a couple of
 10 reasons, one of which is it recognizes that the
 11 Illinois Rules of Evidence are more recent than
 12 Rule 212 that, unfortunately, uses the language
 13 about admissions of parties can be admissible when
 14 they come from a discovery deposition. Illinois
 15 Rule of Evidence 801(d) makes it clear that former
 16 statements of a party are not hearsay and are
 17 admissible if relevant. We can try to split hairs
 18 of is an admission of a party different than a
 19 former statement of a party. But they're not.
 20 The Illinois Rules of Evidence make it
 21 clear that if a party says something at another
 22 place and time, it is not hearsay, and it can be
 23 used by his or her opponent at trial. So what the
 24 proposed rule does is to update 212 to match

31

1 individual, although I continue to chair ITLA's
 2 Amicus Curiae Committee and have chaired it for
 3 26 years. I have authored more than 40 amicus
 4 briefs. I know at least one of the members of our
 5 panel, of your Committee, has also authored briefs
 6 that I have read that are excellent amicus briefs.
 7 The role of amicus is important.
 8 However, I do not support 18-04. I think
 9 Mr. Eaton's statistic helps prove the point, if
 10 the Court was issuing 70 civil opinions years ago,
 11 and now they're issuing 20, I think they're
 12 overburdened. I don't know why. But adding to
 13 the burden of deciding motions that will not
 14 really decide the merits of the case is not going
 15 to help the output of the court. It's not going
 16 to help the court.
 17 Many times, we become aware as a
 18 committee of an important appellate opinion that
 19 comes down. And we're certainly available to
 20 speak with the plaintiff's counsel to say, This is
 21 an important issue, here's an argument you want to
 22 put in your PLA, or, You're authorized to state in
 23 your PLA that the Illinois Trial Lawyers feels
 24 that this is an important issue and respectfully

30

1 801(d), and it is appropriate, and I would
 2 strongly support this change be adopted.
 3 The other part deals with Rule 206. We
 4 have been permitted to take video depositions for
 5 years. However, we have never had the right to
 6 use those at trial. It's always been subject to
 7 the court's discretion. Many of us who try cases
 8 like to make video clips of dumb things your
 9 opponent says in deposition. There might be ten
 10 things that this witness said in deposition that
 11 you would want to make sure the jury heard. You
 12 can make a video clip of this that you can show to
 13 the jury in 30 seconds and have the witness on
 14 screen saying pigs can fly. That's far more
 15 effective than reading the discovery deposition
 16 where the witness said pigs can fly. Most judges
 17 allow that practice. If it's impeachment, you can
 18 use it. Many judges will simply say play the
 19 video. The video always has the scrolling words
 20 under it. It's very effective impeachment.
 21 However, there are some judges who say,
 22 Oh, just read the deposition. I think it's --
 23 I've seen the comment, I think it's too
 24 prejudicial to play the video of the witness

32



1 saying pigs can fly. I'm sorry. I respectfully
2 disagree. I think the change in the Rule to say
3 if you've taken a video deposition, and if it's
4 otherwise admissible, either as a former statement
5 or impeaching language, you should be able to use
6 the video.

7 18-01 I support in concept, but I think
8 the devil is in the details. And I greatly
9 appreciate Judge Ehrlich's efforts, and I very
10 much appreciate him bringing this to the court's
11 attention. I have read through all the comments,
12 and I'm particularly struck by Judge Ortiz from
13 Lake County and his analysis of preemption. And I
14 think the proposal as drafted should not be
15 adopted.

16 I think the idea of having a Rule 218(d)
17 to say that there will be an order limiting the
18 use of PHI, personal health information, or
19 protected health information, is appropriate. The
20 Cook County order, the one that Judge Ehrlich has
21 put before us, I think has the flaw of trying to
22 put two ideas in the same document. One is the
23 plaintiff's consenting to allowing the information
24 to be produced, and the other is the court is

33

1 limiting how that information can be used.
2 They're two separate things.

3 I've practiced in Illinois since 1984.
4 And back in the day, defense lawyers, when serving
5 discovery requests, would send blank
6 authorizations to request plaintiffs' medical
7 records. We live -- Present law, a hospital will
8 not produce medical records, even under subpoena,
9 without an authorization signed by the plaintiff.
10 One of the reasons 18-01 was put together is that
11 many hospitals had different authorizations, they
12 have different requirements. I understand the
13 need for uniformity, and I support it. I think
14 there should be a uniformly adopted authorization
15 for medical records. But it would not take the
16 form that we have in 18-01.

17 I can tell the court that I practiced --
18 I have a substantial practice downstate. I'm in
19 Tazewell and Peoria Counties frequently. They
20 have a form HIPAA order that addresses only the
21 use of the PHI. And I think it's a very good one.
22 I'd be happy -- I should have submitted it with my
23 written materials; I apologize, I didn't. I would
24 be glad to tender it going forward. But it simply

34

1 says the information that is being produced, the
2 PHI that's being produced in this case, you can
3 give it to your experts; you can give it to the
4 court reporter as an exhibit; you can use it for
5 purposes of this litigation. And then if you are
6 not the patient's lawyer, you have to destroy it.
7 And that's very appropriate. And that's what a
8 HIPAA order should say.

9 when it comes to the authorization
10 language that is in the Cook County order, I think
11 it's tortured, and it's compelling, and I don't
12 think we need to compel it. And I'm trying to
13 offer the Committee something going forward of
14 what is the best way to solve this riddle. And
15 it's not simply to, say, reject 18-01 and have
16 nothing. What is the best practice to authorize a
17 patient's medical records? Is it to send the
18 plaintiff's lawyer blank authorization forms for
19 the plaintiff's lawyer to fill in, we're going to
20 authorize you to get records from Christ Medical
21 Center and from Good Shepherd for the time period
22 January 1, 2013, to present, excluding the mental
23 health records and all those other things? Maybe
24 that's the way to go. And if the plaintiff

35

1 objects to it at that time, then the plaintiff can
2 step forward and bring a motion for protective
3 order.

4 But at this point, with 18-01, those who
5 object to it, and I've read their concerns, and I
6 think 99 percent of the cases, it's not subject to
7 abuse. But in that 1 percent of the cases, we
8 might be permitting by 18-01 someone's PHI to be
9 obtained when it shouldn't be.

10 One of the objectors had a great comment
11 that we need to get rid of the "any and all
12 records" subpoena. A subpoena will go to Christ,
13 Advocate Christ, and I want any and all records
14 from Mrs. Jones from January 1, 2010, to present.
15 Well, that might include mental health records; it
16 might include drug records. Those must be
17 excluded. And the form authorization that we use
18 in our practice excludes those things. So it will
19 say, if the defense asks us to sign an
20 authorization to release our client's medical
21 records for a specific provider, that
22 authorization already says this is not to be used
23 to get mental health records and drug records.

24 It's an important problem. I think the

36



1 Committee is the right body to address it. I
2 think the language of 18-01 is not the right
3 vehicle.
4 VICE CHAIR ROMANUCCI: Mr. Pfaff, I appreciate
5 you coming here as an individual, and I would like
6 you to wear your individual hat as opposed to any
7 other hat. One of the comments came from the
8 Illinois State Bar Association. Did you happen to
9 read their proposal on 18-01?
10 MR. PFAFF: I did. But there are so many
11 juggling in my head right now, you might need to
12 refresh me.
13 VICE CHAIR ROMANUCCI: So to summarize the
14 Illinois State Bar Association, and I'm in
15 agreement, I've talked to so many people about the
16 HIPAA issue, the HIPAA orders. It's just all over
17 the place, the comments and everything. But I
18 think people do agree that there needs to be some
19 direction here because we're running into a whole
20 different world with electronic medical records
21 and exposure of medical records.
22 The Illinois State Bar Association, their
23 conclusion was, again, that the rules -- that
24 because of the complexity of this issue and the

37

1 divergent views on it, the ISBA suggested that the
2 Rules Committee postpone its consideration of this
3 proposal and establish a committee or working
4 group of stakeholders who can craft a potentially
5 more widely accepted uniform order, et cetera. Is
6 that something, as an individual, that you see
7 would be worthwhile?
8 MR. PFAFF: Absolutely. Because if this
9 Committee rejects 18-01, which I would
10 respectfully request that they do, in the form it
11 is, then there is an absence, and you'll have a
12 county by county discrepancy. And I think some
13 counties do it better than others. And I would
14 submit that having a statewide group or statewide
15 committee of people with knowledge and interest in
16 the subject would be a good solution.
17 VICE CHAIR ROMANUCCI: Because clearly,
18 there's been a tremendous amount of work put into
19 the Cook County order, not over a months-long
20 period but years-long period. And I think the
21 intent is exceptional. And we need -- Is it
22 something that we need statewide uniformity on as
23 opposed to just countywide?
24 MR. PFAFF: I think that's preferable.

38

1 I don't know what lawyers who practice --
2 Many of us practice in more than one county, and
3 there are different orders governing them. And I
4 think when you're dealing with something like PHI,
5 which is a federal law that's protected and how
6 you should use it, I think we should have a
7 statewide standard. The idea of having one
8 statewide authorization for the release of
9 garden-variety medical records is something that
10 is also a good idea so the plaintiff would be
11 tendering the signature for the release of certain
12 medical records, and that could be tendered by the
13 other side.
14 I think the intent -- The defense somehow
15 has to get the plaintiff's medical records.
16 VICE CHAIR ROMANUCCI: Of course it has to.
17 MR. PFAFF: And they're going to need some
18 form of authorization. So we need to have a good
19 authorization that we can all accept that protects
20 the patient's rights. And we can recognize that
21 the patient may say, "I'm not going to authorize
22 those Resurrection records," and then you have a
23 hearing, and the judge can decide if they are
24 relevant and if there's going to be a sanction.

39

1 That's up to a judge. But the language that is so
2 prefatory in 18-01 about if you sign this, your
3 case can be dismissed, I think is offensive to the
4 average patient and the average patient's lawyer.
5 PROFESSOR BEYLER: I did not practice in this
6 area, so I have some basic things that I hope you
7 can help me with.
8 I cannot understand why the plaintiff's
9 signature as opposed to the judge's signature is
10 required on anything. It seems as though by
11 filing the lawsuit, you've waived, at least as to
12 relevance, and the judge ought to be able to sign
13 an order directing the hospital to produce
14 records; and that order should not require the
15 plaintiff's signature under protest or not --
16 shouldn't require it at all, and the hospital
17 should not be free to disobey it. But it sounds
18 as though, from what you said, that the hospitals,
19 even in the face of a judge-signed order, will
20 refuse without the patient's signature. Am I
21 right in understanding you?
22 MR. PFAFF: I don't think that's right. But I
23 think we're a little apples and oranges. The form
24 HIPAA order that's entered in many counties

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1 doesn't call for the production of records. It
2 simply says when protected health information is
3 produced, it shall be dealt with in this way.
4 what you're describing, let's say there's
5 a dispute in the case, and the defense wants the
6 Resurrection records, and I don't think they're
7 relevant. If the judge orders Resurrection
8 records should be produced, that order will be
9 followed by Resurrection. But it's in 90 percent
10 of the cases, 95 percent of the cases where
11 there's no dispute as to these five providers,
12 judges don't want to be signing those orders.
13 It's silly to bring motions in that respect. And
14 what's the right solution? Do you have plaintiffs
15 sign blank authorizations? No. You've got a
16 couple of problems, and that's bad. But do you
17 have the defense and the plaintiff sign a release
18 for medical information for those providers, and
19 the plaintiff sign it on the back? Maybe that's
20 the best solution. But simply signing a subpoena
21 without an order or a signed authorization will
22 not work and should not work.
23 There are situations where the subpoena
24 goes out, and lo and behold, the plaintiff's

41

1 lawyer doesn't get them. We have to avoid that.
2 It's a big problem.
3 CHAIRMAN ANDERSON: Would you mind
4 supplementing your comments today by providing the
5 Peoria form that you ...
6 MR. PFAFF: I shall. Actually, I'll give full
7 credit. Actually, it's Tazewell County, next town
8 over.
9 CHAIRMAN ANDERSON: Thank you.
10 Any other questions?
11 (No response.)
12 CHAIRMAN ANDERSON: Thank you.
13 (whereupon, a discussion was had
14 off the record.)
15 CHAIRMAN ANDERSON: Next we have Steve
16 Phillips from the Illinois Trial Lawyers
17 Association to comment on 17-03.
18 Good afternoon.
19 MR. PHILLIPS: Steve Phillips. I am a former
20 president of the Illinois Trial Lawyers
21 Association, and I'm here to speak with regard to
22 17-03. And Mr. Pfaff didn't tell me that he was
23 going to basically take away my entire talk. But
24 I would just like to emphasize a few things.

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1 The Supreme Court of the United States
2 made a very candid and telling comment related to
3 this proposal, and that is that a credibility
4 determination cannot be accurately made by simply
5 referring to a cold paper record. And I think
6 that's very telling.
7 with technology 20 years ago, many of us,
8 both the plaintiff and defense, started videotaping
9 important depositions. And as you all know, the
10 credibility, the sincerity, and the method and
11 manner in which a witness answers a question at
12 trial is ultimately left to the jury. And it goes
13 to credibility. And the same thing holds true in
14 deposition. So we started taping depositions, and
15 it goes both ways. There are a handful of judges
16 in Illinois that are not allowing it or making us
17 jump through hoops before we can use it. And I
18 think both sides, if they're being candid with
19 you, will tell you that this is an incredible tool
20 for the jury to make an accurate assessment of
21 credibility because the way a witness answers a
22 question, is there a long pause, is there looking
23 around the room, is there looking at their lawyer,
24 or if they flat out change their answer, which

43

1 we've seen, yes goes to say no, or, "I
2 misunderstood the question," it's a valuable tool
3 for the jury to understand and assess the
4 credibility of a witness.
5 How many times have we all seen someone
6 take the cold, neutered paper record what we
7 believe is impeachment of a witness with a yes,
8 when previously the answer was no, and the jury is
9 looking at us going, what was all that about?
10 What does that mean?
11 So we just want the technology to keep up
12 with the practice, or the practice to keep up with
13 technology. And this is literally for the jury,
14 to give a better understanding. We want the jury
15 to understand it. Again, I think that's pretty
16 neutral. I think the defense bar doesn't have a
17 problem. We've cringed at things our clients have
18 said at deposition too that we wish they hadn't,
19 they had explained it. But it goes both ways.
20 The second thing is the comment about the
21 old law was the admission, we just want
22 Rule 212(a)(2) to catch up with the Rule that we
23 adopted in Illinois in 2011. I think just that
24 the code was left behind, and it's just literally

44



1 an oversight. And we just want to make sure that
2 now that the law in Illinois is a rule with regard
3 to -- with regard to statements, that they be
4 viewed as statements and not be admissions that
5 some judges still think is the important part or
6 is the relevant, current, valid law. So that's
7 literally what I'm here to talk about. Just to
8 catch up and combine 801, the non hearsay, the
9 code section.

10 And if anybody has any questions, I'm not
11 as articulate as Pat, but I've been in the
12 trenches a long time, and I can tell you real war
13 stories about what happens and why these things
14 are incredibly important to the jurors to hear and
15 understand.

16 MR. HANSEN: I assume this would apply --
17 doesn't apply to experts as well. So here's the
18 situation for a downstate civil litigator. Not
19 every discovery depo of someone's expert is
20 videotaped. Do you think there's going to be any
21 increased burden now to videotape every discovery
22 deposition of experts to then possibly try to play
23 that at trial?

24 MR. PHILLIPS: I think that's up to the

45

1 individual practitioner. They choose the path in
2 which they want to present their case. Some
3 experts -- I don't videotape all my depositions.
4 I videotape most of them. But I think if you're
5 going to handle a case for three to five years and
6 you're going to, on both sides, spend a lot of
7 money to try and prove that case and spend a lot
8 of time, I think one might think it's an important
9 tool to present the client's case in the best and
10 most accurate way and give the jury a full breadth
11 of what happened.

12 MR. HANSEN: So the Rule then is basically
13 taking out the "may" and the discretion and giving
14 the parties a right to do so as they so deem fit
15 at trial?

16 MR. PHILLIPS: Yes. Most judges do that now,
17 actually, because they understand the reality of
18 giving the jury the full picture. But there's a
19 handful that don't want to catch up.

20 MR. HANSEN: I have not dealt with that.

21 MR. PHILLIPS: I have on big cases where I had
22 a child who was hurt very badly, and I had a
23 doctor change yes to no, just yes to no. And I
24 went to go play the video of the deposition, and

46

1 the judge stopped me. I said, Judge, the child's
2 got permanent injury, a seven-year life
3 expectancy. The doctor just changed her answer
4 flat out. And, "Sorry, Mr. Phillips."

5 MR. HANSEN: So you were allowed to read it
6 and impeach in that way?

7 MR. PHILLIPS: Yes: "Didn't you tell me on
8 this date," blah, blah, blah. Very sobering to
9 have your hands tied behind your back and not let
10 that jury really understand the answer was crisp,
11 it was clear, it was understandable, there was no
12 hedging. The answer was yes, but somehow they got
13 woodshedded, and the answer became no.

14 And by the way, videotaping isn't that
15 much more expensive in my experience.

16 CHAIRMAN ANDERSON: Any other questions?

17 (No response.)

18 CHAIRMAN ANDERSON: Thank you, Mr. Phillips.
19 And I apologize for messing up your name.

20 Next we have William McVisk from the
21 Illinois Association of Defense Trial Counsel also
22 commenting on 17-03.

23 MR. MCVISK: Thank you. And I'm here on
24 behalf of the incoming president of the Illinois

47

1 Defense Counsel. And basically, I just want to
2 start by saying defense counsel agreed with the
3 plaintiff's counsel on this for the most part on
4 this issue. We don't -- we think that generally,
5 you should have the right to have -- play the
6 video deposition any time that you could read the
7 transcript. I think that does help juries in
8 making the decisions to see what the witnesses
9 look like, and I think that's -- we think that the
10 Rule overall is good. The concern we have is just
11 that as Mr. Pfaff mentioned, that there are some
12 judges, you know, who just don't do what every
13 other judge does; that this Rule, if -- there are
14 some judges who might read this Rule to say you
15 have a right to use the video deposition and
16 expand that to say, well, if you have the right to
17 use video dep, you can use video dep any time. So
18 we would just suggest that the Rule be modified
19 slightly to say that subject to the restrictions
20 of Rule 212, or to the same extent as could be
21 used as an -- that the deposition could be read,
22 you can play the video dep. That's what we're
23 saying, is we just think it ought to be subject to
24 the restrictions of Rule 212 to make it clear that

48



1 the right that we're conferring with this is no
2 greater than the right you would have to read the
3 depositions. And that's -- that's the only change
4 we would propose to the Rule. Otherwise, we are
5 in support of it.
6 If there are any questions, I would be
7 happy to answer them. Otherwise, that's all I
8 have.
9 JUDGE MCBRIDE: I have a question. If you
10 have this Rule subject to the restrictions of 212,
11 then aren't you limiting it to only those
12 depositions? Or are we talking about something
13 else? I'm not sure what you mean.
14 MR. MCVISK: Well, I think Supreme Court
15 Rule 212 allows depositions in more than just
16 those situations. And basically, Rule 212 talks
17 about any time depositions can be used. 212(a)
18 says purposes for which discovery depositions may
19 be used: as a former statement, as impeaching,
20 et cetera. So all we're saying is that's fine.
21 We just -- And it may be because this was coming
22 up in the context of an effort to abandon the
23 distinction between discovery and evidence
24 depositions, which we definitely did not support.

49

1 And basically, our position is Rule 212 is there;
2 it should be followed. And any time you can read
3 the deposition, you can -- you can use the
4 videotape. But I think Rule 212 pretty much sets
5 out when you should be allowed to use deposition
6 testimony.
7 CHAIRMAN ANDERSON: Any other questions?
8 MR. TUCKER: Mr. McVisk, this isn't the
9 subject on which you spoke today. But in
10 connection with the amicus work, you're the
11 president of the Illinois Defense Counsel?
12 MR. MCVISK: Right. Or will be in two weeks.
13 MR. TUCKER: You're familiar with the Amicus
14 Committee?
15 MR. MCVISK: Yes.
16 MR. TUCKER: I'm just wondering, for the
17 Illinois Defense Counsels, are the attorneys who
18 do the amicus paid, or are they volunteer?
19 MR. MCVISK: They're all volunteer.
20 CHAIRMAN ANDERSON: Thank you, sir.
21 Our next speaker is Keith Hebeisen.
22 Again, I'm not good with names.
23 MR. HEBEISEN: No worries.
24 CHAIRMAN ANDERSON: At least I'm connecting

50

1 the right name on the right line.
2 Also with the Illinois Trial Lawyers
3 Association, commenting on proposal 18-01.
4 MR. HEBEISEN: Yes. Thank you.
5 Good morning, everyone. My name is Keith
6 Hebeisen. I'm a past president of the Illinois
7 Trial Lawyers also. I'm also a long serving
8 member of the Executive Committee, and I was
9 involved in the constitutional challenge involving
10 Section 2-1002 that culminated in the Kunkel and
11 Best opinions. So I'm certainly very familiar
12 with the genesis of that and what I believe is the
13 importance of it.
14 I've practiced over 35 years, and as well
15 intentioned as this proposal is, with all due
16 respect to Judge Ehrlich, and I adopt a lot of the
17 comments made by Mr. Pfaff, I share his feel for
18 this and our thoughts about this and trying to
19 figure out a way to do it in a way that's fair to
20 plaintiffs and defendants. But there's a fatal
21 flaw in this proposal, one that I want to address,
22 and it relates to the interplay with the Kunkel
23 opinion. The proposal requires a specific order
24 be entered in every case involving injury in the

51

1 state of Illinois. It's more been instituted in
2 Cook County, I don't know if it was a year ago or
3 whatever. But the leadership of ITLA was never
4 directly consulted before this order was first
5 instituted, and our answer would have been the
6 same as it is today.
7 There was a HIPAA order in Cook County at
8 least a decade before that. To my knowledge, I
9 was not aware of any significant problems with
10 that. It was user friendly for everybody to
11 obtain records. I'm sure there's a hospital here
12 or there a doctor that just doesn't follow through
13 and do what they're supposed to do. But my
14 experience was that things ran pretty smoothly for
15 the most part.
16 The problems with the order, if you look
17 at the order that is proposed, according to the
18 proposal that exists in Cook County now, it says
19 that the plaintiff has waived his right to
20 privacy, period. It doesn't -- It doesn't put any
21 limitation on the disclosures or what the
22 plaintiff -- what the plaintiff has put at issue.
23 There's no provision in the thing to have a 201(k)
24 conference to work this out. It just says it's

52



1 waived. There's nothing in here that requires a
2 subpoena to issue with notice to the plaintiff
3 before the records are requested. And Bruce
4 mentioned, I think, the situation where sometimes
5 the defendant ends up getting records before that
6 the plaintiff doesn't see before they get them,
7 and they don't have an opportunity to object.
8 It doesn't say anywhere in here this is
9 subject to the Code of Civil Procedure or any
10 other Rule of the Supreme Court regarding
11 relevancy. And in a situation involving sanctions
12 against a covered entity, that's against the
13 covered entity that's producing records.
14 The proponent suggests that this can be
15 read -- all these things could be read into the
16 order, just as the proponents of 2-1003 in the
17 Kunkel case argued that unsuccessfully in the
18 Supreme Court. The language was not there.
19 This order says dismissal is a sanction
20 if you don't sign it. In Kunkel, if you didn't
21 sign the authorization, dismissal was a sanction.
22 That's a distinction without a difference.
23 I commend all of you who haven't recently
24 read Kunkel to read it, because I think if you

53

1 read Kunkel, and I'm going to go through a little
2 bit of it real quickly and then take any questions
3 you have, is that the defect in Kunkel was that
4 the -- there was no limitation whatever on the
5 scope of what the plaintiff had to sign off on.
6 And the only difference was this was an
7 authorization.
8 Here, we're talking about an order. An
9 example, one of the examples we put in our
10 position was if a woman, 52-year-old woman has a
11 back surgery, back injury, back surgery in an
12 automobile accident case, this order does not
13 preclude the defendants from subpoenaing her
14 gynecological records, which obviously would have
15 nothing to do with the case on the face of it.
16 There's nothing to prevent that once this order is
17 entered. And if there's no notice of a subpoena
18 going out, they could get the records before you
19 have an opportunity to quash it. That's just a
20 simple example of how you have to -- every case is
21 different, and the discovery has to be tailored in
22 a different way.
23 The Kunkel court talked about the fact
24 that the defense were saying, well, you know, the

54

1 court can do this, the court can do that. But
2 that's not the way it read, and that's not the way
3 this order reads. The court says you have waived
4 your right to privacy, and the plaintiff has
5 signed a document, now signed off on by the court,
6 making that finding, with no limitation, no
7 protection, with no issue of relevancy, no
8 limitation to scope. And the Kunkel court
9 specifically held conditioning a plaintiff's right
10 to proceed with a lawsuit upon unlimited waiver of
11 her privacy privilege was unconstitutional. The
12 order referred to in this proposal suffers from
13 the identical constitutional defect. And the
14 suggestion that this order is highly efficient and
15 an effective discovery tool, as I've heard in
16 support of it, does not trump the constitutional
17 issues here. And there has to be a better way to
18 deal with this.
19 And again, I would allude back to
20 Mr. Pfaff's comments, who I think was very
21 sensible, and I hope you will take those into
22 account as well.
23 So if anyone has any questions .
24 CHAIRMAN ANDERSON: Are there any questions?

55

1 VICE CHAIR ROMANUCCI: Is there anywhere --
2 Maybe if you cannot answer, maybe somebody can
3 answer; I know Judge Ehrlich is going to be
4 speaking as well, but maybe I missed it. Is
5 personal health information defined in the order?
6 In other words, do we know what PHI specifically
7 refers to?
8 MR. HEBEISEN: I don't believe it's defined,
9 per se. It makes reference to the HIPAA Act and
10 45 CFR whatever, whatever.
11 VICE CHAIR ROMANUCCI: So it refers back to
12 HIPAA?
13 MR. HEBEISEN: Yeah, but it doesn't
14 specifically define PHI, as far as I'm looking at
15 it right now, and I don't really see it. If I
16 missed it --
17 VICE CHAIR ROMANUCCI: In other words, what
18 I'm asking is, is there anywhere where PHI in the
19 HIPAA order that's being proposed is defined as
20 relevant medical records to the litigation? Or do
21 we have to relate it back to HIPAA?
22 MR. HEBEISEN: I don't think PHI, which is a
23 term of art that comes out of the federal statute,
24 deals with relevancy at all. It per se covers all

56



1 PHI. The relevance thing doesn't become an issue
2 unless you start talking about exactly what we're
3 talking about, somebody files a lawsuit for a
4 particular type of injury, then the relevancy
5 comes in. And there's much of that PHI that may
6 not be relevant at all. That is the concern of
7 the plaintiff's bar in terms of having proactive
8 protection against its improper disclosure and not
9 a blanket waiver and then hoping it works out
10 okay.

11 CHAIRMAN ANDERSON: Any other questions?
12 (No response.)

13 CHAIRMAN ANDERSON: Thank you, sir.

14 We have several other speakers regarding
15 Proposal 18-01. And I certainly want everyone to
16 say whatever they want to say. But if anyone
17 feels that it's already been covered, it's okay.

18 The next is Robert Fink.

19 MR. FINK: My name is Robert Fink. I'm a
20 personal injury attorney here in Chicago. And I
21 agree with most of the comments that have already
22 been said. I will try to truncate some of my
23 comments to not be overly repetitive.

24 One of the things that I notice as kind

57

1 of a broader picture here, without delving into
2 the rabbit hole that is HIPAA and its interplay
3 with this order, is in reviewing prior proposals
4 to Supreme Court Rules, it appeared that there
5 were not over numerous comments. There's
6 45 comments relative to 18-01. And I think that
7 in and of itself says quite a bit that this is an
8 issue which is very divisive; that amending 218 is
9 going to -- First, I don't think that it's
10 necessary. But of the six proposals that are on
11 today's agenda, there were no comments that didn't
12 address this proposal. There were others that
13 addressed multiple provisions. But the super
14 majority of the comments were in opposition to
15 amending this Rule, including that of the Illinois
16 State Bar Association, which represents 29,000
17 lawyers. And the ISBA stated that their concerns
18 were similar to those that we've heard, that there
19 is a constitutional question; that this is waiving
20 a constitutional right. They question and believe
21 that the proposal violates the federal HIPAA
22 statute and that it fails to ensure the privacy of
23 litigants. That is -- Those comments are mirrored
24 by Judge Ortiz, and those are the two cases that

58

1 came out of Lake County.

2 I was the attorney who argued those
3 motions in Lake County. Judge Ortiz in his
4 comments wrote on behalf of the 19th Circuit from
5 the Administrative Offices of the 19th Judicial
6 Circuit that it is that circuit's position that
7 the current Cook County order, the proposed order
8 before the Committee, violates HIPAA; that it is
9 preempted because it does not include the required
10 language that HIPAA states is necessary in order
11 for an order to actually be a HIPAA order. Those
12 two provisions are 164.512(e)(1)(v)(A) and (B).
13 Those state that in order for an order to qualify
14 as a protective order pursuant to HIPAA, that the
15 order must contain language that prohibits the
16 parties from using or disclosing the protected
17 health information for any purpose other than the
18 litigation or proceeding for which such
19 information was requested. And unfortunately, the
20 current Cook County order and the order that is
21 proposed as a statewide amendment does not include
22 that language. In fact, it does just the
23 opposite. It expressly authorizes information to
24 be used outside of this litigation, of whatever

59

1 litigation in which the information is sought. It
2 specifically enumerates 11 bases in which
3 information can be used by an insurance company,
4 for example, which is certainly outside of the
5 content and constraints of that litigation.

6 The other requirement that must be
7 included in any order to qualify as a HIPAA order
8 is the return to the covered entity or the
9 destruction of the protected health information,
10 including all copies, at the end of the litigation
11 or proceeding. The current Cook County order and
12 proposed order somewhat addresses that. It does
13 have a destruction provision. However, it
14 expressly exempts insurance companies from that
15 provision.

16 There is no exception in HIPAA. HIPAA
17 does not state that you have to -- you can
18 maintain records if you're an insurance company.
19 In order for it to be a valid HIPAA order, it has
20 to contain an unqualified destruction provision or
21 return provision. As Judge Ortiz in the
22 19th Circuit noted, that the issue of the
23 insurance companies maintaining protected health
24 information beyond the litigation, if -- and this

60



1 is not a point which I would personally be ready
2 to concede -- but if the Illinois Insurance Code,
3 which is the stated basis for the claim that the
4 insurance companies need to maintain those records
5 beyond the litigation, if that in fact would be
6 the requirement -- and again, I think that's very
7 much in dispute -- it would be preempted by HIPAA.
8 And Judge Ortiz is very -- he's very clear in
9 his -- The 19th Circuit's rationale was right on
10 when they found that the Cook County order as
11 drafted and the proposed amendment as drafted
12 would be preempted by federal law.

13 One of the other big issues that I have
14 that was kind of voiced here was that we're
15 talking about a waiver of a constitutional right
16 to privacy. In order to exercise one
17 constitutional right, the right to a remedy, to
18 access to our courts, a plaintiff is required to
19 sign a document waiving another constitutional
20 right. And, you know, as a member of the bar, I'm
21 not sure that that is the best approach and
22 certainly not something that I would ever
23 recommend to my clients as the best means of
24 accomplishing this end. Certainly, the defendants

61

1 need to be able to defend their case. They need
2 to have the relevant records to defend their case.
3 And a waiver with respect to the relevant records
4 and relevant materials and documents is certainly
5 appropriate, and I think that that's currently
6 already the state of the law. I don't think
7 there's much -- we don't have any questions with
8 respect to that issue.

9 However, paragraph 3 of the proposed
10 order does not do that. It is a -- pretty much a
11 blanket waiver. It requires entities to disclose
12 a party's protected health information for use in
13 a litigation without separate disclosure
14 authorization. Personally, I'm a fan of including
15 in some order that the specific additional
16 disclosure and authorization is not required; that
17 a specific health HIPAA order is sufficient. But
18 HIPAA requires that a court, in issuing a HIPAA
19 order, expressly authorize the protected health
20 information to be disclosed. And that's under the
21 permitted disclosures section of 164.512(e)(1)(i).
22 If this order is adopted, it does not
23 make any reference to the specific or expressly
24 authorized materials. It blankets --

62

1 Authorization requires pretty much a blanket
2 authorization unless it is a statutorily protected
3 record, such as mental health.

4 And then to the comment earlier, we need
5 to get rid of the "any and all" subpoenas, which
6 clearly will violate not only multiple state
7 statutes, but presumably, although I don't think
8 it's expressly clear, the proposed amended order
9 as well.

10 Importantly, this Rule has a real impact
11 on everyday people. I want to share a story that
12 was recently shared with me. A potential client,
13 28-year-old single female was rear-ended when she
14 was stopped at a red light. Her airbags deployed,
15 and she suffered cervical injury with a possible
16 concussion. However, when she was 14 years old,
17 her stepfather repeatedly sexually assaulted her,
18 and she was terrified that the resulting medical
19 records would become part of an insurance
20 database, and that the history could get out, and
21 she would continue to be victimized by her past
22 abuse. When it was explained to her that she was
23 going to have to sign a Cook County -- the Cook
24 County HIPAA order, she refused to proceed with

63

1 the case. She said that the risk and the possible
2 exposure of having those records outside of her
3 specific control was not worth her exercising her
4 constitutional right to a remedy. She did not --
5 She refused to file a claim. And I don't think
6 that was certainly the intent of this order, but
7 that is a real world example of what is going
8 to -- what has happened in Cook County with this
9 order, and that would be statewide.

10 She was -- She couldn't be assured that a
11 subsequent order would be entered. And that's
12 been one of the -- In reading the comments, that's
13 been one of the suggestions on curing this scope
14 issue, that the court is required to expressly
15 authorize the PHI; that a court can enter a
16 separate court order. Well, there's three issues
17 with that that I see it as. One, in order -- this
18 can't be -- The proposed order can't be our HIPAA
19 order without the expressly authorized
20 information. Second, we know that it doesn't
21 actually happen. Because in Cook County right
22 now, almost all the judges refuse to enter any
23 additional order limiting or modifying the Cook
24 County order in any way. There are a few judges

64



<p>1 who will, but only if it is by an agreement of the 2 parties. So paragraph 3 of the protective order 3 is a very general authorization -- requires a 4 general authorization.</p> <p>5 And then, of course, the third reason is 6 even if a subsequent order limiting the time and 7 scope to the relevant records is subsequently 8 entered, it certainly doesn't cure the defect in 9 the proposed order.</p> <p>10 In response to a couple of the questions 11 I heard earlier and a couple of things -- comments 12 that I had heard from other speakers, one of the 13 issues with the subpoenas being sent out prior to 14 a plaintiff seeking records, that is also a very 15 real world problem. And it actually happened at 16 my firm recently where those records included 17 records I didn't even know existed because they 18 were from multiple years ago. And I have, to this 19 day, no meaningful response as to how the defense 20 even knew to subpoena those records. And it was a 21 subpoena for years' worth of records from a long 22 time ago that had nothing to do with the incident 23 or the bodily injuries complained of, but those 24 are, again, situations which are occurring and</p> <p style="text-align: right;">65</p>	<p>1 haven't seen any citation to a recent Appellate 2 Court case or even in a statement by the relevant 3 department about what their position is on that 4 question.</p> <p>5 MR. FINK: Absolutely.</p> <p>6 PROFESSOR BEYLER: So assuming that it does 7 require it, then it is preempted by HIPAA? I 8 guess we have the Lake County trial court ruling, 9 but we don't have anyone citing any Appellate 10 Court decision, at least in Illinois, on whether 11 the -- they're right, or, I assume, implicitly the 12 Cook County Court has decided that question in any 13 way.</p> <p>14 MR. FINK: Sure.</p> <p>15 PROFESSOR BEYLER: And I don't see how we can 16 have a working group, or anyone, for that matter, 17 come up with an order, at least that's anything 18 other than it might be right and it might not be, 19 until that question is answered. Is there any 20 way, out of the Lake County litigation or anything 21 else, that someone can get those questions up to 22 an Appellate Court so that we know? Because 23 normally, we advise on policy. But these are not 24 policy decisions. This is just what is the law on</p> <p style="text-align: right;">67</p>
<p>1 will continue to occur under this order.</p> <p>2 And I am fully in support of the ISBA's 3 suggestion. And I believe Mr. Romanucci, you had 4 questioned a prior speaker on this as to some sort 5 of working group or some sort of committee to put 6 together a proper order that is going -- with all 7 of the stakeholders that are going to protect 8 plaintiffs, individuals' privacy rights, yet still 9 allow defendants meaningful access to the relevant 10 records in order to defend their case.</p> <p>11 CHAIRMAN ANDERSON: Any questions for 12 Mr. Fink?</p> <p>13 PROFESSOR BEYLER: Yes. Since you were 14 involved in the Lake County litigation, I have 15 sort of two questions. It really bothered me in 16 terms of knowing how to proceed. It seems as 17 though there are two legal questions that have to 18 be answered in order to know what to do. Number 19 one, does the Insurance Code and the regulations 20 issued under it really require insurance companies 21 to keep all of this information they get, and kind 22 of need in order to decide whether to settle, does 23 it really require them to keep it for seven years 24 and not destroy it at the end? Number one. I</p> <p style="text-align: right;">66</p>	<p>1 those two points.</p> <p>2 MR. FINK: Yes. Relative to the question of 3 whether or not an insurance company is required to 4 maintain records, it is my opinion that in order 5 to reach that conclusion, you have to take a 6 fairly tortured reading of the code to do so. 7 There is not, that I'm aware of, an appellate 8 decision addressing that specific issue. However, 9 I can tell you that as part of the briefing in 10 Lake County in response to FOIA requests, the 11 Governor's office, the Department of Insurance, 12 and others all responded that they were unaware of 13 any rule or regulation which required them to 14 maintain a -- and specifically, this is for 15 casualty companies, not health insurance companies 16 and other things like that; but, for example, this 17 was specific to State Farm, these two cases -- 18 that they were not aware of any rule, regulation, 19 or any other requirement that they maintain 20 personal health information past the termination 21 of litigation in response to FOIA. Those were 22 attached to the briefs. Those are now part of -- 23 to answer the second question -- part of the 24 record on appeal that was just this past week</p> <p style="text-align: right;">68</p>



1 filed by State Farm in those cases.
2 Relative to whether a working committee
3 can come to a resolution on this, I don't know the
4 answer to that. I think that at the end of the
5 day, HIPAA quite clearly says that in order to be
6 a HIPAA order, A and B have to be included in the
7 HIPAA order. B is the destruction provision. So
8 any HIPAA order, in order to be a HIPAA order,
9 must include those two things. So whether or not
10 State Farm needs those records really and needs to
11 maintain those records is really totally and
12 utterly irrelevant to what the HIPAA order needs
13 to say to be a HIPAA order.
14 Do I agree that State Farm needs, and
15 other insurance companies need to have access to
16 those records? Of course. They're obviously an
17 integral role in any litigation, personal injury
18 litigation. And there's certainly instances not
19 involving a personal injury in which a HIPAA order
20 may still be necessary as well. Do I think that
21 it is possible to come up with language that can
22 address that which allows the insurance company to
23 obtain and utilize the information, as HIPAA says,
24 for that litigation? I think that's -- there is.

69

1 And, in fact, I don't think that it was attached
2 to my comments, but there actually are other
3 proposals, and I would be happy to share those as
4 well, that I think address many of those issues.
5 Part of that might be adopting what was
6 previously stated in allowing the parties to kind
7 of work this out, having a HIPAA protective order
8 that says if the parties can't agree to it, the
9 judge is going to make the ruling on what is
10 relevant and what is expressly authorized. But if
11 the parties can agree to it and not involve the
12 court, and they can fill it out themselves and
13 walk it in as an agreed motion, that's going to be
14 the case, in my experience, almost all the time.
15 It's very rare not to be in that situation where
16 the parties aren't going to agree on what the
17 injuries are and what kind of records are going to
18 be relevant. The birth records and -- records are
19 not relevant to somebody who had no lifelong
20 injury to their cervical spine and got rear-ended.
21 Those just aren't, and they're easily removed from
22 the scenario.
23 So my suggestion would be yes, a
24 statewide HIPAA order that either allows the judge

70

1 to make the ruling if the parties do not agree, or
2 allows the parties to fill in that portion of the
3 order themselves by agreement.
4 CHAIRMAN ANDERSON: Anyone else have a
5 question for Mr. Fink?
6 (No response.)
7 CHAIRMAN ANDERSON: Thank you, sir.
8 Next we have Sofia Zneimer.
9 MS. ZNEIMER: Good morning. My name is Sofia
10 Zneimer. I practice in Cook County. I'm an
11 attorney. I practice in two areas, immigration
12 and personal injury. So I'm somewhat familiar
13 with the federal procedures mentioned. I was
14 involved in drafting an article that was
15 published. I agree with all the commenters who
16 are opposing the change. I just wanted to stress
17 again that when I -- I most recently reviewed the
18 Constitution this morning, and it's under the Bill
19 of Rights in Illinois, and I saw the right to
20 privacy is in paragraph 6, and the right to remedy
21 is under paragraph 12.
22 Requiring a victim of a random act, a
23 personal injury, someone else's negligence, to
24 weigh one constitutional right in order to be able

71

1 to exercise a constitutional right to a remedy is
2 unconscionable, it's unconstitutional, and it
3 should not be approved.
4 with regard to the question of Mr.- --
5 Professor Beyler with regard to whether or not the
6 Illinois Department of Insurance actually requires
7 medical records, I actually sent a series of
8 Freedom of Information Acts to the Illinois
9 Department of Insurance. I have them here.
10 They're not part of my comments that I submitted.
11 I sent a request to the Illinois Department of
12 Insurance to ask them whether or not -- and I'm
13 happy to submit them electronically, the
14 information -- but they said that:
15 Question, I asked for any and all
16 statistical information, graphics, or similar
17 documentation for casualty and property for any
18 and all insurance coverage for the last five years
19 for which the Illinois Department of Insurance
20 required protected health information.
21 Answer: The Department does not require
22 or need protected health information, so there are
23 no responsive documents for these records.
24 To all my questions, the Illinois

72



<p>1 Department of Insurance has responded they do not 2 specifically require protected health information. 3 What the insurance company is trying to do is they 4 most certainly need relevant medical information 5 during the litigation. However, they really do 6 not need it at the end of the litigation for any 7 purpose that the Illinois Department of 8 Insurance -- if they have medical information in 9 their claims file, that's what they're saying, Oh, 10 we need to keep it because we may be penalized. 11 According to Illinois Department of Insurance, no 12 insurance company has ever been penalized for not 13 having these records. 14 with regard to whether or not they need 15 it, let's assume they need it. The rules under 16 the Illinois Department of Insurance are preempted 17 by HIPAA. This I agree with the comments of Judge 18 Ortiz. I also agree with the Cook County decision 19 that it's preempted by HIPAA. There has been -- 20 An issue of preemption has been raised in Georgia. 21 The State of Georgia has been dealing with this. 22 There are two decisions from Georgia, subsequently 23 in the Supreme Court. One is called Northlake -- 24 it's Northlake Medical Center, LLC, v. Queen. And</p> <p style="text-align: right;">73</p>	<p>1 HIPAA, but there's one more thing that is 2 preempted by HIPAA. I practice immigration. So 3 if a client is going to be deported, I cannot just 4 go to a Cook County judge and say, Can you please 5 reverse the deportation? No. There is an 6 administrative procedure that you have to go 7 through. And HIPAA has an administrative process 8 for any state that needs to use -- needs to 9 decrease the privacy to go to the Illinois 10 Department of -- to the Federal Department of 11 Public Health to explain the valid reason and to 12 request that they are permitted to go below the 13 floor that HIPAA sets for privacy. The regulation 14 is under 45 CFR 160.204. 15 I sent the Freedom of Information Act 16 request to the Illinois Department of Health, to 17 the Illinois Department of Insurance, and to the 18 Federal Department of Health and Human Services to 19 find out if anybody has requested or whether the 20 federal agency has granted such a waiver. And I 21 have here a response from the Governor's office, 22 former Governor, that they have never requested 23 such an exemption. Illinois Department of 24 Insurance never requested such an exemption. And</p> <p style="text-align: right;">75</p>
<p>1 it involved the -- the cite is 280 Ga. App. 510, 2 2006. And then the subsequent Supreme Court it's 3 called Allen v. Wright, 282 Ga. 9, Supreme Court 4 from May 14, 2007. The issue in Georgia was that 5 if you file a medical malpractice action, to the 6 complaint you have to attach a medical 7 authorization. The medical authorization was not 8 signed by the plaintiff because it was very broad 9 and did not comply. 10 There are certain things that we're 11 missing from this. If the Committee contemplates 12 making also a comprehensive authorization, bear in 13 mind that the valid authorization is also 14 authorized by HIPAA. It's also -- It also 15 preempts the type of authorizations the State may 16 require. It's under 45 164.506. It explains what 17 kind of -- how an authorization has to look like. 18 And one of the issues in the Georgia 19 court was it didn't provide for notice, and it 20 didn't advise the plaintiff they can revoke. So 21 that was found to be preempted by HIPAA. 22 Not only is the authorization preempted 23 by HIPAA, and as Mr. Fink and some of the other 24 commenters stated, not only is it preempted by</p> <p style="text-align: right;">74</p>	<p>1 I have a response to my Freedom of Information Act 2 from the federal FOIA as well saying that they did 3 not have any such a request from the State of 4 Illinois. Therefore it is true, and I know you're 5 going to hear from others most likely, because I 6 read their comments, that they need to keep that 7 for whatever reason. I have my opinion what they 8 are looking for. I know that a lot of insurance 9 companies are checking our information, and they 10 are trying to feed our health information into 11 their algorithms, and they're trying right now, 12 they have all these data programs and are 13 combining regulated data like health and finance 14 with unregulated, and social media to make their 15 algorithms smart and harass us to death. And 16 perhaps at one point, we're going to have the 17 social system that China has right now. But I 18 urge the Committee to refuse to adopt this. If 19 you're going to be -- a comprehensive order, it 20 has to be fair. It has to comply with the right 21 to privacy. 22 If anybody has any questions. 23 CHAIRMAN ANDERSON: Thank you very much. 24 Next we have Paul McMahon, also</p> <p style="text-align: right;">76</p>



1 commenting on Proposal 18-01.
2 MR. McMAHON: Pronounced exactly correctly.
3 Good morning. Thanks for your time.
4 I haven't done this before, making a
5 Committee comment before. But this issue
6 particularly upset me because of some of the
7 personal experiences I've had working as a
8 personal injury lawyer in Chicago for 25 plus
9 years.
10 As a young attorney doing personal injury
11 work and interviewing your clients, one of the
12 things that would come up very frequently when you
13 hear about automobile accident cases and things
14 like that, they say, "You know, I'm afraid now to
15 drive in my car. I'm afraid to go across the
16 street since I got hit as a pedestrian. Can I
17 bring a claim for that?" And the conversation we
18 have, and almost universally that we ultimately
19 have the clients tell us that they don't want to
20 pursue it is we say, "Listen, you could bring a
21 claim for your emotional distress, but you will
22 open up all of your privacy. You will open up
23 your marital difficulties and your counselor's
24 records. You'll open up your psychologist's

77

1 records." And almost universally, those clients
2 will tell you, "I don't want anything to do with
3 that. Can we prevent that from happening?"
4 I'm saying this. I completely agree with
5 everything Mr. Pfaff was saying. I want you to
6 just know what's at stake. And I can -- That's
7 kind of the thing that I can tell you from
8 personal experience of meeting with these people
9 for many years, what's at stake.
10 I've had these claims. I've brought ten
11 claims that were involving sexual abuse,
12 psychiatrists molesting his patient, where
13 everything was opened up. We waive all of your
14 privacy where all of these records come out. And
15 they're brutal. Those cases are brutal. A
16 2nd grader molested by a priest, he had to list in
17 his interrogatories every single sexual contact he
18 had ever had in his whole life. And we know --
19 when we're bringing those cases, we know that's
20 what's going to happen. But when he got to the
21 point after his deposition that they started
22 subpoenaing all these other people, he was
23 suicidal himself. Told me, "Take whatever you
24 get, give it to my kid." I had to resolve that

78

1 case immediately.
2 I take it to heart myself when I hear
3 from doctors, when doctors are talking about do no
4 harm. As a personal injury lawyer, I don't want
5 to do harm to these people who have already been
6 hurt. And I'm sorry. I'm actually upset because
7 I'm thinking of this kid shaking in his deposition
8 when he was talking about this stuff.
9 So this is why I say, Judge Ehrlich, I
10 have tremendous respect for his intellect and what
11 he's trying to accomplish here. I think what
12 Mr. Pfaff was saying, we need a better method here
13 that's going to protect these privacy rights that
14 has to be implemented, even another committee.
15 Let's talk about this as a state before we go down
16 this road.
17 Another example that I'd just like to
18 give you, and I'll end my comments, is a
19 13-year-old girl gets her foot run over by a car.
20 We get the medical records. And one of the things
21 that's wonderful about HIPAA is the cooperation
22 and professionalism that I've seen in the defense
23 bar since HIPAA has come around. These defense
24 lawyers take the responsibility of people's

79

1 private information as seriously as we do when we
2 have the attorney-client relationship. HIPAA puts
3 that on them as well and that insurance company
4 and says, we think this is important too, and
5 we're not going to be sharing this, and we're not
6 going to tell anyone. Because within this girl's
7 records, it came out -- You know, we all know we
8 have to give authorizations. We all know they
9 have to have the medical. The way that it has
10 always worked, the defense counsel sends us an
11 interrogatory: Are you claiming psychological and
12 psychiatric injury? And as soon as I say no, we
13 all know that's off the table. We don't have to
14 talk about it. Would it pass the Monier v.
15 Chamberlain test? No. We all know if somebody
16 wanted to go through those records, they could
17 probably find something that might help the
18 defense of the case. But it's such an important,
19 critical aspect of our society that we are trying
20 protect, that it's looked over. And I've seen
21 that with the defense bar. They call me up, "You
22 don't realize, Mr. McMahon, there was a note in
23 here about cutting. There's a note in there about
24 suicide."

80



1 "Thank you so much, Counsel. We've got
2 to get all of that out of there."
3 That's how it's working out right now. I
4 put in my comment, what is the problem that we're
5 trying to solve by having an order being entered
6 waiving your privacy rights? And it could very
7 well be the case that there won't be a problem.
8 But what about that 13-year-old kid? What's she
9 waiving? Isn't it her mom who's signing this?
10 And for what? So the insurance industry can do
11 some statistical methods? Where is the balance
12 there? There isn't any. It's not even close in
13 protecting that kid's privacy. It's not even
14 close from having their statistical methods and
15 things that I saw in that order.
16 That's what I really wanted to share with
17 you is kind of really what's at stake. There
18 couldn't be anything more important than people
19 feeling comfortable going to get the treatment
20 that they need for psychiatric issues, for mental
21 health issues. And I believe that this order is
22 glomming together things that shouldn't be that
23 have already been sorted out in many years doing
24 this, haven't had problems.

81

1 People need records, we get them
2 authorizations. Then we know about it, we know
3 it's going on, we know what subpoenas are going
4 out, we're informed, we get a copy of those
5 records beforehand. We can go through them. If
6 there's an issue, you have an in camera
7 inspection. It's worked for many years. And
8 protecting the privacy, it's extra work. But it's
9 worthwhile extra work and important.
10 Thank you.
11 CHAIRMAN ANDERSON: Okay. Thank you.
12 Dan Kirchner also on 18-01.
13 MR. KIRCHNER: Thank you very much,
14 Mr. Chairman.
15 I'm here not because I want to be. I'm
16 here because I felt compelled. I was the attorney
17 on Mark Ellis -- Mark Shull v. Ellis, which is the
18 case that this order came out of. And I'm here
19 for a couple of reasons. One, I want to say that
20 Judge Ehrlich, throughout the two years we worked
21 on this issue, really did a concerted and
22 phenomenal job trying to get it right. He knows
23 what I think because I have a brief in opposition
24 to it. But I'm here, one, because I think he's

82

1 been unfairly maligned in this process. He really
2 did a phenomenal job in putting this together.
3 But here's what I want to address. I
4 agree with many of the remarks about the necessity
5 for a statewide order and not just because we have
6 one county doing this and another county doing
7 that, and not just as lawyers, we're transient,
8 but our cases are transient. We have cases that
9 get filed here and get transferred for forum non
10 conveniens, for lack of venue, personal
11 jurisdiction. And we have cases that may be
12 multi jurisdictional in the state, because we
13 still have personal jurisdiction over our
14 corporate defendant in Cook County, but we don't
15 over other defendants. So it's important that we
16 have uniformity for that purpose.
17 I will tell you one of the ways in which
18 I think Judge Ehrlich has been maligned in this
19 case is I don't think the way this order has been
20 enforced and interpreted is the way that he
21 intended it throughout this process, which is
22 this -- And I served on the Rules Committee for
23 nine years; good to see you again, Professor.
24 Rule 201(c) is one of my favorite go-to

83

1 rules in the book because it is the sword and the
2 shield that we as lawyers have to protect our
3 clients from undue abuse and embarrassment, and
4 there's nothing in this order that precludes the
5 trial court from using this order in conjunction
6 with the Supreme Court Rules they're required to
7 follow in exercising their discretion under 201(c)
8 to curb abuse and embarrassment. The problem is
9 in practice, that's not happening. And the
10 problem is that the trial courts think they can't
11 do that.
12 You have the luxury that Judge Ehrlich
13 did not, which is to have notes on use and
14 comments and to say, Hey, Trial Court, 201(c) is
15 still alive and well. If the plaintiff's counsel
16 comes to you with a motion and says, Okay, part
17 and parcel to this HIPAA order, you need to have a
18 second protective order in place, or, Before I let
19 any subpoenas go out on a HIPAA order, they need
20 to be returnable to the court or returnable to me
21 or the third party copy company for the
22 plaintiff's attorney to review first before they
23 get sent. The problem is that's not what's
24 happening in practice.

84



1 One of the issues is, and we see this all
2 the time as plaintiff's lawyers, is the hospitals,
3 their record keeping is atrocious in terms of how
4 they segregate out protected health information.
5 And we all see these forms, say, in a motor
6 vehicle crash case. We get the records involving
7 back surgery, and there in the records, their
8 whole electronic chart for the patient, everything,
9 the hospitalization for suicide, the drug and
10 alcohol treatment records, all combined into one
11 fluid electronic record. And it's not supposed to
12 be like that. And while the HIPAA order itself
13 says passively, and this came from the order
14 itself, that nothing from this order precludes the
15 requirements under the Mental Health Act and blah,
16 blah, blah, I think it needs to be turned on its
17 head to make it, rather than passive, make it that
18 you shall not turn over mental health records
19 under this order. You shall not turn over any, so
20 that it really puts more onus not only on the
21 defense lawyers that say -- call me up and say,
22 "Hey, I got these records in there," but also the
23 hospitals to get it right because they're facing
24 sanctions if they do it.

85

1 (indicating). And I knew he didn't send out any
2 subpoenas. So I say, "what do you have there?"
3 "The records you gave me."
4 "No, no. These are the records I gave
5 you. what do you have there?"
6 "I don't know where this came from."
7 It came from Claims. And I still to this
8 day don't know how they got them. And what I
9 suspect is, and I talked to my client about this,
10 she said she had a prior claim with a State Farm
11 insured. And that other claim file that they had
12 got passed on for their use in this case. It
13 wasn't disclosed to me; it wasn't produced to me.
14 But I don't trust for a second the manner in which
15 insurance companies use protected health
16 information. I don't trust for a second the way
17 they say they need to preserve them. So I think
18 that is a fallacy.
19 So those are my comments.
20 And I will also say in response to all
21 the comments, I did not draft a different order.
22 PROFESSOR BEYLER: How would you modify that
23 order that you say you didn't think was ever
24 intended, but which in fact is occurring?

87

1 My thoughts on the requirements of
2 insurance companies to maintain and keep the
3 records, I never quite saw that argument through
4 the course of this. I read the code provisions,
5 and everything that seemed to relate to it had to
6 do with financial audits, but nothing to do
7 specifically with maintaining protected health
8 information. And at the end of the day, while
9 it's certainly helpful to them to assess their
10 claim in having these records, they're not
11 required to have them. They have counsel that
12 they've hired to distill this information for them
13 and report back to them what they should do. And
14 there are ways in which they can view records and
15 not take them into possession and say now we've
16 got these, we have to keep them forever.
17 And we do face, there is this cross
18 pollination between claims files within insurance
19 companies. I have a case right now, a State Farm
20 case, where I went in on a deposition of my
21 plaintiff. And I knew what records they had
22 because I gave them to them. And we're sitting in
23 my client's dep, and the defense attorney starts
24 asking questions with a stack of records like this

86

1 MR. KIRCHNER: I think it needs to be more --
2 One, I think it needs to be more forcefully
3 directed at the doctors and the hospitals to make
4 sure they don't turn over what's not required.
5 Again, to regurgitate prior comments, I
6 do think that the requirement that all records be
7 destroyed is universal, regardless. I think
8 certainly it's the onus on us as the plaintiff's
9 lawyer, I do this in my cases where I take my
10 client and have them sign the current order. And
11 I explain to them what it is, and I say, "Hey,
12 tell me right now what skeletons are in the
13 closet. Tell me what I need to know about before
14 they go and get them, what concerns you have,
15 because then I can protect you." I can use 201(c)
16 and go in on a motion. I can't do that if I don't
17 know about it. So I have that conversation with
18 my clients. So I'm proactive in that sense.
19 The onus is on us, but I certainly echo
20 all the sentiments that there need to be further
21 restrictions honing in on relevancy. 201(a),
22 which talks about discovery, it talks about broad
23 discovery of relevant matters in litigation. So
24 there's no reason why there shouldn't be date

88



1 restrictions or restrictions to parts of the body
2 or whatever makes sense in the context of that
3 case. Because no case -- there are no two cases
4 that are alike. They're individual cases, so I
5 think they need to be treated like individual
6 cases and individual rights with respect to
7 privacy.
8 CHAIRMAN ANDERSON: Thank you very much,
9 Mr. Kirchner.
10 Next we have Mariam Hafezi.
11 MS. HAFEZI: Good afternoon. I'm a
12 plaintiff's personal injury lawyer. I'm doing it
13 for over eight years.
14 I think to answer the professor's
15 question, I think that the prior standard HIPAA
16 order from Cook County was well done. It put the
17 onus on the defense to seek it be answered if they
18 so needed it.
19 And to deal with the issue of alleged
20 compliance with these insurance codes, if you do
21 read it that way, then we can simply add a line
22 that says at the conclusion of litigation, these
23 can be stored for five years or seven years or
24 whatever the alleged time frame is, stored for

89

1 compliance with whatever that code is. And that's
2 it. Nothing more, nothing less.
3 And what, unfortunately, the proposed
4 order asks for is not just to keep them, but to
5 use them in whatever ways they can come up with.
6 And that's really the problem here with the HIPAA
7 order as proposed.
8 And I have my labor and delivery record.
9 And in my labor and delivery record, in the first
10 five pages, you can find out all of my past
11 procedures, any medications I've ever been on, any
12 allergies that I have, my social history. And you
13 can find out on page 5 about my mother, my father,
14 my sister, my grandparents on both sides. And
15 that's what they want to keep and use for whatever
16 databasing they can do. And that's the problem.
17 That's why HIPAA requires destruction at the
18 conclusion of the case. You use it for what it's
19 needed for to settle a claim, and then you destroy
20 it. And that's to protect everybody involved. So
21 within the context of litigation, you can share
22 with experts, you can share with attorneys,
23 whatever you need to do to get it done, that's
24 what's done. And I think that's where I have an

90

1 issue with the HIPAA order that's proposed.
2 So that's what I would propose would be a
3 better HIPAA going forward. But I do think that
4 the concept of a standard statewide HIPAA would be
5 great. So I don't have anything else in addition
6 to what everybody has already said.
7 CHAIRMAN ANDERSON: Any questions?
8 (No response.)
9 CHAIRMAN ANDERSON: Thank you.
10 Next we have Glen Amundsen.
11 MR. AMUNDSEN: Good afternoon, everyone.
12 Thank you for allowing me to address you, and I
13 know it's been a long hearing already, but I think
14 I'm the first person to speak on behalf of this
15 proposal. So I hope that I'll be saying something
16 new here from what we've heard.
17 I bring my testimony privately, but I
18 want to inform this group that I was counsel for
19 State Farm in the Cook County matter that
20 generated this. So I'm a counterpart of
21 Mr. Kirchner, who spent two years working very
22 hard with Judge Ehrlich to handle the matter that
23 resulted in the present Cook County procedures.
24 Also, I've litigated this issue around the state

91

1 of Illinois in many other counties. And I think
2 the one thing I've heard in this room that I
3 endorse that I think is common to us all is there
4 is a need for a common procedure and a rule to be
5 issued on the subject. Because there are
6 important issues of the legitimate rights of
7 privacy that litigants have, but also of the other
8 very significant rights and responsibilities that
9 are involved in the Insurance Code and other
10 issues. There's a confluence of many issues of
11 law that come into this subject. It's not an easy
12 one to address. But it is best addressed.
13 I'm also the counsel who is handling the
14 appeal of the Lake County matter, and I will
15 answer Professor Beyler's question further in a
16 moment that you raised earlier, sir. But I just
17 wanted this Committee to know where I come from as
18 I'm addressing you.
19 So without going into all the details --
20 I've already filed a comment with you -- I would
21 say a couple of things that I've heard here that
22 need to be pointed out and addressed. First,
23 since at least when the Kunkel case was decided,
24 which is back in the 1995, 1996 era, since the

92



1 time of Kunkel, at a minimum, it's been the common
2 law of Illinois that when an injured person
3 puts -- brings a claim and files a suit in an
4 adversarial proceeding, they are implicitly
5 waiving their right of constitutional privacy.
6 That's been in the Constitution since 1970. And
7 our Supreme Court said in that case that full
8 disclosure of all relevant records is required.
9 And further, in that case, it said that
10 the relevancy requirements and proportionality are
11 the protections that make it not an unreasonable
12 thing to require those records to be produced.
13 So there have been a number of people
14 here who have commented to this Committee about --
15 and rightly so, emotionally -- about the impact of
16 privacy on the issue of personal injury. And we
17 all understand that on both sides of the bar. We
18 all want our clients to be protected, including
19 sometimes defendants who get medical records
20 produced as well, by the way. So we all want that
21 to be protected. But the common law of Illinois
22 has required a waiver. And, by the way, the order
23 that is proposed with Proposal 18-01 doesn't say
24 that it's a blanket waiver, or you can get any

93

1 records, or by signing this, you've waived your
2 entire rights to privacy. What it says is, it's
3 got a case caption and a case number. In this
4 case, you are waiving your right to privacy.
5 Judge Ehrlich will address you; but
6 having been in those proceedings, I can -- I will
7 say that in part, the reason for that is so that
8 it is clear. Not all lawyers may be like
9 Mr. Kirchner or others who inform their clients of
10 what it means to file a lawsuit. And so for the
11 court to say we're trying to make this open and
12 completely -- this whole process open for you to
13 understand what these records are going to be used
14 for and how the filing of the suit before those
15 records are being obtained, this is what you're
16 agreeing to do, so there's nothing offensive about
17 that. In fact, it's completely consistent with
18 the rule of law that has been in place since
19 Kunkel.
20 I have to respectfully disagree with my
21 colleague, Mr. Hebeisen. The Kunkel case is not
22 like this matter whatsoever, because in the Kunkel
23 case, we were dealing with a statute that required
24 the production of all prior medical records with

94

1 no limitation of relevancy. That was the point of
2 the Supreme Court in that case. The order that is
3 submitted with 18-01 simply says that any records
4 that aren't produced have to be done under a
5 certain process. The order doesn't say what
6 records should be produced. And part of the
7 reason for that is with the volume of cases in
8 Cook County, it's -- for the court to constantly,
9 in every case, say these records can be produced
10 and these can't be, is not a reasonable way to
11 efficiently get records produced.
12 99 percent of the time, the lawyers know
13 what records need to be produced. There are some
14 people who try to abuse it, and that's what
15 Rule 201 is for, specifically, 201(c). And, in
16 fact, this order says outright, you cannot -- I
17 think the court was very sensitive, the judges of
18 the Circuit Court of Cook County were very
19 sensitive to say, by the way, we're reminding you
20 that you cannot use any means that is not
21 lawfully, you know, other Supreme Court Rules,
22 other -- that is not authorized by the Supreme
23 Court Rules or the law of Illinois to get these
24 records. Don't -- In fact, it expressly says you

95

1 cannot use this order to get records in any other
2 means, by any other means, nor can this order be
3 viewed as a blanket permission to get any records
4 or contact counsel of treating professionals.
5 These are all things that have been put in the
6 comments, and that's just not the case. I think
7 those are emotional things that people are
8 concerned about, but it's a misapprehension of
9 what is in this order.
10 And frankly, if there are violations of
11 this sort, judges know exactly what to do, and so
12 do counsel for their clients to protect them when
13 those bad things happen. They know exactly what
14 to do, and there are sanctions in place in the
15 Rules that address them.
16 As far as the scope and the means of
17 discovery, I would point out that in paragraph 6,
18 the order expressly says what means can be used.
19 And the order as proposed also expressly indicates
20 that no laws of the State of Illinois that deal
21 with special records or privacy in mental health
22 context, et cetera, are -- can be violated or
23 obviated by the use of this order.
24 I think it's important also to say as a

96



1 defense attorney with 38 years of practice in this
2 area, that in my experience in the 18 months since
3 the order has been in place, it has been
4 efficiently used. To my knowledge, there are
5 major physicians' groups and hospitals in the
6 metro Chicago area, the biggest and many of them
7 with robust legal teams that deal with privacy of
8 medical records, who have routinely accepted this
9 order and who have not found it to be -- in other
10 words, the order has been found to be compliant
11 with their obligations under HIPAA that they are
12 required to handle as covered entities.

13 So now I would like to address the issue
14 of preemption because that just recently came up.
15 The order that was issued in Lake County was
16 entered in May, May 15th I believe was the date.
17 And you all have that in front of you along with
18 Judge Ortiz's comments.

19 First let me address two questions that
20 Professor Beyler has raised. Number one, are
21 there requirements for records to be maintained?
22 And of course you noted that in this proposed
23 order, there are 11 different permitted uses. And
24 the order says, You can't use it for anything

97

1 else, insurance company, by the way, except these
2 permitted uses. That is not in that order by
3 accident. I was there, and I understand how it
4 got put in there. Judge Ehrlich can speak for
5 himself, since he drafted it. But each one of
6 those was connected to a citation, to a statute, a
7 regulation that the Court specifically reviewed
8 and either agreed or disagreed that that was a
9 permitted use of medical records under the State
10 of Illinois, under the Insurance Code or
11 regulations of the State of Illinois. It didn't
12 get put into the order because -- by happenstance.

13 And I would point out that in Lake
14 County, there have been statements about what FOIA
15 officers have said and so forth. As you all know
16 as practicing lawyers, FOIA officers don't give
17 any opinions about what the law requires. They
18 respond to records requests. That's what they do.

19 The bottom line is, even the court in
20 Lake County, who ruled adverse to my client in
21 that case, did not say -- did not make its ruling
22 on the premise that the records didn't have to be
23 retained under the Insurance Code. What the Lake
24 County court said are the requirements of the

98

1 Insurance Code are preempted by HIPAA, the second
2 part of your question that you raised.

3 PROFESSOR BEYLER: I would point out from the
4 Illinois Supreme Court standpoint, judges are to
5 reach the constitutional question only if required
6 to as a test.

7 MR. AMUNDSEN: Correct. So I'm not aware of
8 any -- and I've litigated this subject through
9 many courts in Illinois, and I'm not aware yet of
10 a trial judge who has said, you know, the
11 Insurance Code doesn't have these provisions in
12 it, or no, you aren't -- your client, a property
13 and casualty insurance company isn't required or
14 permitted, one or the other, either required or
15 permitted to use records for those purposes.

16 We have in Lake County now a case where
17 they have -- where the court has decided there's
18 preemption. And I would like to address that
19 subject very briefly and then try to answer your
20 questions if you have any that would be directed
21 to me.

22 So in general, the doctrine of preemption
23 applies when there's a conflict between a federal
24 law and then there's a state or local law that is

99

1 trying to regulate or somehow legislate about the
2 same subject. If you do not have a federal law
3 and a state law addressing the same conduct, then
4 there can't be preemption. The fundamental reason
5 there's no preemption here, or a key reason, is
6 because HIPAA does not apply to the conduct of
7 P and C insurers and what they can or can't do
8 with records.

9 Again, no judge in Lake County or
10 elsewhere in the state of Illinois has ruled, to
11 my knowledge, that HIPAA regulates the use and
12 retention of records from an Illinois property and
13 casualty insurer. In fact, I believe that there
14 are specific findings in the Cook County case that
15 the -- that the records cannot be -- that property
16 and casualty insurers are expressly exempt from
17 the requirements of HIPAA.

18 Now, what the court in Lake County
19 decided was, well, there are multiple ways in
20 which you can get records under HIPAA. We know an
21 order could simply be entered that says -- by a
22 judge just saying produce the records of
23 Northwestern Hospital. That complies with HIPAA.
24 An order could be entered saying give an

100



<p>1 authorization for the records of Northwestern 2 Hospital. That complies with HIPAA. An order -- 3 Even without an order, a party can subpoena with a 4 proof of service the records of Northwestern 5 Hospital. That complies with HIPAA. None of 6 those methods I just described limits or requires 7 the destruction of the records or that you can't 8 use it for other purposes.</p> <p>9 There's a reason that Congress and Health 10 and Human Services didn't regulate insurance 11 companies on this, and that's because insurance 12 companies are subject to a robust and very 13 explicit process for the handling of private 14 information. There is, in Illinois, a whole 15 chapter of the Insurance Code that talks about 16 private information and what insurance companies 17 can and can't do with it, and that includes 18 medical records. So Congress and HHS expressly 19 said they didn't want to take jurisdiction over 20 this.</p> <p>21 But what we have is the plaintiff's 22 attorney arguing, or the plaintiff arguing that 23 because I want to have a QPO used, even though 24 there are multiple other ways the records could be</p> <p style="text-align: right;">101</p>	<p>1 right? I can do that. Absolutely, you can, your 2 Honor. Why can't I then do it with respect to 3 insurance companies? Well, the difference is that 4 the litigants, the experts, the attorneys, they 5 aren't subject to a host of regulatory scrutiny 6 and a complete regulatory scheme that was 7 established by the legislature. They're not 8 subject to those things. The insurance industry 9 is. And, by the way, if they violate them, 10 they're subject to penalties and fines.</p> <p>11 And I noted I heard here somebody raised 12 a concern about a particular case, and that should 13 be reported to the Department of Insurance. 14 That's what their role and responsibility is. If 15 there's a violation of privacy -- I'm not 16 suggesting -- I don't know the facts of it -- but 17 if there's an alleged problem with an insurance 18 company violating the privacy rules of the State 19 of Illinois and the Insurance Code, then there is 20 a process under the law for that to be addressed. 21 what the Court needs -- The bottom line 22 is this is not the order of the individual. This 23 protective order is not being -- shouldn't be 24 dictated by the injured party. It should be</p> <p style="text-align: right;">103</p>
<p>1 obtained without a QPO, because I elect to use a 2 QPO, that means that I can require you to 3 contravene the Illinois Insurance Code and the 4 Illinois Insurance Department regulations about 5 what you can do with the records.</p> <p>6 So the Lake County court, I have great 7 respect for them. I practiced there many years. 8 I respectfully submit that that ruling is 9 incorrect because P and C insurers are not covered 10 by HIPAA. The fact that they get medical records 11 or that the plaintiff wants to use in a protective 12 order the terminology of a so-called qualified 13 protective order doesn't make it possible for an 14 individual who's been injured to say well, the 15 Insurance Code of Illinois is -- you know, can be 16 obviated, it can be circumvented.</p> <p>17 And the bottom line is, the conflict is 18 not between Illinois law and HIPAA. The conflict 19 is between courts who attempt to apply the 20 limitations of a QPO to insurance companies who 21 are expressly exempt from those requirements. And 22 one of the things the Lake County Court said was, 23 well, if -- I can certainly require litigants and 24 attorneys to destroy the records. Isn't that</p> <p style="text-align: right;">102</p>	<p>1 dictated by the court. It's the court's order to 2 determine how the records should be handled, and 3 it is the court -- Of course, all trial judges I 4 know are sensitive to not entering court orders 5 that are in direct contravention of other statutes 6 and regulations that would put the litigants in 7 the unhappy position of either violating their 8 order or violating the law. And that, ladies and 9 gentlemen, that's what was at the core of the Cook 10 County case. That's why we filed it.</p> <p>11 The prior order inadvertently applied 12 HIPAA to insurance companies when they are not 13 subject to those regulations. That's what Judge 14 Ehrlich found, and we submit that's what the 15 Appellate Court in the Second District will find.</p> <p>16 So the problem, there's no conflict 17 between HIPAA and Illinois law. There's a 18 conflict between well-meaning orders by courts 19 that try to limit the possession and use of 20 records for insurance companies just the way they 21 do with litigants and lawyers, who are not subject 22 to the Illinois Insurance Code. So that is the 23 problem.</p> <p>24 CHAIRMAN ANDERSON: Does anyone have any</p> <p style="text-align: right;">104</p>



1 questions for Mr. Amundsen?
2 MR. ROTHSTEIN: Thank you for your
3 presentation. You've been arguing that the order
4 that we've been discussing is not as broad as some
5 of the other speakers were suggesting.
6 MR. AMUNDSEN: Yes.
7 MR. ROTHSTEIN: And that the court still
8 retains, I guess, the power to limit it to the
9 issues relative to the case. But do you agree
10 with me that there's nothing on the face of the
11 sample order other than the caption that would
12 give guidance to the recipient of a subpoena for
13 records as to which records they should be
14 producing or not producing?
15 MR. AMUNDSEN: I agree with that statement,
16 Mr. Rothstein. But I would add that that was also
17 true of the predecessor. The predecessor order
18 never specified what records could be obtained
19 either. And that had been in place since at least
20 2012. So it never was a problem.
21 And I've heard many people say, well, the
22 old order was wonderful. Well, the old order
23 didn't specify either. We relied on what? We
24 relied on the fact that most lawyers do not abuse

105

1 that on either side. And if they do, there is a
2 remedy under the -- that every lawyer knows, which
3 is we go to the court for a protective order, and
4 we take care of it.
5 MR. ROTHSTEIN: So we've heard some poignant
6 vignettes today, real world circumstances, of
7 parties who presumably had valid claims, but
8 because of their concerns about records which
9 presumably were irrelevant to their case, they
10 were so fearful of that information becoming known
11 that they abandoned their right to pursue their
12 cases or resolved their cases maybe not at the
13 most opportune time. Do you have any suggestions
14 of how the existing order could be improved upon
15 to eliminate, or at least significantly reduce
16 those concerns of litigants that a provider would
17 just open up its files and provide all
18 information?
19 MR. AMUNDSEN: Well, first of all, as I've
20 already noted, the prior procedures didn't address
21 that problem either.
22 MR. ROTHSTEIN: Put that aside.
23 MR. AMUNDSEN: Okay. So the second thing is
24 what do we do going forward to address that issue?

106

1 And what I would say is there is, of course, the
2 use of 201, Rule 201(c), a conference between
3 counsel, to address that. But if necessary, a
4 motion for a protective order could be made
5 preemptively by counsel. That would be one way to
6 solve it. A second way would be for the court --
7 counsel to submit an authorization to defense
8 counsel and say, "Here's the records, and I'll
9 sign -- my client will sign answers to
10 interrogatories, these are the treating doctors,
11 this is the area of their body they've been hurt,
12 and these are the treating physicians, et cetera.
13 I will give you the authorization, and so use that
14 in lieu of a subpoena, because I want to
15 specifically limit."
16 But ultimately, if the subpoena was
17 issued by defense counsel that was broader than
18 what those appropriate records are, that he would
19 have put -- he or she would have put into the
20 authorization then that there's also the
21 possibility of filing -- as soon as that subpoena
22 is issued, it has to be sent with notice to
23 everyone. And then the counsel would file a
24 protective order that way. But if I had concerns,

107

1 as Mr. Kirchner has indicated, because of my
2 interview of the client, I would go preemptively
3 ahead of time and address it, either with the
4 court or with counsel. If I -- 99 percent of
5 lawyers will, would do that under most
6 circumstances. And the ones that won't should be
7 brought before the court and addressed
8 appropriately. And I know most judges would be
9 very happy to address that. So I think that's the
10 way to do it.
11 The problem with doing it on a
12 case-by-case basis in a county like Cook is that
13 it's prohibitive, and the motion practice already
14 taxes the court to the point of, as you know, the
15 number of cases that are filed. So the only way I
16 can think of to answer your question is either
17 preemptively doing it ahead of time with a
18 protective order or using an authorization in lieu
19 of, which could be done conjunct- -- concurrent
20 with the order and just use an authorization to
21 get the records.
22 MR. ROTHSTEIN: And then on another topic,
23 with respect to the record retention issues, are
24 you aware of any efforts in Springfield to

108



1 legislatively address that issue to clarify that
2 records that are gathered for a particular case
3 should be used only for that case and no other
4 purposes and may be destroyed after the conclusion
5 of the case?
6 MR. AMUNDSEN: The answer is no, I'm not aware
7 of that personally. And it's one of the issues,
8 though, that I think is appropriately -- we're
9 dealing with the common law of Illinois or
10 potentially a Rule of the Supreme Court of
11 Illinois. And the question of what the public
12 policy of the State of Illinois is for the
13 purposes of having a healthy and vibrant insurance
14 agency, what they need or don't need, that goes
15 directly to your question, sir. And that's a
16 different question, what the legislature thinks is
17 required or not required for insurance companies
18 to conduct their business.
19 But we're dealing with the existing set
20 of laws. And I'll reiterate what I said earlier.
21 I'm not aware of any judge, trial judge, who so
22 far ruled that those -- that it is -- that you can
23 restrict or limit under the Insurance Code the use
24 or retention of records that we've been discussing.

109

1 But you're right. It could be addressed
2 by the legislature. I'm not aware of it being --
3 that presently being before the legislature.
4 CHAIRMAN ANDERSON: Any other questions for
5 Mr. Amundsen?
6 (No response.)
7 CHAIRMAN ANDERSON: Thank you, sir.
8 We have Steve Grossi.
9 MR. GROSSI: Thanks very much, your Honor.
10 Just to introduce myself briefly, I'm an
11 attorney with Bruce Farrel Dorn & Associates,
12 which is the State Farm staff counsel handling
13 cases in Cook County. I'm a director elected to
14 IDC, and I'm also a member of the ISBA. I'm here
15 speaking in my individual capacity today, so the
16 views and opinions that I express today do not
17 necessarily reflect the views of State Farm
18 Insurance or any other person or entity.
19 I do want to thank the Committee for
20 taking on this important issue. I want to thank
21 my fellow commenters, who obviously put a lot of
22 time and effort into their thoughts. I'd like to
23 thank Judge Ehrlich for all of his efforts in
24 getting this order and this important issue before

110

1 the Committee.
2 The first thing I would like to talk
3 about is proposal 18-01 in practice. In practice,
4 this has been a success. It's been easier to get
5 orders or to get records from covered entities
6 than it is with authorization or any other method.
7 It's something that's been around for 18 months in
8 one form or another. And with a few perhaps small
9 exceptions, the comments in opposition focused
10 more on the hypothetical and the abstract than
11 anyone saying this order was used to get records
12 from 30 years ago that are gynecological or
13 otherwise wholly unrelated. I haven't heard a
14 single example that said this specific order was
15 ever used to do that. And that's because the
16 language of the order was specifically crafted to
17 ensure that doesn't happen; that the exact same
18 information that was available in discovery with
19 this order will be available without this order,
20 because every request, every subpoena is governed
21 by the Illinois Supreme Court Rules related to
22 discovery as explicitly stated by paragraph 6 of
23 the order. What this order does do is to address
24 a key problem faced by insurers in the state of

111

1 Illinois, and I'll address a technical reason why
2 there is a problem.
3 So the Illinois Insurance Code 919.30
4 requires insurers to maintain claim data for two
5 years after the close of a claim. This claim data
6 includes detailed documentation. And if you go to
7 919.40, detailed documentation is specifically
8 defined as including bills. Bills are
9 unequivocally PHI. So if an insurer gets sent a
10 medical bill, which really they should, they can't
11 just require defense counsels to provide a
12 summary, because honestly, diligence by the
13 insurer is sometimes looking over what defense
14 counsel is doing and making sure they're doing the
15 right things, they're providing the right bills.
16 So getting the bills themselves is a necessary act
17 for an insurer to do. And once they have those
18 bills, if they receive them subject to an order
19 that requires them to destroy it, they simply
20 cannot comply with the plain language of the
21 administrative code. If it's enforced or not by
22 the Director of Insurance, I cannot and do not
23 speak to that in any way. But I'm a simple person
24 who just reads these regulations, and the

112



1 regulation says you have to keep them for at least
2 two years behind the time the claim is closed. I
3 don't see how an insurer could look at that and
4 not comply.
5 PROFESSOR BEYLER: I saw that in your papers
6 in terms of bills, but I didn't see anything else
7 about any X-rays or any of the thousands of
8 different kinds of items that could come. Is
9 there any other regulation that addresses items
10 that would be protected health care information?
11 MR. GROSSI: Well, that same regulation
12 essentially says that if an inspection is to
13 occur, whoever is inspecting has to come in and be
14 able to recreate what was happening when this
15 claim was evaluated. So if it includes bills, it
16 very likely includes records and X-rays. So they
17 can come in and say, Are you evaluating this claim
18 appropriately? If you have no health information,
19 how can they say whether or not this claim was
20 evaluated appropriately versus someone was paid
21 short due to bargaining disadvantage or otherwise
22 if they have no information as to the injuries
23 claimed? Even if you just have the bills, that
24 doesn't tell you if the X-ray showed a fracture or

113

1 no fracture at all. So how could we tell in an
2 inspection if one is appropriately paying on
3 \$7,000 in bills if they don't have the X-ray
4 saying this is a fracture or not? So I think that
5 same regulation does require more than just bills;
6 detailed documentation is required more broadly.
7 PROFESSOR BEYLER: I'm wondering, in terms of
8 claim evaluation, when you get the medical
9 records, do you have people on your staff who
10 basically are medical experts who go into it and
11 go through and, if you will, write memos and other
12 things evaluating that claim?
13 MR. GROSSI: Our office has no doctors or
14 nurses or anything on staff, just the attorneys
15 and the expertise, or the paralegals and the
16 expertise they have in reviewing those records.
17 Again, just specific to our office, which only
18 handles claims that have proceeded to litigation,
19 not presuit.
20 JUDGE VALDERAMMA: If I can ask a question.
21 Does the code -- and I don't know, so I'm asking
22 the question -- from your perspective, anyway,
23 does the code govern both, in relation to the
24 claim, insurer and the insured, and claims that

114

1 are brought by the insured against -- Let me start
2 again.
3 Claims that are being brought against the
4 insured of an insurer company in the sense that,
5 for example, someone saying, I was involved in an
6 accident, they're making a direct claim against
7 the party that, let's say it was an automobile
8 accident, who struck that individual. They are
9 then being represented, meaning that defendant is
10 being represented by presumably an attorney from
11 the insurance company. Versus a claim where
12 someone is actually insured, making a claim
13 against their insurance company, and they're
14 asking for the insurance company to make them
15 whole. Do you see the difference?
16 MR. GROSSI: I think you're asking whether
17 first-party and third-party claims are both
18 covered under the administrative code here.
19 JUDGE VALDERRAMMA: Yes.
20 MR. GROSSI: I don't have a specific cite for
21 you. My understanding is it covers both
22 first-party and third-party claims.
23 JUDGE VALDERRAMMA: And the reason I ask is,
24 and I know the question that was asked earlier, on

115

1 the issue of bills, the insurance company in the
2 case of a third party is making a business
3 decision on whether or not it's going to pay out a
4 claim. In other words, if a plaintiff in an
5 injury case is saying, I've made a demand of
6 \$50,000, the insurance company, whether the bills
7 are 3,000 or 25,000, is making a decision based
8 upon, presumably, the evaluation from their
9 experts as to the value of the claim as well as
10 their defense counsel in terms of what the
11 liability and damages are in that claim. So the
12 insurance company may very well in a case of, I
13 won't say minimal dollars, in a case where there's
14 not a lot of medical bills, pay very little; and
15 in a case where there is slightly more, pay more.
16 But it may be a difference in terms of the
17 evaluation of the medical damages.
18 MR. GROSSI: I can tell you the Department of
19 Insurance certainly regulates both first-party and
20 third-party claims. And if that's a concern, it's
21 all the more reason why we do need proper
22 regulation from the Department of Insurance to be
23 insured, which is what proposal 18-01 does.
24 Something I'd like to address is the

116



<p>1 separate methods by which information is provided 2 to or obtained by an insurer. And I'll just try 3 and highlight them briefly. The first is a 4 specific court order that is markedly different 5 from a HIPAA QPO or qualified protective order, 6 which would be the second method.</p> <p>7 The third method is a subpoena with 8 satisfactory assurance of notice to the 9 individual. You can also have assurance of 10 seeking a QPO, but I'm going to kind of lump that 11 into the prior one.</p> <p>12 So a subpoena with satisfactory assurance 13 of notice to the individual and a time period to 14 object, and no objection being filed, that is a 15 method to obtain records with no order and with no 16 authorization. In fact, 164.512 of the Code of 17 Federal Regulations specifically says these are 18 the uses for which an opportunity to object is not 19 required.</p> <p>20 So what Proposal 18-01 actually does is 21 it streamlines the method to obtain these records. 22 They can be obtained without a court order. They 23 can be obtained without an authorization if you 24 send a proper subpoena with satisfactory</p> <p style="text-align: right;">117</p>	<p>1 order under HIPAA, there are two different 2 methods. A court order and a HIPAA QPO, they are 3 equals. One is not subordinate to the other. 4 They are alternatives to comply with HIPAA. And 5 all HIPAA does, the HIPAA privacy rule does, is 6 allow covered entities to produce these records in 7 response to a court order, subpoena, or other 8 proper request.</p> <p>9 So what are examples of a valid court 10 order? Well, if it's a defendant hospital and 11 they are directly ordered to produce records from 12 this date identified as such, that's an example of 13 a court order directing someone to produce those 14 records.</p> <p>15 Another example is a compelling order 16 against a nonparty hospital to comply with the 17 subpoena. And there, the records are just what is 18 detailed in the subpoena. What Proposal 18-01 19 does is essentially says the same thing as that 20 latter example, but says the subpoena is yet to 21 issue. And I'm going to address that a little bit 22 more at a later point.</p> <p>23 So there's no requirement that expressly 24 authorizes a court order to comply with the</p> <p style="text-align: right;">119</p>
<p>1 assurance. And typically, the language of the 2 subpoena itself will be sufficient for 3 satisfactory assurance, according to HHS.gov in 4 the Frequently Asked Questions for Professionals. 5 So at that point, if you get the information 6 through satisfactory assurance, the insurer is not 7 subject to destroying; it is not subject to any 8 use requirements. In fact, when this Proposal 18-01 9 says you can only get records through the 10 discovery process when you're using this order, 11 there is more protection for privacy than there is 12 in the event that someone obtains the records 13 through a subpoena with satisfactory assurance. 14 And I'm not sure that point has really been made.</p> <p>15 Lastly, there's a HIPAA authorization, 16 which is the fourth method to obtain records.</p> <p>17 Fifth, records are routinely provided by 18 claimants before and during litigation, either 19 through discovery or just presuit to try and 20 settle it. Those aren't protected by HIPAA in any 21 way. They can be used, and they can be destroyed 22 consistent with the laws that are applicable.</p> <p>23 So as far as a technical analysis of 24 this, looking to whether Proposal 18-01 is a court</p> <p style="text-align: right;">118</p>	<p>1 definition of a HIPAA QPO. It shouldn't be read 2 in; rather, the purpose of that section, a court 3 order, was to allow the states to regulate what 4 will be allowed, not to impose a federal 5 regulation on the definition of a court order.</p> <p>6 The second point I'd like --</p> <p>7 CHAIRMAN ANDERSON: Mr. Grossi, I'm going to 8 give you another two minutes. It's ten minutes a 9 person.</p> <p>10 MR. GROSSI: I apologize. I will go as 11 quickly as I can.</p> <p>12 For preemption analysis, it's improper to 13 compare the HIPAA QPO to the court order. An 14 authorization doesn't have to comply with the 15 definition of a QPO, and an authorization is not 16 preempted. A subpoena with satisfactory assurance 17 does not have to comply with the HIPAA QPO 18 definition; it's not preemptive. They're all 19 equal, so there's no preemption. And, in fact, 20 the court order here explicitly complies with 21 HIPAA. So how could it be preempted if it 22 complies with HIPAA?</p> <p>23 The impact on the constitutional right to 24 privacy has to be viewed in light of what the</p> <p style="text-align: right;">120</p>



<p>1 right to privacy is. There's no physician-patient 2 privilege, and all relevant information is not 3 protected by the right to privacy.</p> <p>4 As far as alternatives, if you look at 5 using an authorization, I can tell you that my 6 office issues somewhere in the range of 5,000 7 record requests in the context that they use. So 8 there would be no way that the court could look 9 through 5,000 specific recommendations to say is 10 there a time, is there a scope, that type of 11 thing. It's properly addressed with a subpoena 12 that is objected to if there is some improper 13 request. The time and scope limitations would be 14 very difficult because sometimes a permanent back 15 injury from 25 years ago is still relevant now. 16 Sometimes if you have a foot claim, it can be 17 explained by a back injury. And sometimes a 18 permanent injury from 40 years ago explains why 19 you don't have a normal life now. So time and 20 scope really has to be addressed on a specific 21 basis.</p> <p>22 Last thing, I just want to say I believe 23 the proposal is a viable option as written. If 24 not recommended as written, I suggest that the</p> <p style="text-align: right;">121</p>	<p>1 paragraph to have it match the HIPAA protective 2 order, or HIPAA qualified protective order 3 definition, it's just to limit the use to the 4 parties and their agents just to something that's 5 relevant to this litigation, just like the 6 definition of the HIPAA QPO, again, just for the 7 parties and their agents.</p> <p>8 And additional points made today to make 9 clear that the mental health records need a 10 specific order in addition to this one or to state 11 that this is explicitly bound by Rule 201 and the 12 other Illinois Supreme Court Rules related to 13 discovery.</p> <p>14 This framework is good. It could be 15 tweaked, if you believe, in that manner; it's 16 viable as it is. But really, it's something that 17 should be looking at tweaks rather than a complete 18 overhaul. Because if you were to take away what 19 the insurance companies could do with that, again, 20 that is only for insurance companies to comply 21 with laws and rules and regulations that apply to 22 them. Those are the only uses allowed by the 23 order. They can't keep them for any other use. 24 So what we take away, we can say they</p> <p style="text-align: right;">123</p>
<p>1 Committee consider a few alternatives, or an 2 alternative version with just slight 3 modifications. And I'll address those very 4 briefly.</p> <p>5 The first I would suggest is a title 6 change to a HIPAA Court Order because it's not a 7 qualified protective order under HIPAA. It 8 doesn't meet that definition. It is a HIPAA court 9 order.</p> <p>10 The second thing I would say is to amend 11 perhaps the language in Rule 18 per the order to 12 require compliance with satisfactory assurance. 13 So you could say something, for example, of a 14 provider shouldn't provide these until ten days 15 have elapsed and there's been no objection or no 16 notice of objection. And if there is an 17 objection, they shouldn't provide these until the 18 objection has been ruled upon and addressed. That 19 would -- and require notice to any patient in 20 writing if their records are going to potentially 21 be obtained.</p> <p>22 And finally, just as to paragraph 2(c) of 23 the order, "for the use by the parties and their 24 agents," I think you can amend that specific</p> <p style="text-align: right;">122</p>	<p>1 don't have to comply with the laws related to 2 record retention or something like that. That 3 wouldn't be proper. And again, I think it's 4 tailored appropriately for the right to privacy.</p> <p>5 If there are any questions, I'll address 6 them. If not, thank you again.</p> <p>7 VICE CHAIR ROMANUCCI: Very, very quickly. 8 You talked about subpoenas. Do you feel that 9 there's any conflict in the "any and all" language 10 that's used in subpoenas with the qualified 11 protective order? Is there a conflict?</p> <p>12 MR. GROSSI: I certainly see the concerns that 13 any and all records could be subject to be 14 obtained. But again, the relevance and the 15 reasonableness requirements in 201 on a 16 case-by-case basis are appropriate to address 17 that. If it's an OB-GYN, any and all may not, 18 depending on the context of it, be appropriate. 19 If it's an orthopedic doctor, it may. The trouble 20 is the insurer or the defense attorney doesn't 21 know what's in the records until we get them. We 22 have no idea. Family doctor records go back 23 20 years. You don't know what could possibly be 24 in there until we see those records. So it's very</p> <p style="text-align: right;">124</p>



<p>1 difficult to try and speculate as to what could or 2 might be in there, especially because the 3 frequency with which some of these things are not 4 reported, visits are not reported, conditions are 5 not reported. It's far too regular to just 6 wholesale accept some kind of limitation as noted 7 in the Supreme Court Rule as opposed to on a 8 case-by-case basis.</p> <p>9 So I definitely see that concern. I 10 think it has to be addressed on a case-by-case 11 basis because most subpoenas are not objected to. 12 The vast, vast majority are just left alone by 13 plaintiffs and their counsel. It's a rare, rare 14 instance where you get a subpoena objection. I 15 personally have never seen one with an objection 16 to the right to privacy being a reason to not 17 produce those records. I've seen some with 18 relevant time limitations, and I think judges have 19 addressed those appropriately. The Supreme Court 20 in Kunkel and Appellate Court in Shull, both had 21 faith in the judges to address and protect the 22 right to privacy appropriately. I share that same 23 faith.</p> <p>24 Thank you for your time.</p> <p style="text-align: right;">125</p>	<p>1 was two years prior to the effective date of the 2 statute. I did that as Chief Assistant 3 Corporation Counsel for the City of Chicago. I 4 was the person designated to implement HIPAA with 5 regard to all the City's documentation, 6 particularly that in the Law Department. I then 7 became the City's HIPAA privacy officer in my role 8 as Deputy Corporation Counsel when I headed the 9 City's Torts Division. So I like to think I have 10 more than a passing knowledge of the statute and 11 the regulations. I'm certainly not the be-all and 12 end-all with regard to the statute and the 13 regulations, but I think I have a fairly good 14 grasp of the issues involved in the statute.</p> <p>15 So what I'd like to do is address 16 essentially four areas, and this will be 17 relatively quick. First, some legal issues; 18 second, some practical issues; third, issues of 19 scope, which have been addressed by many of the 20 persons here today; and finally, some additional 21 recommendations perhaps for language changes to 22 this order as well as to the QPO.</p> <p>23 Starting first with legal questions, let 24 me be clear. Neither HIPAA nor its regulations in</p> <p style="text-align: right;">127</p>
<p>1 CHAIRMAN ANDERSON: Any other questions? 2 (No response.)</p> <p>3 CHAIRMAN ANDERSON: Thank you.</p> <p>4 Finally, we have Judge Ehrlich. Good 5 afternoon, sir.</p> <p>6 JUDGE EHRLICH: I want to thank the Committee 7 for allowing me to speak today. I specifically 8 asked to speak last today because I wanted the 9 Committee to appreciate in excruciating detail 10 that no good deed goes unpunished.</p> <p>11 VICE CHAIR ROMANUCCI: We agree to that 12 already. And by the way, I don't know that you're 13 so much misaligned. I think that's what happens, 14 and I think we all appreciate that.</p> <p>15 JUDGE EHRLICH: But I would like to, if I 16 could with the Committee's agreement, is I'd like 17 to get through my statement first, what I'd like 18 to present. I know there are probably lots of 19 questions, but I think I will address some of them 20 as I go through my notes. And I'd be happy to 21 take your questions at the end.</p> <p>22 Just by way of introduction, I'd like to 23 make some comments with regard to HIPAA. I 24 started to get involved with HIPAA in 2000, which</p> <p style="text-align: right;">126</p>	<p>1 any way mandates any specific type of language 2 that must be included in the protective order. It 3 simply does not. You can look at the DHS website, 4 which plainly states exactly that fact. So what 5 goes into a court order is up to a particular 6 court. That's important because HIPAA also 7 specifically authorizes the disclosure of 8 protected health information pursuant to subpoena 9 and other forms of court process. That is 10 particularly important, and it's one of the 11 practical issues that I'm going to address as to 12 how we use that here in Cook County. But just so 13 you know, there is nothing that mandates any 14 particular type of language to be contained in the 15 HIPAA order.</p> <p>16 Second legal issue, HIPAA does not 17 address in any way constitutional rights to 18 privacy. As I indicated in my opinion in Shull v. 19 Ellis, there are only ten states that have 20 explicit constitutional rights to privacy. 21 Illinois is one of them. That is one of the 22 reasons we had to take into consideration the 23 Constitution when we addressed the issue here.</p> <p>24 I will let you know just as one side</p> <p style="text-align: right;">128</p>



1 point, the prior HIPAA order that was in effect
2 was under Judge Maddux's auspices, which was
3 something I drafted when I was at the Corporation
4 Counsel's Office, because I drafted that order,
5 sent it to Judge Evans, and Judge Maddux
6 eventually put it into effect. It's only because
7 I didn't have to deal with insurance issues at the
8 Corporation Counsel's Office that I didn't see all
9 the ramifications that a HIPAA order requires in
10 Illinois, the things as I indicated, the insurance
11 issues, the constitutional issues, the HIPAA
12 issues, which is something I only began to
13 appreciate once I became a judge. So again, just
14 to give you a little background on that.
15 But the reason that that's important is
16 because we know that -- and this goes to Professor
17 Beyler's question earlier -- simply filing a
18 lawsuit does not waive one's constitutional right
19 to privacy. That is one of the reasons we had to
20 include a specific waiver in the HIPAA order so
21 that we can get around that hurdle that's imposed
22 by the Constitution.
23 I would just also make a note with regard
24 to some of the other opinions from County judges

129

1 as well as Judge Hoffman's proposed HIPAA order
2 that he attached to one of his opinions, one of
3 the fundamental problems with those opinions is
4 they fail to distinguish between what is protected
5 health information and what are medical records.
6 They seem to conflate those two things. And they
7 are plainly not.
8 Protected health information is
9 explicitly defined in the statutes and regulations.
10 It is the data that is contained within the
11 records, whether it's medical bills, medical
12 records, employment records, any other sort of
13 information that contains any one of the 19 personal
14 identifiers that HIPAA lists as being information
15 that is subject to protection under the statute
16 and regulations.
17 For such a fundamental issue to be
18 misunderstood is critical to what we have tried to
19 achieve with the HIPAA order here, because we've
20 distinguished between the types of information
21 that are contained in medical records, bills,
22 those sorts of things, from the medical records
23 and the documents themselves. That goes also to
24 the tension issue that Mr. Hebeisen spoke about,

130

1 what insurance companies are required to do under
2 the Insurance Code and regulations.
3 Second area, practical issues. I do want
4 to let the Committee know that the drafting of
5 this did take more than two years. With regard to
6 a statement by Mr. Hebeisen, I have to disagree
7 with him. The Illinois Trial Lawyers Association
8 was involved because in fact the president of it
9 was sitting at the table when we went through the
10 final iteration of the language, as was Mr. Pfaff,
11 as was Mr. Kirchner, as was Hebeisen, Judge
12 Flanagan. Many other persons were sitting at the
13 table as we went through this. So this was not a
14 surprise in terms of what the final language was
15 to anyone.
16 But with regard to what we do in the
17 Circuit Court of Cook County, I sit in the Law
18 Division's Motion Section. There are ten judges
19 that sit in that section. We hear all
20 nonstatutory tort cases, personal injury, wrongful
21 death, Survivor Act, the typical type of personal
22 injury cases we all know about. As of last week
23 when Justice's statistics came out, there are
24 14,157 cases divided between ten judges. That

131

1 means that we have an average of over 1400 cases
2 per judge just on the 22nd floor of the Motion
3 Section. To accept the statements made by some of
4 the people here today with regard to unique HIPAA
5 orders with regard to each of those cases, it is
6 absolutely impossible. It would drive our dockets
7 to a screaming halt. We would be spending most of
8 our time dealing with those sorts of orders. It
9 simply can't be done. That is why we tried to
10 achieve a broader HIPAA order that can be applied
11 in a variety of circumstances depending on the
12 factual specifics of the case, the type of case,
13 the type of information that is necessary for that
14 case.
15 I will say this as well. Because of the
16 use of the HIPAA order, our numbers from -- our
17 disposition date numbers have actually been driven
18 down in the Motion Section. We have been able to
19 get rid of cases earlier because by having the
20 HIPAA order requiring records to be produced on a
21 more rapid basis. We get through the written
22 discovery sooner, we get to oral discovery sooner,
23 we get that done sooner, the case gets resolved
24 sooner. So it has actually had a statistical

132



1 effect and increased the efficiency we have in the
2 Motion Section. And why those numbers are
3 important is not to indicate that we are
4 hardworking judges in the Motion Section, my flag
5 to wave for the judges in that section, but the
6 takeaway is if the HIPAA order that we have works
7 under the extreme circumstances that we have in
8 Cook County, then plainly it would work in
9 counties where they have far fewer cases in which
10 you don't have this volume and the need to address
11 specific issues with regard to discovery.
12 Third, I'd like to address exactly how we
13 deal with, or how a HIPAA order is used in Cook
14 County. Once a HIPAA order is entered by the
15 judge, it is attached to all subpoenas that are
16 issued for records. As I indicated before, that
17 is permitted under HIPAA to get the release
18 pursuant to the subpoena. The subpoena is the
19 document that drives the discovery and the release
20 of protected health information. The fact that we
21 don't have objections, I will just as a side note,
22 since this went into effect year and a half ago, I
23 have gotten three motions -- three motions, and
24 three motions only -- from plaintiff's attorneys

133

1 objecting to the scope of the release of documents
2 pursuant to a subpoena. This in no way changes
3 the requirements for the parties to conduct
4 discussions under Rule 201(k) and to agree to the
5 scope of discovery, and it in no way affects
6 Illinois Supreme Court Rule 201(c), which
7 authorizes the court to control discovery to
8 prevent abuse from going on in the litigation. So
9 to the extent that persons are complaining that
10 this is too broad, it certainly hasn't come up
11 either in my courtroom or, I can tell you on
12 behalf of the other judges on the 22nd floor, it
13 simply is raised almost -- as I said, three in my
14 courtroom. I think Judge Flanagan told me she had
15 two last year. So it simply is not the issue that
16 people testifying today have made it out to be.
17 The suggestion that we go back to using
18 authorizations, Mr. Pfaff addressed that and some
19 of the other people today addressed that as well.
20 That would be an enormous mistake. When you deal
21 with authorizations, you take the case, you take
22 the authorization out of the court purview. I
23 have no control over an authorization that is
24 signed by a plaintiff if it is a form from the

134

1 University of Chicago Hospital or Northwestern.
2 If it's coming from a court order that has the
3 subpoena attached to it, I have the authority to
4 require University of Chicago to produce those
5 records or Northwestern or any other provider to
6 give me those records.
7 The second problem with authorizations is
8 every provider has its own form. So plaintiff has
9 to file -- has to sign every single form for every
10 single provider that it has. And I can tell you
11 in complex personal injury cases, medical
12 malpractice cases, sometimes we get 15, 20, up to
13 30 different providers in those cases. Plaintiff
14 would have to sign all of them. The reason that's
15 important is that once documents are produced in
16 discovery, oftentimes it's seen that there is past
17 treatment that is somehow relevant to the current
18 treatment. We don't have to go back and get
19 another authorization for that other doctor whose
20 records appear to be somehow relevant to the case.
21 We can use the same HIPAA order that's already
22 been ordered and attach it to a new subpoena to
23 that physician, who then can provide those
24 records.

135

1 Scope issues. This was particularly
2 indicated in some of the written submissions but
3 also made today orally. Again I will note that if
4 there have been objections, they have not been
5 presented to courts. It's simply not the practice
6 we have on the 22nd floor. We have just not
7 gotten any complaints in the system.
8 Second, there's an enormous
9 misunderstanding in terms of what HIPAA covers.
10 HIPAA is the Health Insurance Portability and
11 Accountability Act. It is not the workers'
12 compensation portability and accountability act.
13 It is not errors and omissions. It is not any
14 other type of insurance. It's health insurance.
15 That's why property and casualty insurers are
16 explicitly exempt from HIPAA. Nothing that you've
17 heard today affects property and casualty
18 insurers. They're simply not subject to HIPAA
19 regulations. And that, again, is a
20 misunderstanding that people don't seem to
21 apprehend. That's why we had to include in the
22 HIPAA order some aspect of the Insurance Code, the
23 insurance regulations, because it's those that are
24 driving that property and casualty insurers must

136



1 retain, not HIPAA. So that's why those explicit
2 statements are in there as to what the documents
3 may be used for.
4 The reason we included that language, and
5 I heard this objection to it from Mr. Pfaff -- and
6 I have a great respect for Mr. Pfaff -- the reason
7 we included that is because without having some
8 specific explanation of what those documents may
9 be used for, there's not a knowing and explicit
10 waiver by the plaintiff over their medical
11 records. So that's the reason we included that.
12 Fourth issue regarding scope, any sort of
13 production or any disclosure of protected health
14 information in litigation is going to be overly
15 broad. The reason is if you go to a doctor for a
16 broken leg as a result of a motor vehicle
17 collision, the fact that you are taking
18 antidepressants or beta blockers or some other
19 sort of medications will already be automatically
20 included in the records you get. That's because
21 medical providers do not segregate medical records
22 based upon what we need them for for purposes of
23 litigation. You get what you get. But that's
24 something, again, to be discussed by the parties

137

1 ahead of time. Absolutely I agree if you're going
2 in for a broken leg, there's no reason whatsoever
3 for OB-GYN records to be produced unless there's a
4 claim of fetal harm of some sort. But that's an
5 issue for a 201(k) conference for the parties.
6 They're the ones who can direct why they want
7 them, drive the type of discovery that's going on,
8 not the courts coming in and interfering on the
9 front end. If they have a problem, they come and
10 talk to us about it.
11 Finally, the scope issue also is, as
12 Mr. Hebeisen told you before, many times, parties
13 submit their medical records to a property and
14 casualty insurer in hopes of settling a claim
15 prior to filing a suit. So this is even before
16 someone is a plaintiff. It's just a claimant.
17 Well, those records are, again, not subject to
18 HIPAA whatsoever, because they're not subject
19 to -- they're not being brought as part of the
20 litigation, it's simply brought as part of the
21 claims process. So again, there's no control of
22 that.
23 Let me finally get to the
24 recommendations. I have three which I think might

138

1 be of use to the Committee in terms of where we go
2 with this moving forward.
3 First, I would add the word "limited" in
4 two places to the proposed Rule 218(b), first in
5 the title of the Rule itself. So it would read
6 "Limited Release of Medical Information." And
7 secondly, in the text of 218(b) so it would read
8 "executed limited waiver." To the extent that
9 people think this is somehow an overall, broad
10 waiver, which it is not, even though the order
11 doesn't say that, this would provide some
12 additional sort of protection or explanation in
13 terms of what we mean is the scope of the HIPAA
14 order itself.
15 VICE CHAIR ROMANUCCI: I'm sorry, your Honor.
16 Could you repeat that last part?
17 JUDGE EHRLICH: Sure. Two things. First, in
18 the title itself, "Limited Release of Medical
19 Information," because the words "release of
20 medical information" are already there, so simply
21 adding the word "limited" before that.
22 And secondly, in the text itself, I think
23 it's the bottom of the Rule, would be "an executed
24 limited waiver." Again, the word "limited" is the

139

1 new word to be inserted. That's one recommendation.
2 The second recommendation is to add a
3 paragraph to the protective order itself that --
4 language to the effect that -- and again, I'm just
5 suggesting this -- "The scope of disclosure of
6 protected health information pursuant to this
7 order is limited by the subpoenas for release of
8 protected health information that accompany this
9 order."
10 That goes back to, again, how we deal
11 with this in Cook County. Subpoenas are attached
12 to the court order, the providers see that there
13 is an attached court order requiring them to
14 produce those records, and it is defined by the
15 subpoena that is attached thereto. So again, the
16 parties will have discussed what they want to have
17 produced. They will agree to subpoena for the
18 release of those documents. They will attach that
19 to have them shipped off. And again, that would
20 make clear by this provision that indicates the
21 scope of disclosure of the protected health
22 information is controlled by the subpoena. Again,
23 HIPAA provides for the release of records pursuant
24 to subpoena, so that's certainly within the scope

140



1 of HIPAA.
2 Third recommendation, add a paragraph to
3 the qualified protective order again stating
4 language to this effect: "Nothing in this QPO, or
5 qualified protective order, limits the rights of
6 any party to challenge the scope of the subpoenas
7 issued in conjunction with this order or the
8 court's authority to prevent discovery abuse
9 pursuant to Illinois Supreme Court Rule 201(c)."
10 That addresses the issue which, again, should have
11 been obvious to everyone. It doesn't seem to have
12 been. Nothing in this court order, or nothing in
13 the QPO that we currently use affects in any way
14 their duties under 201(k) or the Court's authority
15 under 201(c). But if we need to make it explicit,
16 let's make it explicit in that paragraph.
17 Those are my comments. If you have any
18 questions, I would be happy to take them.
19 MR. HANSEN: I have a background, kind of; I
20 want to get your fundamental opinion on this. I'm
21 a downstate civil litigator, as is Mr. Tucker
22 here. We cover central and southern Illinois.
23 And as you said, what goes into court orders on
24 this issue has been up to a particular court.

141

1 it sounds like based on what you're telling me,
2 you've kind of solved your problem in Cook County.
3 You said since this has been entered, you've had
4 three motions since this HIPAA issue has been
5 addressed by your court.
6 But downstate, we don't seem to have as
7 many problems as, obviously, motion practice,
8 et cetera. For the most part, we usually come to
9 an agreement. The amount of times I've had to
10 litigate this issue I can tell you has been few
11 and far between.
12 JUDGE EHRLICH: would you like to come and
13 practice here more often?
14 MR. HANSEN: So my question is this. Why
15 should we enact a rule that will imposes this
16 order on everybody else, and why would we not just
17 leave it to the courts to say, "You solved your
18 problem in Cook County, it appears. If Lake has a
19 different opinion, et cetera, let them hammer out
20 what they want in their order"?
21 JUDGE EHRLICH: I think there needs to be
22 consistency in the state. I think Mr. Amundsen
23 addressed this as well. There needs to be a
24 consistent order for -- and Mr. Kirchner

142

1 identified it as well with regard to transfer of
2 cases. This is not an issue that should be
3 subject to the discretion of Circuit Court judges,
4 at least in the sense of creating their own orders
5 for their own specific courts. This is something
6 that goes to the use of records, or the use of
7 protected health information regardless of the
8 county, regardless of the case. It's, I think, a
9 burden that does not need to be imposed on either
10 parties, plaintiffs and defendants, or on the
11 insurance industry, in terms of having to adjust
12 to every particular courtroom. I mean, if that
13 were the case, there would be ten separate orders
14 on my floor relating to how cases are handled,
15 whether it's before me, Judge Flanagan, or another
16 judge.
17 If it works here, it's going to work in
18 your courtrooms downstate because it will be the
19 same thing. And essentially what it's doing is
20 simply putting in text what you as practitioners
21 already do in central and southern Illinois. You
22 agree with all this in 201. That's what this
23 order is attempting to do as well here. So I
24 think for consistency's sake, it's something we do

143

1 need statewide.
2 PROFESSOR BEYLER: Do you have any advice on
3 how we deal with the fact that the Lake County
4 court thinks HIPAA preempts this?
5 JUDGE EHRLICH: With regard to Judge Hoffman's
6 recommendation, his attachment, he fails to
7 address -- This is as a constitutional issue. And
8 he doesn't make any indication there was a
9 necessary waiver of constitutional rights. I
10 don't know how one gets around that fact since
11 simply filing a lawsuit does not waive your
12 constitutional right to privacy. I think there
13 has to be some sort of waiver included in the
14 order. I think that's a major shortcoming to his
15 recommendation.
16 I think with regard to Judge Ortiz's
17 opinion, I think as I stated before, it improperly
18 conflates the issues of protected health
19 information and medical records and, again, also
20 just misses the boat in terms of property and
21 casualty insurers. They are simply exempt under
22 HIPAA 100 percent. And that's, again, why we
23 tried to, in doing this language, deal with those
24 sorts of three buckets of law: The Insurance

144



1 Code, the Constitution, and HIPAA.
2 And yes, it is a long order. It is a
3 relatively complex order. But that's what has to
4 be addressed simply by the nature of the law in
5 this case, at least as I see it. And as I said, I
6 think the other parties interested who came to the
7 table to work on this agreed.

8 CHAIRMAN ANDERSON: Thank you very much.

9 JUDGE EHRLICH: If you have any other
10 questions, I have very large files. I'll be happy
11 to share any other information I have, both from
12 the State of Hawaii, as I cited, as well as the
13 two other cases. Feel free to give me a call.

14 CHAIRMAN ANDERSON: Thank you.

15 All right. We're adjourned from our
16 public hearing.

17 (Whereupon, the Public Hearing
18 adjourned at 1:26 p.m.)
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145

1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF C O O K)
4

5 I, TRACY JONES, being first duly sworn, on
6 oath says that she is a court reporter doing
7 business in the City of Chicago; and that she
8 reported in shorthand the proceedings of said
9 Public Hearing, and that the foregoing is a true
10 and correct transcript of her shorthand notes so
11 taken as aforesaid, and contains the proceedings
12 given at said Public Hearing.

Tracy Jones

13
14
15 TRACY JONES, CSR, RPR, CLR
16 LIC. NO. 084-004553
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146



\$				7		
\$50,000 116:6	1970 93:6	25,000 116:7		70 18:11 30:10	acknowledge 11:4 13:8	advance 3:5
\$7,000 114:3	1984 34:3	26 30:3			acknowledging 12:8	advantage 28:24
(1992 18:10	28-year-old 63:13		8	act 56:9 71:22 75:15 76:1 85:15 112:16 131:21 136:11,12	adversarial 93:4
(B) 59:12	1995 92:24	280 74:1			action 74:5	adverse 98:20
1	1996 92:24	282 74:3		801 45:8	Acts 72:8	advise 144:2
	19th 59:4,5 60:22 61:9	29,000 58:16		801(d) 31:15 32:1	add 9:1 10:1 11:21 22:6 31:6 89:21 105:16 139:3 140:2 141:2	advise 67:23 74:20
	1:26 145:18	2nd 78:16		9	addition 11:12 12:11,17 18:15	advocacy 14:7
1 35:22 36:7,14	2	3		9 74:3	adding 10:19,21 30:12 31:4 139:21	Advocate 36:13
100 144:22	2 13:17,19	3 62:9 65:2		90 41:9	added 11:12 12:11,17 18:15	affect 20:18
10:31 3:1	2(c) 122:22	3,000 116:7		90s 27:1	addition 9:5 12:1 14:6 23:9 91:5 123:10	affected 20:22 28:7
11 60:2 97:23	2-1002 51:10	30 4:6 18:6 32:13 111:12 135:13		919.30 112:3	additional 8:16,18,19 10:1,21 11:4,9,15,21 12:9,12 21:23 22:16 62:15 64:23 123:8 127:20 139:12	affects 19:10 134:5 136:17 141:13
12 71:21	2-1003 53:16	30-day 5:22 6:2		919.40 112:7	address 5:9 10:13 12:19,23 17:16,21 37:1 51:21 58:12 69:22 70:4 83:3 91:12 92:12 94:5 96:15 97:13,19 99:18 106:20,24 107:3 108:3,9 109:1 111:23 112:1 116:24 119:21 122:3 124:5, 16 125:21 126:19 127:15 128:11,17 133:10,12 144:7	affirmed 19:8
12th 24:11	20 15:7,10 18:14 30:11 43:7 124:23 135:12	306 4:1 5:8,12,15 6:16		95 41:10	addressed 58:13 92:12,22 103:20 108:7 110:1 121:11,20 122:18 125:10,19 127:19 128:23 134:18,19 142:5,23 145:4	afraid 77:14,15
13-year-old 79:19 81:8	200 19:21	307 6:13		99 36:6 95:12 108:4	agents 122:24 123:4,7	afternoon 42:18 89:11 91:11 126:5
13th 24:11	2000 126:24	307(d) 6:6		A	agency 75:20 109:14	agency 75:20 109:14
14 8:14 24:8 63:16 74:4	2000s 28:14	308 4:1 5:8,13,17 6:16		a.m. 3:1	agenda 58:11	agents 122:24 123:4,7
14,157 131:24	2003 21:4	315 4:13,14		abandon 49:22	agree 19:14 37:18 57:21 69:14 70:8,11,16 71:1,15 73:17,18 78:4 83:4 105:9,15 126:11 134:4 138:1 140:17 143:22	agree 19:14 37:18 57:21 69:14 70:8,11,16 71:1,15 73:17,18 78:4 83:4 105:9,15 126:11 134:4 138:1 140:17 143:22
1400 132:1	2006 74:2	315(d) 4:13,18 7:14 8:8		abandoned 106:11	agreed 48:2 70:13 98:8 145:7	agreeing 94:16
14th 24:11	2007 74:4	315(h) 4:19 8:10,23		ability 12:19,23 17:22 20:15,17	agreement 37:15 65:1 71:3 126:16 142:9	agreement 37:15 65:1 71:3 126:16 142:9
15 135:12	201 95:15 107:2 123:11 124:15 143:22	342 5:4 9:17 10:11 17:24		absence 38:11	ahead 108:3,17 138:1	airbags 63:14
15th 97:16	201(a) 88:21	345 4:7 7:11 17:20		absolutely 22:12 38:8 67:5 103:1 132:6 138:1	alike 89:4	alcohol 85:10
16-08 3:12,24 5:7 17:11	201(c) 83:24 84:7,14 88:15	35 51:14		abstract 111:10	alive 84:15	alleged 89:19,24 103:17
160.204 75:14	201(k) 52:23 134:4 138:5 141:14	38 97:1		abuse 36:7 63:22 78:11 84:3,8 95:14 105:24 134:8 141:8	Allen 74:3	allergies 90:12
164.506 74:16	2010 36:14	4		accept 10:24 26:9 39:19 125:6 132:3	allowed 7:12 18:3 47:5 50:5 120:4 123:22	allowing 3:16 4:9 10:3 11:22 28:13 33:23 43:16 70:6 91:12 126:7
164.512 117:16	2011 44:23	40 30:3 121:18		accepted 21:13 38:5 97:8	allude 55:19	alternative 122:2
164.512(e)(1)(i) 62:21	2012 105:20	45 56:10 58:6 74:16 75:14		accepts 15:18 26:10		
164.512(e)(1)(v)(a) 59:12	2013 35:22	5		access 61:18 66:9 69:15		
17-03 29:16 31:9 42:17,22 47:22	206 32:3	5,000 121:6,9		accident 54:12 77:13 98:3 115:6,8		
18 15:10 97:2 111:7 122:11	212 31:12,24 48:20,24 49:10,15,16 50:1,4	500 19:20		accompany 140:8		
18-01 29:16 33:7 34:10,16 35:15 36:4,8 37:2,9 38:9 40:2 51:3 57:15 58:6 77:1 82:12 93:23 95:3 111:3 116:23 117:20 118:8,24 119:18	212(a) 49:17	510 74:1		accomplish 79:11		
18-04 3:13 4:7 6:17 17:11 26:7 29:16 30:8	212(a)(2) 44:22	52-year-old 54:10		accomplishing 61:24		
18-12 3:13 4:12,20 7:14	218 58:8	6		account 55:22		
19 130:13	218(b) 139:4,7	6 71:20 96:17 111:22		accountability 136:11,12		
19-02 3:13 5:2 9:14,16 17:11 22:20	218(d) 33:16			accurate 16:22 43:20 46:10		
	22nd 132:2 134:12 136:6			accurately 43:4		
	25 77:8 121:15			achieve 130:19 132:10		



<p>alternatives 119:4 121:4 122:1</p> <p>amend 24:17 122:10,24</p> <p>amended 21:8 63:8</p> <p>amending 12:17,21 58:8,15</p> <p>amendment 4:16 7:16,21 8:7 10:10 17:19 59:21 61:11</p> <p>amicus 4:8,9 6:18,21,24 7:4, 12 11:1,7,18 14:14, 15 15:23 16:13,18 17:2,6,20 18:3 20:16 21:3,6,10,19 26:10, 18 30:2,3,6,7 31:3 50:10,13,18</p> <p>amount 7:23 38:18 142:9</p> <p>Amundsen 91:10,11 99:7 105:1, 6,15 106:19,23 109:6 110:5 142:22</p> <p>analog 6:4 25:10</p> <p>analysis 12:8,11 33:13 118:23 120:12</p> <p>analyze 18:12</p> <p>Anderson 3:2 16:9 17:7,9,13 23:23 25:1,5 29:9, 13,21 42:3,9,12,15 47:16,18 50:7,20,24 55:24 57:11,13 66:11 71:4,7 76:23 82:11 89:8 91:7,9 104:24 110:4,7 120:7 126:1,3 145:8, 14</p> <p>anecdotal 26:15</p> <p>answers 15:3 43:11,21 107:9</p> <p>antidepressants 137:18</p> <p>apologize 34:23 47:19 120:10</p> <p>App 74:1</p> <p>appeal 4:2,10,15 6:19 7:1, 13,17 8:1,3,9 10:19 15:3,4,19,24 16:14 17:4 22:8 68:24 92:14</p> <p>appeals 5:15,16,20 6:7 18:23</p> <p>appeared 58:4</p> <p>appears 142:18</p> <p>appellant 5:4 8:14,17 9:4,19, 24 10:4,6 28:17</p> <p>appellant's 9:20</p> <p>appellate 3:11,18 4:2,4 5:14, 18,19,22 6:9,22 7:18,23 8:4 10:5 13:11,14 16:19 18:9, 23,24 19:4,6 20:9 22:9 23:15 24:6 29:2 30:18 67:1,9,22 68:7 104:15 125:20</p>	<p>appellee 8:15 9:2,6,20 23:2</p> <p>appellee's 9:2,4,22</p> <p>appendices 9:18 17:23 23:22</p> <p>appendix 5:5 9:19,21 10:2,8 22:21 23:4,12 24:1, 9,15,16,19,23 25:3, 12 28:16,20 29:6</p> <p>apples 40:23</p> <p>applicable 8:22 118:22</p> <p>applied 104:11 132:10</p> <p>applies 99:23</p> <p>apply 45:16,17 100:6 102:19 123:21</p> <p>apprehend 136:21</p> <p>approach 61:21</p> <p>appropriately 108:8 109:8 113:18, 20 114:2 124:4 125:19,22</p> <p>approved 72:3</p> <p>area 18:7 40:6 97:2,6 107:11 131:3</p> <p>areas 7:8 8:6 11:12 71:11 127:16</p> <p>argued 53:17 59:2</p> <p>arguing 101:22 105:3</p> <p>argument 30:21 86:3</p> <p>arguments 4:21</p> <p>arise 6:2 9:12 23:15</p> <p>art 56:23</p> <p>article 25:16 71:14</p> <p>articulate 45:11</p> <p>asks 31:1 36:19 90:4</p> <p>aspect 6:13 80:19 136:22</p> <p>assaulted 63:17</p> <p>assess 44:3 86:9</p> <p>assessment 43:20</p> <p>assist 14:3</p> <p>Assistant 127:2</p> <p>Associates 110:11</p> <p>association 3:11,18 17:19 18:10 31:2 37:8,14,22 42:17,21 47:21 51:3 58:16 131:7</p> <p>assume 15:19,21 45:16 67:11 73:15</p> <p>assuming 67:6</p>	<p>assurance 117:8,9,12 118:1,3, 6,13 120:16 122:12</p> <p>assured 64:10</p> <p>atrocious 85:3</p> <p>attach 23:11 24:13 74:6 135:22 140:18</p> <p>attached 23:4 25:11 68:22 70:1 130:2 133:15 135:3 140:11,13,15</p> <p>attachment 144:6</p> <p>attempt 102:19</p> <p>attempting 143:23</p> <p>attention 7:10 9:23 33:11</p> <p>attorney 3:8 57:20 59:2 71:11 77:10 82:16 84:22 86:23 97:1 101:22 110:11 115:10 124:20</p> <p>attorney-client 80:2</p> <p>attorneys 50:17 90:22 102:24 103:4 114:14 133:24</p> <p>attribute 18:18 19:2</p> <p>audits 86:6</p> <p>auspices 129:2</p> <p>authored 30:3,5</p> <p>authority 135:3 141:8,14</p> <p>authorization 34:9,14 35:9,18 36:17,20,22 39:8,18, 19 41:21 53:21 54:7 62:14,16 63:1,2 65:3,4 74:7,12,13, 17,22 101:1 107:7, 13,20 108:18,20 111:6 117:16,23 118:15 120:14,15 121:5 134:22,23 135:19</p> <p>authorizations 34:6,11 41:15 74:15 80:8 82:2 134:18,21 135:7</p> <p>authorize 35:16,20 39:21 62:19 64:15</p> <p>authorized 30:22 62:24 64:19 70:10 74:14 95:22</p> <p>authorizes 59:23 119:24 128:7 134:7</p> <p>automatically 137:19</p> <p>automobile 54:12 77:13 115:7</p> <p>average 40:4 132:1</p> <p>avoid 42:1</p> <p>aware 29:2 30:17 52:9 68:7,18 99:7,9 108:24 109:6,21 110:2</p>	<p style="text-align: center;">B</p> <p>back 5:7 34:4 41:19 47:9 54:11 55:19 56:11, 21 85:7 86:13 92:24 121:14,17 124:22 134:17 135:18 140:10</p> <p>back-of-the-napkin 15:16</p> <p>background 129:14 141:19</p> <p>bad 41:16 96:13</p> <p>badly 46:22</p> <p>balance 26:13 81:11</p> <p>bar 7:6,19 11:9,23 13:5 14:2,4 17:5,18 18:8 19:4 29:2 37:8,14,22 44:16 57:7 58:16 61:20 79:23 80:21 93:17</p> <p>bar's 6:22</p> <p>bargaining 113:21</p> <p>based 116:7 137:22 142:1</p> <p>bases 60:2</p> <p>basic 40:6</p> <p>basically 42:23 46:12 48:1 49:16 50:1 114:10</p> <p>basis 61:3 108:12 121:21 124:16 125:8,11 132:21</p> <p>be-all 127:11</p> <p>bear 74:12</p> <p>began 129:12</p> <p>behalf 3:17 17:18 47:24 59:4 91:14 134:12</p> <p>behold 41:24</p> <p>belief 11:8</p> <p>benefit 11:2,13 12:11</p> <p>beta 137:18</p> <p>Beyler 14:10 15:5,8 19:18 26:3 40:5 66:13 67:6,15 72:5 87:22 97:20 99:3 113:5 114:7 144:2</p> <p>Beyler's 92:15 129:17</p> <p>big 42:2 46:21 61:13</p> <p>biggest 97:6</p> <p>bill 71:18 112:10</p> <p>bills 112:8,15,16,18 113:6,15,23 114:3,5 116:1,6,14 130:11, 21</p>	<p>birth 70:18</p> <p>bit 4:24 5:10 10:16 12:4 22:3 26:2 54:2 58:7 119:21</p> <p>blah 47:8 85:15,16</p> <p>blank 34:5 35:18 41:15</p> <p>blanket 57:9 62:11 63:1 93:24 96:3</p> <p>blankets 62:24</p> <p>blockers 137:18</p> <p>boat 144:20</p> <p>bodily 65:23</p> <p>body 37:1 89:1 107:11</p> <p>book 84:1</p> <p>bothered 66:15</p> <p>bottom 98:19 102:17 103:21 139:23</p> <p>bound 123:11</p> <p>Brady 3:8,9</p> <p>breadth 46:10</p> <p>briefing 4:21 6:12 7:3 8:12 9:11 12:13 15:24 16:7 68:9</p> <p>briefly 9:14 99:19 110:10 117:3 122:4</p> <p>briefs 4:8,9 6:18,21,24 7:4, 12 9:18 11:7 14:16 17:21,23 18:3 21:3, 10 26:11,18 27:8 28:14 30:4,5,6 68:22</p> <p>bring 36:2 41:13 77:17,20 91:17</p> <p>bringing 33:10 78:19</p> <p>brings 6:17 93:3</p> <p>broad 74:8 88:22 105:4 134:10 137:15 139:9</p> <p>broader 58:1 107:17 132:10</p> <p>broadly 114:6</p> <p>broken 137:16 138:2</p> <p>brought 78:10 108:7 115:1,3 138:19,20</p> <p>Bruce 29:14,24 53:3 110:11</p> <p>brutal 78:15</p> <p>buckets 144:24</p> <p>burden 11:3,14 12:17 14:8 18:2,5 19:11 22:3,4 28:11 30:13 31:4,7 45:21 143:9</p>	<p style="text-align: center;">C</p> <p>call 3:1 41:1 80:21 85:21 145:13</p> <p>called 73:23 74:3</p> <p>camera 82:6</p> <p>candid 43:2,18</p> <p>capacity 110:15</p> <p>caption 94:3 105:11</p> <p>car 77:15 79:19</p> <p>care 106:4 113:10</p> <p>case 10:24 17:1,5 19:5 21:12 23:19 26:21 27:7 30:14 35:2 40:3 41:5 46:2,5,7,9 51:24 53:17 54:12, 15,20 62:1,2 64:1 66:10 67:2 70:14 79:1 80:18 81:7 82:18 83:19 85:6 86:19,20 87:12 89:3 90:18 92:23 93:7,9 94:3,4,21,23 95:2,9 96:6 98:21 99:16 100:14 103:12 104:10 105:9 106:9 109:2,3,5 116:2,5, 12,13,15 132:12,14, 23 134:21 135:20 143:8,13 145:5</p> <p>case-by-case 108:12 124:16 125:8,10</p> <p>caseload 27:5,11</p> <p>cases 6:2 7:8,9 13:22,23 14:6 16:19,24 18:15, 17 19:13,16,24 20:4, 7,11,12 21:9 22:1,4 27:9,23 28:3,9,13 32:7 36:6,7 41:10 46:21 58:24 68:17 69:1 77:13 78:15,19 83:8,11 88:9 89:3,4, 6 95:7 106:12 108:15 110:13 131:20,22,24 132:1, 5,19 133:9 135:11, 12,13 143:2,14 145:13</p> <p>casualty 68:15 72:17 99:13 100:13,16 136:15, 17,24 138:14 144:21</p> <p>catch 44:22 45:8 46:19</p> <p>cause 4:6 5:24 6:1</p> <p>Center 35:21 73:24</p> <p>central 141:22 143:21</p> <p>certified 5:16</p>
---	--	---	--	---	---



<p>certiorari 21:19</p> <p>cervical 63:15 70:20</p> <p>cetera 38:5 49:20 96:22 107:12 142:8,19</p> <p>CFR 56:10 75:14</p> <p>chair 12:2 13:7 25:24 30:1 37:4,13 38:17 39:16 56:1,11,17 124:7 126:11 139:15</p> <p>chaired 30:2</p> <p>Chairman 16:9 17:7,9 23:23 25:1,5 29:9,13,21 42:3,9,12,15 47:16, 18 50:7,20,24 55:24 57:1,13 66:11 71:4, 7 76:23 82:11,14 89:8 91:7,9 104:24 110:4,7 120:7 126:1, 3 145:8,14</p> <p>challenge 51:9 141:6</p> <p>Chamberlain 80:15</p> <p>change 27:4 32:2 33:2 43:24 46:23 49:3 71:16 122:6</p> <p>changed 28:5 47:3</p> <p>chapter 101:15</p> <p>chart 85:8</p> <p>checking 76:9</p> <p>Chicago 17:18 57:20 77:8 97:6 127:3 135:1,4</p> <p>Chief 127:2</p> <p>child 46:22</p> <p>child's 47:1</p> <p>China 76:17</p> <p>choose 46:1</p> <p>Christ 35:20 36:12,13</p> <p>circle 5:7</p> <p>Circuit 18:20 59:4,6 60:22 95:18 131:17 143:3</p> <p>circuit's 59:6 61:9</p> <p>circumstances 9:23 106:6 108:6 132:11 133:7</p> <p>circumvented 102:16</p> <p>citation 67:1 98:6</p> <p>cite 26:6 74:1 115:20</p> <p>cited 145:12</p> <p>citing 67:9</p> <p>City 127:3</p>	<p>City's 127:5,7,9</p> <p>civil 13:18 18:7,11,13,17 27:14,20 28:3 30:10 45:18 53:9 141:21</p> <p>claim 61:3 64:5 77:17,21 86:10 87:10,11 90:19 93:3 112:4,5 113:2,15,17,19 114:8,12,24 115:6, 11,12 116:4,9,11 121:16 138:4,14</p> <p>claimant 138:16</p> <p>claimants 118:18</p> <p>claimed 113:23</p> <p>claiming 80:11</p> <p>claims 73:9 78:10,11 86:18 87:7 106:7 114:18, 24 115:3,17,22 116:20 138:21</p> <p>clarify 8:7 109:1</p> <p>clarifying 4:16 7:15</p> <p>clarity 8:21</p> <p>clear 21:6 27:6 31:15,21 47:11 48:24 61:8 63:8 94:8 123:9 127:24 140:20</p> <p>client 20:18,20 63:12 75:3 87:9 88:10 98:20 99:12 107:9 108:2</p> <p>client's 36:20 46:9 86:23</p> <p>clients 44:17 61:23 77:11, 19 78:1 84:3 88:18 93:18 94:9 96:12</p> <p>clip 32:12</p> <p>clips 32:8</p> <p>close 81:12,14 112:5</p> <p>closed 113:2</p> <p>closet 88:13</p> <p>code 44:24 45:9 53:9 61:2 66:19 68:6 86:4 90:1 92:9 98:10,23 99:1, 11 101:15 102:3,15 103:19 104:22 109:23 112:3,21 114:21,23 115:18 117:16 131:2 136:22 145:1</p> <p>codes 89:20</p> <p>cold 43:5 44:6</p> <p>colleague 94:21</p> <p>collision 137:17</p> <p>combine 45:8</p> <p>combined 85:10</p>	<p>combining 76:13</p> <p>comfortable 81:19</p> <p>commend 53:23</p> <p>comment 3:12 9:14 32:23 36:10 42:17 43:2 44:20 63:4 77:5 81:4 92:20</p> <p>commented 93:14</p> <p>commenters 71:15 74:24 110:21</p> <p>commenting 47:22 51:3 77:1</p> <p>comments 10:20 13:10 33:11 37:7,17 42:4 51:17 55:20 57:21,23 58:5, 6,11,14,23 59:4 64:12 65:11 70:2 72:10 73:17 76:6 79:18 84:14 87:19, 21 88:5 96:6 97:18 111:9 126:23 141:17</p> <p>committee 3:3,20 5:9 7:2 8:2 9:1,15 10:12 16:10, 18 17:14 20:24 30:2, 5,18 35:13 37:1 38:2,3,9,15 50:14 51:8 59:8 66:5 69:2 74:11 76:18 77:5 79:14 83:22 92:17 93:14 110:19 111:1 122:1 126:6,9 131:4 139:1</p> <p>Committee's 126:16</p> <p>common 92:3,4 93:1,21 109:9</p> <p>companies 19:10,11 60:14,23 61:4 66:20 68:15 69:15 76:9 86:2,19 87:15 101:11,12,16 102:20 103:3 104:12,20 109:17 123:19,20 131:1</p> <p>company 60:3,18 68:3 69:22 73:3,12 80:3 84:21 98:1 99:13 103:18 115:4,11,13,14 116:1,6,12</p> <p>compare 26:4,8 120:13</p> <p>compared 27:13</p> <p>compel 35:12</p> <p>compelled 82:16</p> <p>compelling 35:11 119:15</p> <p>compensation 136:12</p> <p>complained 65:23</p> <p>complaining 134:9</p> <p>complaint 74:6</p> <p>complaints 136:7</p> <p>complete 103:6 123:17</p> <p>completely 78:4 94:12,17</p>	<p>completion 6:12</p> <p>complex 135:11 145:3</p> <p>complexity 37:24</p> <p>compliance 89:20 90:1 122:12</p> <p>compliant 97:10</p> <p>complies 100:23 101:2,5 120:20,22</p> <p>comply 74:9 76:20 112:20 113:4 119:4,16,24 120:14,17 123:20 124:1</p> <p>component 4:19 7:15</p> <p>comprehensive 74:12 76:19</p> <p>computer 25:6,23</p> <p>concede 61:2</p> <p>concept 33:7 91:4</p> <p>concern 48:10 57:6 103:12 116:20 125:9</p> <p>concerned 10:17 96:8</p> <p>concerns 36:5 58:17 88:14 106:8,16 107:24 124:12</p> <p>concerted 82:21</p> <p>conclusion 37:23 68:5 89:22 90:18 109:4</p> <p>concurrent 108:19</p> <p>concussion 63:16</p> <p>conditioning 55:9</p> <p>conditions 125:4</p> <p>conduct 100:3,6 109:18 134:3</p> <p>conference 52:24 107:2 138:5</p> <p>conferring 49:1</p> <p>conflate 130:6</p> <p>conflates 144:18</p> <p>conflict 99:23 102:17,18 104:16,18 124:9,11 20:8</p> <p>conflicts 92:10</p> <p>confronted 7:23</p> <p>confusion 7:24</p> <p>Congress 101:9,18</p> <p>conjunct- 108:19</p> <p>conjunction 84:5 141:7</p> <p>connected 98:6</p>	<p>connecting 50:24</p> <p>connection 28:15 50:10</p> <p>consenting 33:23</p> <p>consideration 10:3 13:24 16:24 38:2 128:22</p> <p>consistency 142:22</p> <p>consistency's 143:24</p> <p>consistent 94:17 118:22 142:24</p> <p>constantly 95:8</p> <p>Constitution 71:18 93:6 128:23 129:22 145:1</p> <p>constitutional 28:1 51:9 55:13,16 58:19,20 61:15,17, 19 64:4 71:24 72:1 93:5 99:5 120:23 128:17,20 129:11,18 144:7,9,12</p> <p>constraints 60:5</p> <p>constructive 7:4</p> <p>consulted 52:4</p> <p>contact 78:17 96:4</p> <p>contained 128:14 130:10,21</p> <p>contemplates 74:11</p> <p>contemplation 13:1</p> <p>content 60:5</p> <p>context 49:22 89:2 90:21 96:22 121:7 124:18</p> <p>continue 30:1 63:21 66:1</p> <p>contrast 26:5</p> <p>contravene 102:3</p> <p>contravention 104:5</p> <p>control 64:3 134:7,23 138:21</p> <p>controlled 140:22</p> <p>convenience 25:20</p> <p>conveniens 83:10</p> <p>conversation 77:17 88:17</p> <p>convinced 12:21</p> <p>convincing 20:19</p> <p>Cook 33:20 35:10 38:19 52:2,7,18 59:7,20 60:11 61:10 63:23 64:8,21,23 67:12 71:10 73:18 75:4 83:14 89:16 91:19, 23 95:8,18 100:14 104:9 108:12 110:13 128:12 131:17 133:8,13 140:11 142:2,18</p>	<p>cooperation 79:21</p> <p>copies 29:4 60:10</p> <p>copy 25:21 82:4 84:21</p> <p>core 104:9</p> <p>corporate 83:14</p> <p>Corporation 127:3,8 129:3,8</p> <p>correct 3:14 16:15 27:17 99:7</p> <p>correctly 16:13 77:2</p> <p>counsel 30:20 47:21 48:1,2,3 50:11 80:10 81:1 84:15 86:11 91:18 92:13 96:4,12 107:3, 5,7,8,17,23 108:4 110:12 112:14 116:10 125:13 127:3,8</p> <p>Counsel's 129:4,8</p> <p>counselor's 77:23</p> <p>counsels 50:17 112:11</p> <p>count 4:18</p> <p>counterpart 91:20</p> <p>counties 34:19 38:13 40:24 92:1 133:9</p> <p>counts 4:15</p> <p>county 3:7 33:13,20 35:10 38:12,19 39:2 42:7 52:2,7,18 59:1,3,7, 20 60:11 61:10 63:23,24 64:8,21,24 66:14 67:8,12,20 68:10 71:10 73:18 75:4 83:6,14 89:16 91:19,23 92:14 95:8, 18 97:15 98:14,20, 24 99:16 100:9,14, 18 102:6,22 104:10 108:12 110:13 128:12 129:24 131:17 133:8,14 140:11 142:2,18 143:8 144:3</p> <p>countywide 38:23</p> <p>couple 18:15 23:16 31:9 41:16 65:10,11 82:19 92:21</p> <p>court 3:3 4:3,4,11,13,22 5:3,14,18,19,23 6:10 7:6,9 8:11,13 9:11, 16 10:21,23 11:5,13, 14,19,24 12:9,12,14, 15 13:17,21 14:3,5, 9,23 15:18,21,23 16:20 17:20 18:2,7, 14,18,20,23,24 19:3, 6,9,17,24 20:5,9,10, 14,23 21:6,14,15,21, 24 22:9,10,13,16,19 23:3,8,24 24:7 25:7, 20 26:9,12 28:11 29:3 30:10,15,16 31:1,2,4,7 33:24</p>
--	---	---	--	---	---



34:17 35:4 43:1 49:14 53:10,18 54:23 55:1,3,5,8 58:4 62:18 64:14,15, 16 67:2,8,10,12,22 70:12 73:23 74:2,3, 19 84:5,6,14,20 93:7 94:11 95:2,8,17,18, 21,23 98:7,19,24 99:4,17 100:18 102:6,22 103:21 104:1,3,4,15 105:7 106:3 107:6 108:4,7, 14 109:10 111:21 117:4,22 118:24 119:2,7,9,13,24 120:2,5,13,20 121:8 122:6,8 123:12 125:7,19,20 128:5,6, 9 131:17 134:6,7,22 135:2 140:12,13 141:9,12,23,24 142:5 143:3 144:4	cure 65:8 Curiae 30:2 curing 64:13 current 5:12 13:15 15:1 27:10 45:6 59:7,20 60:11 88:10 135:17 cut 18:22 cutting 80:23	decreased 19:18 deed 126:10 deem 46:14 defect 54:3 55:13 65:8 defend 62:1,2 66:10 defendant 53:5 83:14 115:9 119:10 defendants 51:20 54:13 61:24 66:9 83:15 93:19 143:10 defense 34:4 36:19 39:14 41:5,17 43:8 44:16 47:21 48:1,2 50:11, 17 54:24 65:19 79:22,23 80:10,18, 21 85:21 86:23 89:17 97:1 107:7,17 112:11,13 116:10 124:20 define 56:14 defined 56:5,8,19 112:8 130:9 140:14 definition 120:1,5,15,18 122:8 123:3,6 delivery 90:8,9 delving 58:1 demand 116:5 denial 6:8 deny 11:20 21:12 denying 21:5 dep 48:17,22 86:23 department 67:3 68:11 72:6,9, 11,19,21 73:1,7,11, 16 75:10,16,17,18, 23 102:4 103:13 116:18,22 127:6 depending 124:18 132:11 deployed 63:14 depo 45:19 deportation 75:5 deported 75:3 deposition 31:14 32:9,10,15,22 33:3 43:14 44:18 45:22 46:24 48:6,15, 21 50:3,5 78:21 79:7 86:20 depositions 32:4 43:9,14 46:3 49:3,12,15,17,18,24 Deputy 127:8 describing 41:4 deserves 29:23	designated 127:4 designed 8:7 14:1 destroy 35:6 66:24 90:19 102:24 112:19 destroyed 88:7 109:4 118:21 destroying 118:7 destruction 60:9,13,20 69:7 90:17 101:7 detail 5:1,11 126:9 detailed 112:6,7 114:6 119:18 details 33:8 92:19 determination 43:4 determinations 5:19 determine 4:5 5:14 21:24 104:2 determining 6:5 devil 33:8 DHS 128:3 dictated 103:24 104:1 difference 26:8 53:22 54:6 103:3 115:15 116:16 difficult 15:14 121:14 125:1 difficulties 77:23 digital 25:10 diligence 112:12 direct 104:5 115:6 138:6 directed 88:3 99:20 directing 40:13 119:13 direction 37:19 directly 52:4 109:15 119:11 director 110:13 112:22 disadvantage 113:21 disagree 20:10 33:2 94:20 131:6 disagreed 98:8 disclose 62:11 disclosed 62:20 87:13 disclosing 59:16 disclosure 57:8 62:13,16 93:8 128:7 137:13 140:5, 21 disclosures 52:21 62:21 discovery 31:14 32:15 34:5 45:19,21 49:18,23	54:21 55:15 88:22, 23 96:17 111:18,22 118:10,19 123:13 132:22 133:11,19 134:5,7 135:16 138:7 141:8 discrepancy 38:12 discretion 32:7 46:13 84:7 143:3 discretionary 26:19 27:24 28:1 discussed 17:17 137:24 140:16 discussing 105:4 109:24 discussion 42:13 discussions 134:4 dismissal 53:19,21 dismissed 40:3 disobey 40:17 disposition 132:17 dispute 41:5,11 61:7 dissolution 6:8 distill 86:12 distinction 49:23 53:22 distinguish 130:4 distinguished 130:20 distress 77:21 District 104:15 districts 20:11 divergent 38:1 divided 131:24 Division 127:9 Division's 131:18 divisive 58:8 docket 12:19 13:16 dockets 132:6 doctor 46:23 47:3 52:12 124:19,22 135:19 137:15 doctors 79:3 88:3 107:10 114:13 doctrine 99:22 document 23:4 25:8,16 33:22 55:5 61:19 133:19 documentation 72:17 112:6,7 114:6 127:5 documents 62:4 72:23 130:23 134:1 135:15 137:2, 8 140:18	dollars 116:13 Dorn 110:11 downstate 34:18 45:18 141:21 142:6 143:18 draft 87:21 drafted 33:14 61:11 98:5 129:3,4 drafting 71:14 131:4 drag 12:18 dramatic 28:6 dramatically 28:4 drive 77:15 132:6 138:7 driven 132:17 drives 133:19 driving 136:24 drug 36:16,23 85:9 due 13:3 16:13,14 23:16 24:7 51:15 113:21 dumb 32:8 duties 141:14
	D			E	
damages 116:11,17 Dan 82:12 data 15:15 76:12,13 112:4,5 130:10 database 63:20 databasing 90:16 date 47:8 88:24 97:16 119:12 127:1 132:17 day 20:2 24:11 29:18 34:4 65:19 69:5 86:8 87:8 days 4:6 6:11 8:14 23:16 24:8 122:14 de 26:24 deadline 5:13 17:6 deal 55:18 89:19 96:20 97:7 129:7 133:13 134:20 140:10 144:3,23 dealing 17:22 39:4 73:21 94:23 109:9,19 132:8 deals 17:24 32:3 56:24 dealt 41:3 46:20 death 28:8,9,13 76:15 131:21 decade 52:8 decide 4:5 11:6 23:19 30:14 39:23 66:22 decided 67:12 92:23 99:17 100:19 decides 10:24 deciding 30:13 decision 67:10 68:8 73:18 116:3,7 decisions 27:9 48:8 67:24 73:22 decline 18:16 19:1,2 22:6 decrease 75:9		earlier 63:4 65:11 92:16 109:20 115:24 129:17 132:19 early 27:1 28:14 easier 25:23 111:4 easily 70:21 easy 92:11 Eaton 17:10,12,13 24:4 25:4,14,24 26:14 27:11,16,18,22 28:22 29:10,12,20, 22 Eaton's 30:9 echo 88:19 effect 12:23 19:22 129:1,6 133:1,22 140:4 141:4 effective 32:15,20 55:15 127:1 efficiency 12:5 133:1 efficient 12:4 55:14 efficiently 95:11 97:4 effort 49:22 110:22 efforts 33:9 108:24 110:23			



<p>Ehrlich 33:20 51:16 56:3 79:9 82:20 83:18 84:12 91:22 94:5 98:4 104:14 110:23 126:4,6,15 139:17 142:12,21 144:5 145:9</p> <p>Ehrlich's 33:9</p> <p>elapsed 122:15</p> <p>elect 102:1</p> <p>elected 110:13</p> <p>electronic 37:20 85:8,11</p> <p>electronically 72:13</p> <p>eliminate 106:15</p> <p>elimination 28:8</p> <p>Ellis 82:17 128:19</p> <p>else's 71:23</p> <p>embarrassment 84:3,8</p> <p>emotional 77:21 96:7</p> <p>emotionally 93:15</p> <p>emphasize 42:24</p> <p>empirical 26:3,16</p> <p>employment 130:12</p> <p>enact 142:15</p> <p>end 9:13 15:23 16:2 60:10 61:24 66:24 69:4 73:6 79:18 86:8 126:21 138:9</p> <p>end-all 127:12</p> <p>endorse 92:3</p> <p>ends 53:5</p> <p>enforced 83:20 112:21</p> <p>enhance 20:17</p> <p>enormous 27:14 134:20 136:8</p> <p>ensure 58:22 111:17</p> <p>enter 64:15,22</p> <p>entered 40:24 51:24 54:17 64:11 65:8 81:5 97:16 100:21,24 133:14 142:3</p> <p>entering 104:4</p> <p>enthusiastic 3:19</p> <p>entire 25:6 42:23 94:2</p> <p>entities 62:11 97:12 111:5 119:6</p> <p>entity 53:12,13 60:8 110:18</p>	<p>entry 6:8</p> <p>enumerates 60:2</p> <p>equal 120:19</p> <p>equals 119:3</p> <p>era 92:24</p> <p>errors 136:13</p> <p>essentially 113:12 119:19 127:16 143:19</p> <p>establish 38:3</p> <p>established 103:7</p> <p>estate 19:11</p> <p>esteemed 17:10,15</p> <p>estimate 14:11 15:11,15,17 16:5</p> <p>evaluated 113:15,20</p> <p>evaluating 113:17 114:12</p> <p>evaluation 114:8 116:8,17</p> <p>Evans 129:5</p> <p>event 118:12</p> <p>eventually 129:6</p> <p>everyday 63:11</p> <p>evidence 31:11,15,20 49:23</p> <p>exact 111:17</p> <p>examples 54:9 119:9</p> <p>excellent 30:6</p> <p>exception 4:6 60:16</p> <p>exceptional 38:21</p> <p>exceptions 111:9</p> <p>excluded 4:17 7:20 36:17</p> <p>excludes 36:18</p> <p>excluding 35:22</p> <p>excruciating 126:9</p> <p>executed 139:8,23</p> <p>Executive 51:8</p> <p>exempt 100:16 102:21 136:16 144:21</p> <p>exemption 75:23,24</p> <p>exempts 60:14</p> <p>exercise 61:16 72:1</p> <p>exercising 64:3 84:7</p> <p>exhibit 35:4</p>	<p>existed 65:17</p> <p>existing 23:24 106:14 109:19</p> <p>exists 52:18</p> <p>expand 48:16</p> <p>expect 14:23</p> <p>expectancy 47:3</p> <p>essentially 6:15</p> <p>expediting 5:19</p> <p>expensive 47:15</p> <p>experience 11:10 47:15 52:14 70:14 78:8 97:2</p> <p>experiences 77:7</p> <p>expert 45:19</p> <p>expertise 11:12 114:15,16</p> <p>experts 35:3 45:17,22 46:3 90:22 103:4 114:10 116:9</p> <p>explain 75:11 88:11</p> <p>explained 44:19 63:22 121:17</p> <p>explains 74:16 121:18</p> <p>explanation 26:1 137:8 139:12</p> <p>explicit 101:13 128:20 137:1,9 141:15,16</p> <p>explicitly 9:1 111:22 120:20 123:11 130:9 136:16</p> <p>exposure 37:21 64:2</p> <p>express 110:16</p> <p>expressly 59:23 60:14 62:19, 23 63:8 64:14,19, 70:10 95:24 96:18, 19 100:16 101:18 102:21 119:23</p> <p>extent 48:20 134:9 139:8</p> <p>extra 9:1,3 11:3 82:8,9</p> <p>extreme 133:7</p> <p>extremely 14:21</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 40:19 54:15 86:17 105:10</p> <p>faced 111:24</p> <p>facing 85:23</p> <p>fact 29:3,5 54:23 59:22 61:5 70:1 87:24 94:17 95:16,24 100:13 102:10 105:24 117:16 118:8 120:19 128:4 131:8</p>	<p>133:20 137:17 144:3,10</p> <p>facto 26:24</p> <p>factor 18:19 27:19</p> <p>facts 103:16</p> <p>factual 132:12</p> <p>fail 130:4</p> <p>failed 20:15</p> <p>fails 58:22 144:6</p> <p>fair 7:18 51:19 76:20</p> <p>fairly 68:6 127:13</p> <p>faith 125:21,23</p> <p>fallacy 87:18</p> <p>familiar 7:19 50:13 51:11 71:12</p> <p>Family 124:22</p> <p>fan 62:14</p> <p>far-reaching 7:9</p> <p>Farm 68:17 69:1,10,14 86:19 87:10 91:19 110:12,17</p> <p>Farrel 110:11</p> <p>fatal 51:20</p> <p>father 90:13</p> <p>fault 19:3</p> <p>favorite 83:24</p> <p>fearful 106:10</p> <p>federal 39:5 56:23 58:21 61:12 71:13 75:10, 18,20 76:2 99:23 100:2 117:17 120:4</p> <p>feed 76:10</p> <p>feel 6:13 9:8 22:2 51:17 124:8 145:13</p> <p>feeling 81:19</p> <p>feels 14:4 30:23 57:17</p> <p>fellow 110:21</p> <p>felt 5:24 82:16</p> <p>female 63:13</p> <p>fetal 138:4</p> <p>fewer 18:19,24 19:13 133:9</p> <p>figure 51:19</p> <p>file 5:4 7:24 9:21 11:1,7 14:14 17:22 21:5 22:21 23:24 24:9,12,</p>	<p>13,14,15,16 31:3 64:5 73:9 74:5 87:11 94:10 107:23 135:9</p> <p>filed 4:11 8:3,5 11:5,18 12:24 13:2 16:21 18:3 19:19 21:11,20 23:15,22 26:18 69:1 83:9 92:20 104:10 108:15 117:14</p> <p>files 9:19 28:18 57:3 86:18 93:3 106:17 145:10</p> <p>filing 4:9 6:20,24 22:14 24:8 40:11 94:14 107:21 129:17 138:15 144:11</p> <p>filings 10:17 11:21 18:20</p> <p>fill 35:19 70:12 71:2</p> <p>final 131:10,14</p> <p>finally 122:22 126:4 127:20 138:11,23</p> <p>finance 76:13</p> <p>financial 86:6</p> <p>find 11:19 75:19 80:17 90:10,13 104:15</p> <p>finding 55:6</p> <p>findings 100:14</p> <p>fine 22:15 49:20</p> <p>fines 103:10</p> <p>Fink 57:18,19 66:12 67:5, 14 68:2 71:5 74:23</p> <p>firm 65:16</p> <p>first-party 115:17,22 116:19</p> <p>fit 46:14</p> <p>Fitzgerald's 27:1</p> <p>flag 133:4</p> <p>Flanagan 131:12 134:14 143:15</p> <p>flat 43:24 47:4</p> <p>flaw 33:21 51:21</p> <p>floor 75:13 132:2 134:12 136:6 143:14</p> <p>fluid 85:11</p> <p>fly 32:14,16 33:1</p> <p>focal 12:10</p> <p>focused 23:2 111:9</p> <p>focusing 24:11</p> <p>FOIA 68:10,21 76:2 98:14, 16</p>	<p>follow 52:12 84:7</p> <p>follow-up 13:8</p> <p>foot 79:19 121:16</p> <p>forcefully 88:2</p> <p>forever 86:16</p> <p>form 22:24 34:16,20 36:17 38:10 39:18 40:23 42:5 111:8 134:24 135:8,9</p> <p>forms 35:18 85:5 128:9</p> <p>forum 83:9</p> <p>forward 34:24 35:13 36:2 91:3 106:24 139:2</p> <p>found 61:10 74:21 97:9,10 104:14</p> <p>fourth 118:16 137:12</p> <p>fracture 113:24 114:1,4</p> <p>frame 5:22 6:5 8:21 89:24</p> <p>frames 6:14</p> <p>framework 123:14</p> <p>frankly 96:10</p> <p>free 40:17 145:13</p> <p>Freedom 72:8 75:15 76:1</p> <p>frequency 125:3</p> <p>frequently 34:19 77:12 118:4</p> <p>Friday 20:3</p> <p>friendly 52:10</p> <p>friends 29:1</p> <p>front 97:17 138:9</p> <p>full 42:6 46:10,18 93:7</p> <p>fully 21:24 66:2</p> <p>fundamental 100:4 130:3,17 141:20</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>Ga 74:1,3</p> <p>garden-variety 39:9</p> <p>gathered 109:2</p> <p>gave 86:22 87:3,4</p> <p>general 6:23 7:22 21:4 65:3, 4 99:22</p> <p>generally 24:2,10 25:1 48:4</p> <p>generate 15:12 16:7</p> <p>generated 91:20</p>
--	---	---	---	---	--



<p>generating 15:23</p> <p>genesis 51:12</p> <p>gentlemen 104:9</p> <p>Georgia 73:20,21,22 74:4,18</p> <p>get all 81:2</p> <p>girl 79:19</p> <p>girl's 80:6</p> <p>give 3:21 23:18 35:3 42:6 44:14 46:10 78:24 79:18 80:8 98:16 100:24 105:12 107:13 120:8 129:14 135:6 145:13</p> <p>giving 11:9 13:12 46:13,18</p> <p>glad 34:24</p> <p>Glen 91:10</p> <p>glomming 81:22</p> <p>go-to 83:24</p> <p>good 3:2,15 4:6 5:24 6:1 17:12,13,14 20:19, 20 29:17,18 34:21 35:21 38:16 39:10, 18 42:18 48:10 50:22 51:5 71:9 77:3 83:23 89:11 91:11 123:14 126:4,10 127:13</p> <p>govern 114:23</p> <p>governed 111:20</p> <p>governing 39:3</p> <p>Governor 75:22</p> <p>Governor's 68:11 75:21</p> <p>governs 9:17</p> <p>grader 78:16</p> <p>grandparents 90:14</p> <p>granted 15:9 24:3 31:3 75:20</p> <p>graphics 72:16</p> <p>grasp 127:14</p> <p>great 36:10 91:5 102:6 137:6</p> <p>greater 49:2</p> <p>greatly 33:8</p> <p>Grossi 110:8,9 113:11 114:13 115:16,20 116:18 120:7,10 124:12</p> <p>group 38:4,14 66:5 67:16 91:18</p> <p>groups 7:7 97:5</p>	<p>guess 10:16 13:7 17:14 26:24 67:8 105:8</p> <p>guidance 7:6 105:12</p> <p>gynecological 54:14 111:12</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>Hafezi 89:10,11</p> <p>hairs 31:17</p> <p>half 13:17,19 133:22</p> <p>halt 132:7</p> <p>hammer 142:19</p> <p>handful 43:15 46:19</p> <p>handle 46:5 91:22 97:12</p> <p>handled 104:2 143:14</p> <p>handles 114:18</p> <p>handling 92:13 101:13 110:12</p> <p>hands 47:9</p> <p>HANSEN 45:16 46:12,20 47:5 141:19 142:14</p> <p>happen 37:8 64:21 78:20 96:13 111:17</p> <p>happened 46:11 64:8 65:15</p> <p>happening 23:7 78:3 84:9,24 113:14</p> <p>happenstance 98:12</p> <p>happy 10:13 22:17 34:22 49:7 70:3 72:13 108:9 126:20 141:18 145:10</p> <p>harass 76:15</p> <p>hard 25:20 29:4 91:22</p> <p>hardworking 133:4</p> <p>harm 79:4,5 138:4</p> <p>hat 37:6,7</p> <p>hate 28:6 31:6</p> <p>Hawaii 145:12</p> <p>he'll 10:24 17:10</p> <p>head 37:11 85:17</p> <p>headed 127:8</p> <p>health 33:18,19 35:23 36:15,23 41:2 56:5 59:17 60:9,23 62:12, 17,19 63:3 68:15,20 72:20,22 73:2 75:11, 16,18 76:10,13 81:21 85:4,15,18 86:7 87:15 96:21 101:9 113:10,18</p>	<p>123:9 128:8 130:5,8 133:20 136:10,14 137:13 140:6,8,21 143:7 144:18</p> <p>healthy 12:16 109:13</p> <p>hear 3:4 45:14 76:5 77:13 79:2 131:19</p> <p>heard 32:11 55:15 58:18 65:11,12 91:16 92:2, 21 103:11 105:21 106:5 111:13 136:17 137:5</p> <p>hearing 3:3 39:23 91:13 145:16,17</p> <p>hearsay 31:16,22 45:8</p> <p>heart 79:2</p> <p>Hebeisen 50:21,23 51:4,6 56:8,13,22 94:21 130:24 131:6,11 138:12</p> <p>hedging 47:12</p> <p>held 55:9</p> <p>helpful 23:3 26:1 29:7 86:9</p> <p>helps 30:9</p> <p>Hey 84:14 85:22 88:11</p> <p>HHS 101:18</p> <p>HHS.GOV 118:3</p> <p>high 13:5</p> <p>higher 28:2</p> <p>highlight 11:23 117:3</p> <p>highly 55:14</p> <p>HIPAA 34:20 35:8 37:16 40:24 52:7 56:9,12, 19,21 58:2,21 59:8, 10,11,14 60:7,16,19 61:7 62:17,18 63:24 64:18 67:7 69:5,6,7, 8,12,13,19,23 70:7, 24 73:17,19 74:14, 21,23 75:1,2,7,13 79:21,23 80:2 84:17, 19 85:12 89:15 90:6, 17 91:1,3,4 97:11 99:1 100:6,11,17,20, 23 101:2,5 102:10, 18 104:12,17 117:5 118:15,20 119:1,2,4, 5 120:1,13,17,21,22 122:6,7,8 123:1,2,6 126:23,24 127:4,7, 24 128:6,15,16 129:1,9,11,20 130:1, 14,19 132:4,10,16, 20 133:6,13,14,17 135:21 136:9,10,16, 18,22 137:1 138:18 139:13 140:23 141:1 142:4 144:4,22 145:1</p> <p>hired 86:12</p>	<p>history 63:20 90:12</p> <p>hit 77:16</p> <p>Hoffman's 130:1 144:5</p> <p>holds 43:13</p> <p>hole 58:2</p> <p>honestly 112:12</p> <p>honing 88:21</p> <p>honor 3:14 24:5 29:23 103:2 110:9 139:15</p> <p>hoops 43:17</p> <p>hope 29:14 40:6 55:21 91:15</p> <p>hopes 138:14</p> <p>hoping 57:9</p> <p>Horvath 3:10,14 11:4 12:3,7 13:15 14:24 15:7,14 16:15,22 17:7,8 19:14</p> <p>hospital 34:7 40:13,16 52:11 100:23 101:2,5 119:10,16 135:1</p> <p>hospitalization 85:9</p> <p>hospitals 34:11 40:18 85:2,23 88:3 97:5</p> <p>host 103:5</p> <p>Human 75:18 101:10</p> <p>hurdle 129:21</p> <p>hurt 46:22 79:6 107:11</p> <p>hypothetical 111:10</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>IDC 110:14</p> <p>idea 33:16 39:7,10 124:22</p> <p>ideas 33:22</p> <p>identical 16:17 55:13</p> <p>identified 13:4 16:3 119:12 143:1</p> <p>identifiers 130:14</p> <p>identifying 7:5 14:3</p> <p>Illinois 4:11 5:3 8:13 9:16 13:16 18:6,13 19:3, 23 26:8,22 28:9 30:23 31:11,14,20 34:3 37:8,14,22 42:16,20 43:16 44:23 45:2 47:21,24 50:11,17 51:2,6 52:1 58:15 61:2 67:10 71:19 72:6,8,11,19, 24 73:7,11,16 75:9,</p>	<p>16,17,23 76:4 92:1 93:2,21 95:23 96:20 98:10,11 99:4,9 100:10,12 101:14 102:3,4,15,18 103:19 104:17,22 109:9,11,12 111:21 112:1,3 123:12 128:21 129:10 131:7 134:6 141:9,22 143:21</p> <p>immediately 79:1</p> <p>immigration 71:11 75:2</p> <p>impact 63:10 93:15 120:23</p> <p>impeach 47:6</p> <p>impeaching 33:5 49:19</p> <p>impeachment 32:17,20 44:7</p> <p>implement 127:4</p> <p>implemented 79:14</p> <p>implications 7:9</p> <p>implicitly 67:11 93:4</p> <p>importance 12:13 13:5 14:4 16:4 17:2 20:8 51:13</p> <p>important 7:5 11:24 14:19,20 15:20 16:24 19:5 20:16 21:17,22 23:18 24:22 30:7,18, 21,24 31:9 36:24 43:9 45:5,14 46:8 80:4,18 81:18 82:9 83:15 92:6 96:24 110:20,24 128:6,10 129:15 133:3 135:15</p> <p>Importantly 63:10</p> <p>impose 22:3 120:4</p> <p>imposed 129:21 143:9</p> <p>imposes 142:15</p> <p>impossible 132:6</p> <p>improper 57:8 120:12 121:12</p> <p>improperly 144:17</p> <p>improved 106:14</p> <p>improvement 13:11,14</p> <p>inadvertently 104:11</p> <p>incident 65:22</p> <p>include 6:1 9:2 10:7 24:18, 23 36:15,16 59:9,21 69:9 129:20 136:21</p> <p>included 7:16,20 60:7 65:16 69:6 128:2 137:4,7, 11,20 144:13</p> <p>includes 101:17 112:6 113:15,16</p> <p>including 58:15 60:10 62:14 93:18 112:8</p>	<p>incoming 47:24</p> <p>incorrect 102:9</p> <p>increased 19:12 45:21 133:1</p> <p>increasingly 18:21 23:5</p> <p>incredible 43:19</p> <p>incredibly 45:14</p> <p>incremental 12:17 14:6,8</p> <p>indicating 87:1</p> <p>indication 144:8</p> <p>individual 30:1 37:5,6 38:6 46:1 89:4,5,6 102:14 103:22 110:15 115:8 117:9,13</p> <p>individuals' 66:8</p> <p>industries 11:11</p> <p>industry 20:22 81:10 103:8 143:11</p> <p>inform 91:18 94:9</p> <p>information 21:23 22:16 23:19 33:18,19,23 34:1 35:1 41:2,18 56:5 59:17,19,23 60:1,3, 9,24 62:12,20 64:20 66:21 68:20 69:23 72:8,14,16,20,22 73:2,4,8 75:15 76:1, 9,10 80:1 85:4 86:8, 12 87:16 101:14,16 106:10,18 111:18 113:10,18,22 117:1 118:5 121:2 128:8 130:5,8,13,14,20 132:13 133:20 137:14 139:6,19,20 140:6,8,22 143:7 144:19 145:11</p> <p>informed 82:4</p> <p>initiated 5:17</p> <p>injured 93:2 102:14 103:24</p> <p>injuries 65:23 70:17 113:22</p> <p>injury 47:2 51:24 54:11 57:4,20 63:15 69:17, 19 70:20 71:12,23 77:8,10 79:4 80:12 89:12 93:16 116:5 121:15,17,18 131:20,22 135:11</p> <p>inquire 16:20</p> <p>insert 10:4</p> <p>inserted 140:1</p> <p>inspecting 113:13</p> <p>inspection 82:7 113:12 114:2</p> <p>instance 125:14</p> <p>instances 69:18</p>
---	--	---	--	---	---



<p>instanter 24:14</p> <p>instituted 52:1,5</p> <p>instructive 9:10</p> <p>insurance 60:3,14,18,23 61:2,4 63:19 66:19,20 68:3, 11,15 69:15,22 72:6, 9,12,18,19 73:1,3,8, 11,12,16 75:17,24 76:8 80:3 81:10 86:2,18 87:15 89:20 92:9 98:1,10,23 99:1,11,13 101:10, 11,15,16 102:3,4,15, 20 103:3,8,13,17,19 104:12,20,22 109:13,17,23 110:18 112:3,22 115:11,13, 14 116:1,6,12,19,22 123:19,20 129:7,10 131:1,2 136:10,14, 22,23 143:11 144:2,4</p> <p>insured 87:11 114:24 115:1, 4,12 116:23</p> <p>insurer 100:13 112:9,13,17 113:3 114:24 115:4 117:2 118:6 124:20 138:14</p> <p>insurers 100:7,16 102:9 111:24 112:4 136:15,18,24 144:21</p> <p>integral 69:17</p> <p>intellect 79:10</p> <p>intended 83:21 87:24</p> <p>intent 38:21 39:14 64:6</p> <p>intentioned 51:15</p> <p>interest 3:20 5:18 7:7 38:15</p> <p>interested 145:6</p> <p>interfering 138:8</p> <p>interplay 51:22 58:2</p> <p>interpreted 83:20</p> <p>interrogatories 78:17 107:10</p> <p>interrogatory 80:11</p> <p>interview 108:2</p> <p>interviewing 77:11</p> <p>introduce 110:10</p> <p>introduction 126:22</p> <p>involve 10:3 12:9 70:11</p> <p>involved 9:10 20:13 28:2 51:9 66:14 71:14 74:1 90:20 92:9 115:5 126:24 127:14 131:8</p> <p>involves 3:24 4:7,20</p> <p>involving 4:14 51:9,24 53:11 69:19 78:11 85:6</p>	<p>irrelevant 69:12 106:9</p> <p>ISBA 38:1 58:17 110:14</p> <p>ISBA's 66:2</p> <p>isolated 13:4</p> <p>issue 28:2 30:21,24 37:16, 24 48:4 52:22 53:2 55:7 57:1 58:8 60:22 62:8 64:14 68:8 73:20 74:4 77:5 82:6,21 89:19 91:1, 24 93:16 97:13 106:24 109:1 110:20,24 116:1 119:21 128:16,23 130:17,24 134:15 137:12 138:5,11 141:10,24 142:4,10 143:2 144:7</p> <p>issued 66:20 92:5 97:15 107:17,22 133:16 141:7</p> <p>issues 6:12 12:13 20:7 55:17 61:13 64:16 65:13 70:4 74:18 81:20,21 85:1 92:6, 10 105:9 108:23 109:7 121:6 127:14, 17,18 128:11 129:7, 11,12 131:3 133:11 136:1 144:18</p> <p>issuing 30:10,11 62:18</p> <p>items 113:8,9</p> <p>iteration 131:10</p> <p>ITLA 52:3</p> <p>ITLA's 30:1</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>January 35:22 36:14</p> <p>Jerry 3:8</p> <p>job 82:22 83:2</p> <p>Jones 36:14</p> <p>Journal 18:8</p> <p>judge 3:2 17:13 33:9,12,20 39:23 40:1,12 41:7 47:1 48:13 49:9 51:16 56:3 58:24 59:3 60:21 61:8 70:9,24 73:17 75:4 79:9 82:20 83:18 84:12 91:22 94:5 97:18 98:4 99:10 100:9,22 104:13 109:21 110:23 114:20 115:19,23 126:4,6,15 129:2,5, 13 130:1 131:11 132:2 133:15 134:14 139:17 142:12,21 143:15,16 144:5,16 145:9</p> <p>judge's 40:9</p>	<p>judge-signed 40:19</p> <p>judges 32:16,18,21 41:12 43:15 45:5 46:16 48:12,14 64:22,24 95:17 96:11 99:4 104:3 108:8 125:18, 21 129:24 131:18,24 133:4,5 134:12 143:3</p> <p>judicial 23:6,10,12 25:15 59:5</p> <p>judicious 29:6</p> <p>juggling 37:11</p> <p>jump 43:17</p> <p>juries 48:7</p> <p>jurisdiction 83:11,13 101:19</p> <p>jurisdictional 83:12</p> <p>jurisdictions 26:20</p> <p>jurors 45:14</p> <p>jury 32:11,13 43:12,20 44:3,8,13,14 46:10, 18 47:10</p> <p>Justice 3:6 27:1</p> <p>Justice's 131:23</p> <p>justification 10:9</p> <p>justify 11:2</p> <p>juvenile 18:15</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>keeping 85:3</p> <p>Keith 50:21 51:5</p> <p>key 100:5 111:24</p> <p>kid 78:24 79:7 81:8</p> <p>kid's 81:13</p> <p>Kilbride 3:6</p> <p>kind 12:2 26:2 57:24 61:14 66:21 70:6,17 74:17 78:7 81:17 117:10 125:6 141:19 142:2</p> <p>kinds 24:2 113:8</p> <p>Kirchner 82:12,13 88:1 89:9 91:21 94:9 108:1 131:11 142:24</p> <p>knew 65:20 86:21 87:1</p> <p>knowing 66:16 137:9</p> <p>knowledge 26:17 38:15 52:8 97:4 100:11 127:10</p> <p>knowledgeable 7:7</p>	<p>Kunkel 51:10,22 53:17,20, 24 54:1,3,23 55:8 92:23 93:1 94:19,21, 22 125:20</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>labor 90:8,9</p> <p>lack 8:20 83:10</p> <p>ladies 104:8</p> <p>Lake 33:13 59:1,3 66:14 67:8,20 68:10 92:14 97:15 98:13,20,23 99:16 100:9,18 102:6,22 142:18 144:3</p> <p>language 31:12 33:5 35:10 37:2 40:1 53:18 59:10,15,22 69:21 111:16 112:20 118:1 122:11 124:9 127:21 128:1,14 131:10,14 137:4 140:4 141:4 144:23</p> <p>large 145:10</p> <p>Lastly 118:15</p> <p>law 7:8 34:7 39:5 44:21 45:2,6 61:12 62:6 67:24 92:11 93:2,21 94:18 95:23 98:17 99:24 100:2,3 102:18 103:20 104:8,17 109:9 127:6 131:17 144:24 145:4</p> <p>lawfully 95:21</p> <p>laws 96:20 109:20 118:22 123:21 124:1</p> <p>lawsuit 40:11 55:10 57:3 94:10 129:18 144:11</p> <p>lawyer 35:6,18,19 40:4 42:1 43:23 77:8 79:4 88:9 89:12 106:2</p> <p>lawyers 3:11,18 8:5 18:9 30:23 34:4 39:1 42:16,20 51:2,7 58:17 79:24 83:7 84:2 85:2,21 94:8 95:12 98:16 104:21 105:24 108:5 131:7</p> <p>lead 14:13</p> <p>leadership 52:3</p> <p>leave 4:2,10,15 6:19 7:1, 13,17 8:1,3,9 10:19 11:6,15,18 14:14 15:2,3,19,24 16:14, 21 17:3 21:5,18 22:8 24:9,14,16 31:2 142:17</p> <p>left 43:12 44:24 125:12</p> <p>leg 137:16 138:2</p>	<p>legal 66:17 97:7 127:17, 23 128:16</p> <p>legislate 100:1</p> <p>legislatively 109:1</p> <p>legislature 103:7 109:16 110:2, 3</p> <p>legitimate 25:18 92:6</p> <p>lends 16:23</p> <p>level 17:1 26:11</p> <p>liability 116:11</p> <p>lieu 107:14 108:18</p> <p>life 28:10 47:2 78:18 121:19</p> <p>lifelong 70:19</p> <p>light 63:14 120:24</p> <p>limit 8:8 22:12 104:19 105:8 107:15 109:23 123:3</p> <p>limitation 52:21 54:4 55:6,8 95:1 125:6</p> <p>limitations 102:20 121:13 125:18</p> <p>limited 8:12 13:6 27:20 139:3,6,8,18,21,24 140:7</p> <p>limiting 33:17 34:1 49:11 64:23 65:6</p> <p>limits 4:20,23 7:17 8:21 15:1,2 101:6 141:5</p> <p>lines 12:3</p> <p>list 78:16</p> <p>Listen 77:20</p> <p>lists 130:14</p> <p>literally 44:13,24 45:7</p> <p>litigants 9:10 18:22 58:23 92:7 102:23 103:4 104:6,21 106:16</p> <p>litigate 142:10</p> <p>litigated 91:24 99:8</p> <p>litigation 35:5 56:20 59:18,24 60:1,5,10,24 61:5 62:13 66:14 67:20 68:21 69:17,18,24 73:5,6 88:23 89:22 90:21 114:18 118:18 123:5 134:8 137:14, 23 138:20</p> <p>litigator 45:18 141:21</p> <p>live 34:7</p> <p>LLC 73:24</p>	<p>lo 41:24</p> <p>load 14:21</p> <p>local 99:24</p> <p>long 14:15,22 24:6,20 26:23 43:22 45:12 51:7 65:21 91:13 145:2</p> <p>longer 19:22 21:7 28:11</p> <p>looked 27:12 80:20</p> <p>lot 15:5 24:21 29:1,3 46:6,7 51:16 76:8 110:21 116:14</p> <p>lots 126:18</p> <p>love 29:22</p> <p>low 31:7</p> <p>lump 117:10</p> <p>luxury 84:12</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>Maddux 129:5</p> <p>Maddux's 129:2</p> <p>made 18:21 21:6 43:2,4 51:17 107:4 116:5 118:14 123:8 132:3 134:16 136:3</p> <p>maintain 60:18 61:4 68:4,14, 19 69:11 86:2 112:4</p> <p>maintained 97:21</p> <p>maintaining 60:23 86:7</p> <p>major 97:5 144:14</p> <p>majority 58:14 125:12</p> <p>make 18:9 31:20 32:8,11, 12 43:20 45:1 48:24 62:23 70:9 71:1 76:14 85:17 88:3 93:11 94:11 98:21 102:13 115:14 123:8 126:23 129:23 140:20 141:15,16 144:8</p> <p>makes 9:7 31:15 56:9 89:2</p> <p>making 19:4 21:1 27:9 28:17 43:16 48:8 55:6 74:12 77:4 112:14 115:6,12 116:2,7</p> <p>maligned 83:1,18</p> <p>malpractice 74:5 135:12</p> <p>man 25:10</p> <p>mandates 128:1,13</p> <p>mandatory 5:13 6:5</p>
--	---	--	---	---	--



<p>manner 43:11 87:14 123:15</p> <p>March 19:23</p> <p>marginally 10:22</p> <p>Mariam 89:10</p> <p>marital 77:23</p> <p>Mark 82:17</p> <p>markedly 117:4</p> <p>match 31:24 123:1</p> <p>material 4:17 10:2,4,6,8 24:22</p> <p>materials 34:23 62:4,24</p> <p>math 15:17</p> <p>matter 5:6 6:6 7:16 8:7 11:12 13:3 24:12 25:19 67:16 91:19, 22 92:14 94:22</p> <p>matters 6:11,15 7:5 11:24 13:4,5,18,20 14:3 15:20,22 16:3 88:23</p> <p>Mcbride 49:9</p> <p>Mcmahon 76:24 77:2 80:22</p> <p>Mcvisk 47:20,23 49:14 50:8, 12,15,19</p> <p>meaning 115:9</p> <p>meaningful 12:22 65:19 66:9</p> <p>means 61:23 94:10 95:20 96:2,16,18 102:2 132:1</p> <p>mechanics 16:12</p> <p>mechanism 10:6</p> <p>media 76:14</p> <p>medical 34:6,8,15 35:17,20 36:20 37:20,21 39:9, 12,15 41:18 56:20 63:18 72:7 73:4,8,24 74:5,6,7 79:20 80:9 93:19 94:24 97:8 98:9 101:18 102:10 112:10 114:8,10 116:14,17 130:5,11, 21,22 135:11 137:10,21 138:13 139:6,18,20 144:19</p> <p>medications 90:11 137:19</p> <p>meet 122:8</p> <p>meeting 78:8</p> <p>member 51:8 61:20 110:14</p> <p>members 10:12 11:9,22 17:14 30:4</p> <p>memos 114:11</p> <p>mental 35:22 36:15,23 63:3</p>	<p>81:20 85:15,18 96:21 123:9</p> <p>mentioned 48:11 53:4 71:13</p> <p>merits 22:14 30:14</p> <p>messaging 47:19</p> <p>met 6:3</p> <p>method 43:10 79:12 111:6 117:6,7,15,21 118:16</p> <p>methods 81:11,14 101:6 117:1 119:2</p> <p>metro 97:6</p> <p>mind 42:3 74:13</p> <p>minimal 116:13</p> <p>minimum 93:1</p> <p>minutes 3:21 9:14 120:8</p> <p>mirrored 58:23</p> <p>misaligned 126:13</p> <p>misapprehension 96:8</p> <p>mischievous 28:19</p> <p>missed 14:1 56:4,16</p> <p>misses 144:20</p> <p>missing 19:16 74:11</p> <p>mistake 134:20</p> <p>misunderstanding 136:9,20</p> <p>misunderstood 44:2 130:18</p> <p>modification 4:3 6:8</p> <p>modifications 4:1,23 122:3</p> <p>modified 48:18</p> <p>modify 87:22</p> <p>modifying 7:2 9:8 64:23</p> <p>molested 78:16</p> <p>molesting 78:12</p> <p>mom 81:9</p> <p>moment 92:16</p> <p>money 46:7</p> <p>Monier 80:14</p> <p>months 28:10 97:2 111:7</p> <p>months-long 38:19</p> <p>morning 3:2,5,7,15,17 17:12, 13,14 29:17 51:5 71:9,18 77:3</p> <p>mother 90:13</p>	<p>motion 11:17 12:16,19 13:6 14:8 21:5 24:1,8,13, 16 36:2 70:13 84:16 88:16 107:4 108:13 131:18 132:2,18 133:2,4 142:7</p> <p>motions 11:6,15,20 12:14,23 13:2 24:2 30:13 41:13 59:3 133:23, 24 142:4</p> <p>motor 85:5 137:16</p> <p>moving 7:14 139:2</p> <p>Mr.- 72:4</p> <p>multi 83:12</p> <p>multiple 58:13 63:6 65:18 100:19 101:24</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>names 50:22</p> <p>naturally 19:1</p> <p>nature 13:6 145:4</p> <p>necessarily 25:14 110:17</p> <p>necessity 83:4</p> <p>needed 10:9 89:18 90:19</p> <p>negative 12:22</p> <p>negligence 71:23</p> <p>neutered 44:6</p> <p>neutral 44:16</p> <p>non-record 10:4</p> <p>nonelectronic 22:24</p> <p>nonparty 119:16</p> <p>nonstatutory 131:20</p> <p>normal 121:19</p> <p>Northern 21:5</p> <p>Northlake 73:23,24</p> <p>Northwestern 100:23 101:1,4 135:1,5</p> <p>note 80:22,23 129:23 133:21 136:3</p> <p>noted 60:22 97:22 103:11 106:20 125:6</p> <p>notes 84:13 126:20</p> <p>notice 23:6,10,12 25:16 53:2 54:17 57:24 74:19 107:22 117:8, 13 122:16,19</p> <p>number 3:4 17:17 18:16,17, 23 19:17 20:1 21:9 22:4,5 26:9 27:14,20</p>	<p>66:18,24 93:13 94:3 97:20 108:15</p> <p>numbers 14:11 132:16,17 133:2</p> <p>numerous 58:5</p> <p>nurses 114:14</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>OB-GYN 124:17 138:3</p> <p>object 36:5 53:7 117:14,18</p> <p>objected 121:12 125:11</p> <p>objecting 134:1</p> <p>objection 117:14 122:15,16, 17,18 125:14,15 137:5</p> <p>objections 133:21 136:4</p> <p>objectors 36:10</p> <p>objects 36:1</p> <p>obligations 97:11</p> <p>obtain 52:11 69:23 117:15, 21 118:16</p> <p>obtained 36:9 94:15 102:1 105:18 117:2,22,23 122:21 124:14</p> <p>obtains 118:12</p> <p>obviated 96:23 102:16</p> <p>obvious 18:19 141:11</p> <p>occur 66:1 113:13</p> <p>occurrence 25:16</p> <p>occurring 65:24 87:24</p> <p>offensive 40:3 94:16</p> <p>offer 35:13</p> <p>offering 10:10 14:2</p> <p>office 68:11 75:21 114:13, 17 121:6 129:4,8</p> <p>officer 127:7</p> <p>officers 98:15,16</p> <p>Offices 59:5</p> <p>oftentimes 135:16</p> <p>older 17:15</p> <p>omissions 136:13</p> <p>one's 129:18</p> <p>onus 85:20 88:8,19 89:17</p> <p>open 77:22,24 94:11,12 106:17</p>	<p>opened 78:13</p> <p>opinion 19:16 20:6 30:18 51:23 68:4 76:7 128:18 141:20 142:19 144:17</p> <p>opinions 18:7,11,13 19:1 27:15,20 28:3 30:10 31:8 51:11 98:17 110:16 129:24 130:2,3</p> <p>opponent 31:23 32:9</p> <p>opportune 106:13</p> <p>opportunity 11:1,10,23 14:2 27:8 28:19 53:7 54:19 117:18</p> <p>opposed 37:6 38:23 40:9 125:7</p> <p>opposing 71:16</p> <p>opposite 59:23</p> <p>opposition 4:10 6:19 7:1,13 36:1 10:18 17:3 58:14 82:23 111:9</p> <p>option 23:17 121:23</p> <p>oral 132:22</p> <p>orally 136:3</p> <p>oranges 40:23</p> <p>order 3:1 6:9 33:17,20 34:20 35:8,10 36:3 38:5,19 40:13,14,19, 24 41:8,21 51:23 52:4,7,16,17 53:16, 19 54:8,12,16 55:3, 12,14 56:5,19 58:3 59:7,10,11,13,14,15, 20 60:7,11,12,19 61:10,16 62:10,15, 17,19,22 63:8,24 64:6,9,11,16,17,18, 19,23,24 65:2,6,9 66:1,6,10,18,22 67:17 68:4 69:5,6,7, 8,12,13,19 70:7,24 71:3,24 76:19 81:5, 15,21 82:18 83:5,19 84:4,5,17,18,19 85:12,13,14,19 87:21,23 88:10 89:16 90:4,7 91:1 93:22 95:2,5,16 96:1,2,9,18,19,23 97:3,9,10,15,23,24 98:2,12 100:21,24 101:2,3 102:12,13 103:22,23 104:1,8, 11 105:3,11,17,22 106:3,14 107:4,24 108:18,20 110:24 111:11,14,16,19,23 112:18 117:4,5,15, 22 118:10 119:1,2,7, 10,13,15,24 120:3,5, 13,20 122:6,7,9,11, 23 123:2,10,23 124:11 127:22 128:2,5,15 129:1,4, 9,20 130:1,19 132:10,16,20 133:6, 13,14 135:2,21 136:22 139:10,14 140:3,7,9,12,13 141:3,5,7,12 142:16, 20,24 143:23 144:14 145:2,3</p> <p>ordered 119:11 135:22</p> <p>orders 37:16 39:3 41:7,12 104:4,18 111:5 132:5,8 141:23 143:4,13</p> <p>originally 23:15</p> <p>orthopedic 124:19</p> <p>Ortiz 33:12 58:24 59:3 60:21 61:8 73:18</p> <p>Ortiz's 97:18 144:16</p> <p>output 30:15 31:8</p> <p>outright 95:16</p> <p>outweigh 11:13 14:7</p> <p>overburdened 30:12</p> <p>overhaul 123:18</p> <p>overly 57:23 137:14</p> <p>oversight 45:1</p> <p>overview 3:21 5:2</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m. 145:18</p> <p>pace 23:7</p> <p>pages 8:16,18 9:1,3,8 14:18,20 15:6,7,10 22:11,13,15 90:10</p> <p>paid 50:18 113:20</p> <p>panel 30:5</p> <p>paper 10:21 29:4 43:5 44:6</p> <p>papers 113:5</p> <p>paperwork 11:5 12:9</p> <p>paragraph 62:9 65:2 111:20,21 96:17 117:22 122:22 123:1 140:3 141:2, 16</p> <p>paralegals 114:15</p> <p>parcel 84:17</p> <p>part 12:7 16:5 21:17 25:17 27:2 28:24 32:3 45:5 48:3 52:15 63:19 68:9,22,23 70:5 72:10 84:16 94:7 95:6 99:2 138:19,20 139:16 142:8</p> <p>parties 31:13 46:14 59:16 65:2 70:6,8,11,16 71:1,2 106:7 122:23</p>
--	---	--	--	--



123:4,7 134:3 137:24 138:5,12 140:16 143:10 145:6	permissive 5:15,16	97:3 105:19	36:18 39:1,2 40:5 44:12 71:10,11 75:2 84:9,24 97:1 108:13 111:3 136:5 142:7, 13	privacy 52:20 55:4,11 58:22 61:16 66:8 71:20 75:9,13 76:21 77:22 78:14 79:13 81:6,13 82:8 89:7 92:7 93:5, 16 94:2,4 96:21 97:7 103:15,18 118:11 119:5 120:24 121:1, 3 124:4 125:16,22 127:7 128:18,20 129:19 144:12	prohibitive 108:13
parts 3:23 4:12 89:1	permitted 32:4 62:21 75:12 97:23 98:2,9 99:14, 15 133:17	places 139:4	practiced 24:6 26:16 34:3,17 51:14 102:7	private 80:1 101:13,16	prohibits 59:15
party 31:16,18,19,21 84:21 101:3 103:24 115:7 116:2 141:6	permitting 36:8	plain 112:20	practitioner 21:15 46:1	privately 91:17	pronounced 29:15 77:2
party's 62:12	person 91:14 93:2 110:18 112:23 120:9 127:4	plaintiff 34:9 35:24 36:1 39:10 41:17,19 43:8 52:19,22 53:2,6 54:5 55:4 61:18 65:14 74:8,20 86:21 101:22 102:11 116:4 134:24 135:8,13 137:10 138:16	practicing 98:16	privilege 18:5 55:11 121:2	proof 101:4
pass 80:14	personal 33:18 56:5 57:20 68:20 69:17,19 71:12,23 77:7,8,10 78:8 79:4 83:10,13 89:12 93:16 130:13 131:20,21 135:11	plaintiff's 30:20 33:23 35:18, 19 39:15 40:8,15 41:24 48:3 55:9 57:7 84:15,22 85:2 88:8 89:12 101:21 133:24	practitioners 7:22 143:20	properly 29:15 121:11	proper 66:6 116:21 117:24 119:8 124:3
passed 3:8 87:12	personally 21:9 61:1 62:14 109:7 125:15	plaintiffs 41:14 51:20 66:8 125:13 143:10	preclude 54:13	property 72:17 99:12 100:12, 15 136:15,17,24 138:13 144:20	proponent 53:14
passing 127:10	persons 127:20 131:12 134:9	plaintiffs' 34:6	precludes 84:4 85:14	proportionality 93:10	proposals 3:24 4:7,12,20 5:2,3, 7 6:17 7:14,15 8:10, 12,24 9:14,16 10:17 11:8 14:1 15:1 16:16 17:11,22 20:23 29:16 33:14 37:9 38:3 43:3 51:3,15, 21,23 52:18 55:12 57:15 58:12,21 77:1 91:15 93:23 111:3 116:23 117:20 118:8,24 119:18 121:23
passive 85:17	perspective 114:22	PLAS 14:12 18:4 19:17 21:3,7 22:5 26:9 28:14	predecessor 105:17	proposal 3:24 4:7,12,20 5:2,3, 7 6:17 7:14,15 8:10, 12,24 9:14,16 10:17 11:8 14:1 15:1 16:16 17:11,22 20:23 29:16 33:14 37:9 38:3 43:3 51:3,15, 21,23 52:18 55:12 57:15 58:12,21 77:1 91:15 93:23 111:3 116:23 117:20 118:8,24 119:18 121:23	proposers 53:16
passively 85:13	persuade 20:15	play 32:18,24 45:22 46:24 48:5,22	preempted 59:9 61:7,12 67:7 73:16,19 74:21,22, 24 75:2 99:1 120:16, 21	problems 41:16 52:9,16 81:24 130:3 142:7	proportionality 93:10
past 51:6 63:21 68:20,24 90:10 135:16	pertain 4:13	pleading 23:4 25:22	preemptive 120:18	procedure 6:4 53:9 75:6 92:4	proposals 3:19,22 5:10 58:3,10 70:3
Pat 45:11	pertaining 4:8	poignant 106:5	preemptively 107:5 108:2,17	proceed 55:10 63:24 66:16	propose 4:22 49:4 91:2
path 46:1	pertains 6:7 9:16	point 12:11 14:24 23:1 30:9 36:4 61:1 76:16 78:21 95:1 96:17 98:13 99:3 108:14 118:5,14 119:22 120:6 129:1	preempts 74:15 144:4	proceeded 114:18	proposed 3:24 4:3,8,16 5:22 6:14 31:24 52:17 56:19 59:7,21 60:12 61:11 62:9 63:8 64:18 65:9 90:3,7 91:1 93:23 96:19 97:22 130:1 139:4
patient 39:21 40:4 78:12 85:8 122:19	petition 6:6 8:9 10:18 11:1 15:24 16:14,20 17:3	pointed 92:22	prefatory 40:2	proceeding 59:18 60:11 93:4	proposed 3:24 4:3,8,16 5:22 6:14 31:24 52:17 56:19 59:7,21 60:12 61:11 62:9 63:8 64:18 65:9 90:3,7 91:1 93:23 96:19 97:22 130:1 139:4
patient's 35:6,17 39:20 40:4, 20	petitions 4:2,5,10,15 5:17,23 6:19 7:1,13,17,24 8:2 14:12 15:2,3,12, 18 21:18 22:8	points 23:14 68:1 123:8	preferable 38:24	proceedings 94:6	proposing 26:7
Paul 76:24	Pfaff 29:14,18,23,24 37:4, 10 38:8,24 39:17 40:22 42:6,22 48:11 51:17 78:5 79:12 131:10 134:18 137:5,6	policy 67:23,24 109:12	preference 114:19 118:19	process 10:23 20:16 21:18 75:7 83:1,21 94:12 95:5 101:13 103:20 118:10 128:9 138:21	protect 66:7 79:13 80:20 84:2 88:15 90:20 96:12 125:21
pause 43:22	Pfaff's 55:20	pollination 86:18	prejudicial 32:24	produced 33:24 35:1,2 41:3,8 87:13 93:12,20 95:4, 6,9,11,13 132:20 135:15 138:3 140:17	protected 33:19 39:5 41:2 59:16 60:9,23 62:12, 19 63:2 72:20,22 73:2 85:4 86:7 87:15 93:18,21 113:10 118:20 121:3 128:8 130:4,8 133:20 137:13 140:6,8,21 143:7 144:18
pay 7:10 116:3,14,15	phenomenal 82:22 83:2	portability 136:10,12	premise 98:22	production 41:1 94:24 137:13	protecting 81:13 82:8
paying 114:2	PHI 33:18 34:21 35:2 36:8 39:4 56:6,14, 18,22 57:1,5 64:15 112:9	portion 71:2	present 3:17,19 34:7 35:22 36:14 46:2,9 91:23 126:18	professionalism 79:22	protection 55:7 57:8 118:11 130:15 139:12
pedestrian 77:16	Phillips 42:16,19 45:24 46:16,21 47:4,7,18	position 7:4 50:1 54:10 59:6 67:3 104:7	presentation 105:3	professionals 96:4 118:4	protections 93:11
penalized 73:10,12	physician 135:23	possession 86:15 104:19	presentations 18:8	Professor 14:10,24 15:5,8 19:18 22:7 26:3 40:5 66:13 67:6,15 72:5 83:23 87:22 92:15 97:20 99:3 113:5 114:7 129:16 144:2	protective 36:2 59:14 65:2 70:7 84:18 102:11,13 103:23 106:3 107:4, 24 108:18 117:5 122:7 123:1,2 124:11 128:2 140:3 141:3,5
penalties 103:10	physician-patient 121:1	possibility 107:21	prefatory 40:2	programs 76:12	
penalty 28:8,9,13	physicians 107:12	possibly 45:22 124:23	preferable 38:24	prohibit 6:20	
pending 3:22	physicians' 97:5	postpone 38:2	prejudicial 32:24		
people 8:3 21:22 37:15,18 38:15 63:11 78:8,22 79:5 81:18 82:1 93:13 95:14 96:7 105:21 114:9 132:4 134:16,19 136:20 139:9	picking 26:2	potential 63:12	premise 98:22		
people's 79:24	picture 46:18 58:1	potentially 38:4 109:10 122:20	present 3:17,19 34:7 35:22 36:14 46:2,9 91:23 126:18		
Peoria 3:7 34:19 42:5	pigs 32:14,16 33:1	power 105:8	presentation 105:3		
percent 13:17,18,19 15:18, 20,22 16:3,7 36:6,7 41:9,10 95:12 108:4 144:22	PLA 19:19 21:11 26:11, 19 27:3 30:22,23 31:3	practical 24:12 127:18 128:11 131:3	presentations 18:8		
percentage 14:13 15:10 16:2 19:15 26:7	place 26:24 31:22 37:17 84:18 94:18 96:14	practice 6:23 8:4,5 12:16 13:6,12,14 14:8 29:2 32:17 34:18 35:16	presented 136:5		
period 35:21 38:20 52:20 117:13			presently 110:3		
permanent 47:2 121:14,18			preserve 87:17		
permission 96:3			president 42:20 47:24 50:11 51:6 131:8		
			pressure 6:1		
			presuit 114:19 118:19		
			pretty 20:19 44:15 50:4 52:14 62:10 63:1		
			prevent 54:16 78:3 134:8 141:8		
			previously 44:8 70:6		
			priest 78:16		
			prior 58:3 65:13 66:4 87:10 88:5 89:15 94:24 104:11 106:20 117:11 127:1 129:1 138:15		



protects 39:19	13	real 19:11 45:12 54:2 63:10 64:7 65:15 106:6	101:1,4,7,18,24 102:5,10,24 104:2, 20 105:13,18 106:8 107:8,18 108:21 109:2,24 111:5,11 113:16 114:9,16 117:15,21 118:9,12, 16,17 119:6,11,14, 17 122:20 123:9 124:13,21,22,24 125:17 130:5,11,12, 21,22 132:20 133:16 135:5,6,20,24 137:11,20,21 138:3, 13,17 140:14,23 143:6 144:19	relates 51:22	require 4:4 22:13 40:14,16 66:20,23 67:7 72:21 73:2 74:16 93:12 102:2,23 112:11 114:5 122:12,19 135:4
protest 40:15	qualified 102:12 117:5 122:7 123:2 124:10 141:3, 5	reality 46:17	recreate 113:14	relating 143:14	required 6:10 12:14 40:10 59:9 61:18 62:16 64:14 68:3,13 72:20 84:6 86:11 88:4 93:8,22 94:23 97:12 99:5,13,14 109:17 114:6 117:19 131:1
prove 30:9 46:7	qualify 59:13 60:7	realize 80:22	red 63:14	relation 114:23	relative 58:6 68:2 69:2 105:9
provide 7:5 9:9 74:19 106:17 112:11 122:14,17 135:23 139:11	quash 54:19	rear-ended 63:13 70:20	reduce 14:21 106:15	relationship 80:2	release 36:20 39:8,11 41:17 133:17,19 134:1 139:6,18,19 140:7, 18,23
provided 117:1 118:17	Queen 73:24	reason 17:4 24:18 27:6 65:5 75:11 76:7 88:24 94:7 95:7 100:4,5 101:9 112:1 115:23 116:21 125:16 129:15 135:14 137:4,6,11,15 138:2	refer 55:12	relative 40:12 57:1 124:14	relevancy 53:11 55:7 56:24 57:4 88:21 93:10 95:1
provider 36:21 106:16 122:14 135:5,8,10	question 5:16,20,21 16:11 43:11,22 44:2 49:9 58:19,20 67:4,12,19 68:2,23 71:5 72:4,15 89:15 92:15 99:2,5 108:16 109:11,15,16 114:20,22 115:24 129:17 142:14	reasonable 95:10	reference 14:21 106:15	relevance 31:17 39:24 41:7 45:6 56:20 57:6 62:2,3,4 65:7 66:9 67:2 70:10,18,19 73:4 88:23 93:8 121:2,15 123:5 125:18 135:17,20	required 60:6 61:6 68:19 88:6 119:23
providers 41:11,18 135:13 137:21 140:12	questioned 66:4	reasonableness 124:15	referring 55:12	relevent 31:17 39:24 41:7 45:6 56:20 57:6 62:2,3,4 65:7 66:9 67:2 70:10,18,19 73:4 88:23 93:8 121:2,15 123:5 125:18 135:17,20	requirements 34:12 85:15 86:1 93:10 97:21 98:24 100:17 102:21 118:8 124:15 134:3
providing 42:4 112:15	questions 5:9 9:15 10:13 16:9 17:18 18:1 22:17 29:9 42:10 45:10 47:16 49:6 50:7 54:2 55:23,24 57:11 62:7 65:10 66:11,15,17 67:21 72:24 76:22 86:24 91:7 97:19 99:20 105:1 110:4 118:4 124:5 126:1, 19,21 127:23 141:18 145:10	recognition 7:11	refers 56:7,11	rely 26:12	requires 51:23 53:1 62:11,18 63:1 65:3 72:6 90:17 98:17 101:6 112:4, 19 129:9
provision 52:23 60:13,15,20, 21 69:7 140:20	quick 127:17	recipient 105:12	reflect 110:17	relying 23:6	requiring 71:22 132:20 140:13
provisions 58:13 59:12 86:4 99:11	quickly 54:2 120:11 124:7	recognition 7:11	reflection 11:7	remarks 83:4	resist 20:23
prudent 6:1	published 71:15	recognized 9:6	refresh 37:12	remedy 61:17 64:4 71:20 72:1 106:2	resolution 69:3
psychiatric 80:12 81:20	pull 25:5,8,23	recognizes 31:10	refuse 40:20 64:22 76:18	remember 26:24	resolved 6:10 78:24
psychiatrists 78:12	purely 16:4,5	recommend 61:23	refused 23:20 63:24 64:5	reminding 95:19	resolving 6:6 10:23
psychological 80:11	purpose 25:18 31:5 59:17 73:7 83:16 120:2	recommendation 140:1,2 141:2 144:6, 15	regard 42:21 45:2,3 72:4,5 73:14 126:23 127:5, 12 129:23 131:5,16 132:4,5 133:11 143:1 144:5,16	removed 70:21	respect 22:19 29:5 41:13 51:16 62:3,8 79:10 89:6 102:7 103:2 108:23 137:6
psychologist's 77:24	purposes 35:5 49:18 99:15 101:8 109:4,13 137:22	recommendations 121:9 127:21 138:24	regular 125:5	repeat 139:16	respectfully 30:24 33:1 38:10 94:20 102:8
public 10:20 13:9,10 14:4 20:8,21 23:7 75:11 109:11 145:16,17	put 13:18,20 29:6 30:22 33:21,22 34:10 38:18 52:20,22 54:9 66:5 81:4 89:16 96:5 98:4,12 104:6 106:22 107:19 110:21 129:6	recommended 121:24	regulate 100:1 101:10 120:3	repeatedly 63:17	respond 8:14,18,19 9:4 18:1 98:18
published 71:15	purview 134:22	record 10:5,7 23:1,9 25:2,6, 17 42:14 43:5 44:6 63:3 68:24 85:3,11 90:8,9 108:23 121:7 124:2	regulation 68:13,18 75:13 98:7 113:1,9,11 114:5 116:22 120:5	repetitive 57:23	responded 68:12 73:1
pull 25:5,8,23	puts 80:2 85:20 93:3	records 34:7,8,15 35:17,20, 23 36:12,13,15,16, 21,23 37:20,21 39:9, 12,15,22 40:14 41:1, 6,8 52:11 53:3,5,13 54:14,18 56:20 60:18 61:4 62:2,3 63:19 64:2 65:7,14, 16,17,20,21 66:10 68:4 69:10,11,16 70:17,18 72:7,23 73:13 77:24 78:1,14 79:20 80:7,16 82:1,5 85:6,7,10,18,22 86:3,10,14,21,24 87:3,4 88:6 93:8,12, 19 94:1,13,15,24 95:3,6,9,11,13,24 96:1,3,21 97:8,21 98:9,18,22 99:15 100:8,12,15,20,22	regulations 66:19 98:11 102:4 104:6,13 112:24 117:17 123:21 127:11,13,24 130:9, 16 131:2 136:19,23	reply 5:5 9:8 10:1,8 17:23 22:22 23:5,13 24:7, 14,15 28:16,20	responsibilities 92:8
purely 16:4,5	putting 25:3 83:2 143:20	recommend 61:23	regular 125:5	report 86:13	responsibility 79:24 103:14
purpose 25:18 31:5 59:17 73:7 83:16 120:2	Q	regulate 100:1 101:10 120:3	regulation 68:13,18 75:13 98:7 113:1,9,11 114:5 116:22 120:5	reported 103:13 125:4,5	responsive 72:23
purposes 35:5 49:18 99:15 101:8 109:4,13 137:22	QPO 101:23 102:1,2,20 117:5,10 119:2 120:1,13,15,17 123:6 127:22 141:4,	regulations 66:19 98:11 102:4 104:6,13 112:24 117:17 123:21 127:11,13,24 130:9, 16 131:2 136:19,23	regulatory 103:5,6	reporter 35:4	restraining 6:9
purview 134:22		regulatory 103:5,6	regurgitate 88:5	represented 115:9,10	restrict 109:23
put 13:18,20 29:6 30:22 33:21,22 34:10 38:18 52:20,22 54:9 66:5 81:4 89:16 96:5 98:4,12 104:6 106:22 107:19 110:21 129:6		regulate 100:1 101:10 120:3	reiterate 109:20	represents 58:16	restriction 14:23
puts 80:2 85:20 93:3		regulation 68:13,18 75:13 98:7 113:1,9,11 114:5 116:22 120:5	reject 35:15	request 8:16,18,20 9:2,5,7 16:13 34:6 38:10 72:11 75:12,16 76:3 111:20 119:8 121:13	restrictions 48:19,24 49:10 88:21 89:1
putting 25:3 83:2 143:20		regulates 100:11 116:19	rejected 22:23	requested 8:11,15 53:3 59:19 75:19,22,24	restrictive 14:22
Q		regulation 68:13,18 75:13 98:7 113:1,9,11 114:5 116:22 120:5	rejects 38:9	requests 8:22 9:11 11:19 14:14 15:13 34:5 68:10 98:18 121:7	result 14:6 18:24 137:16 91:23
QPO 101:23 102:1,2,20 117:5,10 119:2 120:1,13,15,17 123:6 127:22 141:4,		records 34:7,8,15 35:17,20, 23 36:12,13,15,16, 21,23 37:20,21 39:9, 12,15,22 40:14 41:1, 6,8 52:11 53:3,5,13 54:14,18 56:20 60:18 61:4 62:2,3 63:19 64:2 65:7,14, 16,17,20,21 66:10 68:4 69:10,11,16 70:17,18 72:7,23 73:13 77:24 78:1,14 79:20 80:7,16 82:1,5 85:6,7,10,18,22 86:3,10,14,21,24 87:3,4 88:6 93:8,12, 19 94:1,13,15,24 95:3,6,9,11,13,24 96:1,3,21 97:8,21 98:9,18,22 99:15 100:8,12,15,20,22	relate 56:21 86:5		



<p>resulting 63:18</p> <p>Resurrection 39:22 41:6,7,9</p> <p>retain 137:1</p> <p>retained 98:23</p> <p>retains 105:8</p> <p>retention 100:12 108:23 109:24 124:2</p> <p>return 60:8,21</p> <p>returnable 84:20</p> <p>reverse 75:5</p> <p>reversed 19:8</p> <p>review 10:22 12:14 18:12 27:8 84:22</p> <p>reviewed 71:17 98:7</p> <p>reviewing 18:6 58:3 114:16</p> <p>revoke 74:20</p> <p>rid 36:11 63:5 132:19</p> <p>riddle 35:14</p> <p>rightly 93:15</p> <p>rights 39:20 66:8 71:19 79:13 81:6 89:6 92:6,8 94:2 128:17, 20 141:5 144:9</p> <p>rises 17:1</p> <p>risk 64:1</p> <p>road 79:16</p> <p>roadmap 9:10</p> <p>Robert 57:18,19</p> <p>robust 97:7 101:12</p> <p>role 30:7 69:17 103:14 127:7</p> <p>rolled 19:20</p> <p>Romanucci 12:2 13:7 25:24 37:4,13 38:17 39:16 56:1,11,17 66:3 124:7 126:11 139:15</p> <p>room 23:23 43:23 92:2</p> <p>Rothstein 10:16 13:9 105:2,7, 16 106:5,22 108:22</p> <p>rough 14:10</p> <p>roughly 15:11</p> <p>round 18:15</p> <p>routinely 97:8 118:17</p> <p>rule 4:3,7,13,24 5:4,15, 17 6:6,7 7:3,11,19 8:8,23 9:6,9,17,18</p>	<p>10:11 11:15 12:18, 21 17:20 19:21 21:2, 8 22:20 23:21 26:6, 24 31:12,15,24 32:3 33:2,16 44:22 45:2 46:12 48:10,13,14, 18,20,24 49:4,10,15, 16 50:1,4 53:10 58:15 63:10 68:13, 18 83:24 92:4 94:18 95:15 107:2 109:10 119:5 122:11 123:11 125:7 134:4,6 139:4, 5,23 141:9 142:15</p> <p>ruled 98:20 100:10 109:22 122:18</p> <p>rules 3:3 4:1 5:8,12 6:16, 20 12:1 17:16 23:24 31:11,20 37:23 38:2 58:4 73:15 83:22 84:1,6 95:21,23 96:15 103:18 111:21 123:12,21</p> <p>ruling 67:8 70:9 71:1 98:21 102:8</p> <p>run 79:19</p> <p>running 37:19</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safe 15:21 16:1</p> <p>sake 143:24</p> <p>sample 105:11</p> <p>sanction 39:24 53:19,21</p> <p>sanctions 53:11 85:24 96:14</p> <p>satisfactory 117:8,12,24 118:3,6, 13 120:16 122:12</p> <p>scenario 70:22</p> <p>scheme 103:6</p> <p>scope 54:5 55:8 64:13 65:7 96:16 121:10,13,20 127:19 134:1,5 136:1 137:12 138:11 139:13 140:5,21,24 141:6</p> <p>screaming 132:7</p> <p>screen 32:14</p> <p>scrolling 32:19</p> <p>scrutiny 103:5</p> <p>seconds 32:13</p> <p>section 4:14 45:9 51:10 62:21 120:2 131:18, 19 132:3,18 133:2,4, 5</p> <p>seek 31:1,2 89:17</p> <p>seeking 65:14 117:10</p> <p>segregate 85:4 137:21</p>	<p>selection 16:23</p> <p>selective 13:22</p> <p>self-represented 18:21</p> <p>send 34:5 35:17 87:1 117:24</p> <p>sends 80:10</p> <p>sense 88:18 89:2 115:4 143:4</p> <p>sensitive 95:17,19 104:4</p> <p>sentiments 88:20</p> <p>separate 34:2 62:13 64:16 117:1 143:13</p> <p>series 72:7</p> <p>served 83:22</p> <p>serves 31:5</p> <p>service 101:4</p> <p>services 3:9 75:18 101:10</p> <p>servicing 34:4 51:7</p> <p>set 9:18 22:12 109:19</p> <p>Seth 3:10</p> <p>sets 50:4 75:13</p> <p>settle 66:22 90:19 118:20</p> <p>settling 138:14</p> <p>seven-year 47:2</p> <p>sexual 78:11,17</p> <p>sexually 63:17</p> <p>shaking 79:7</p> <p>share 11:10 13:13 51:17 63:11 70:3 81:16 90:21,22 125:22 145:11</p> <p>shared 63:12</p> <p>sharing 80:5</p> <p>Shepherd 35:21</p> <p>shield 84:2</p> <p>shipped 140:19</p> <p>short 24:19 113:21</p> <p>shortcoming 144:14</p> <p>show 13:16 32:12</p> <p>showed 113:24</p> <p>Shull 82:17 125:20 128:18</p> <p>sic 22:20</p> <p>side 39:13 106:1 128:24</p>	<p>133:21</p> <p>sides 43:18 46:6 90:14 93:17</p> <p>sign 36:19 40:2,12 41:15, 17,19 53:20,21 54:5 61:19 63:23 88:10 107:9 135:9,14</p> <p>signature 39:11 40:9,15,20</p> <p>signed 34:9 41:21 55:5 74:8 134:24</p> <p>significant 18:16 52:9 92:8</p> <p>significantly 19:12,18 29:19 106:15</p> <p>signing 21:18 41:12,20 81:9 94:1</p> <p>silly 41:13</p> <p>similar 58:18 72:16</p> <p>simple 54:20 112:23</p> <p>simply 7:15 10:5 22:21 32:18 34:24 35:15 41:2,20 43:4 89:21 95:3 100:21 112:19 128:3 129:17 132:9 134:13,15 136:5,18 138:20 139:20 143:20 144:11,21 145:4</p> <p>sincerity 43:10</p> <p>single 63:13 78:17 111:14 135:9,10</p> <p>sir 29:17 50:20 57:13 71:7 92:16 109:15 110:7 126:5</p> <p>sister 90:14</p> <p>sit 131:17,19</p> <p>sitting 86:22 131:9,12</p> <p>situation 14:2 45:18 53:4,11 70:15</p> <p>situations 41:23 49:16 65:24</p> <p>skeletons 88:12</p> <p>slight 19:15 122:2</p> <p>slightly 48:19 116:15</p> <p>slow 12:20</p> <p>slows 10:22</p> <p>small 111:8</p> <p>smart 76:15</p> <p>smoothly 52:14</p> <p>so-called 26:23 102:12</p> <p>sobering 47:8</p> <p>social 76:14,17 90:12</p>	<p>society 80:19</p> <p>Sofia 71:8,9</p> <p>solution 38:16 41:14,20</p> <p>solve 35:14 81:5 107:6</p> <p>solved 142:2,17</p> <p>someone's 28:10 36:8 45:19</p> <p>sooner 132:22,23,24</p> <p>sort 14:16 66:4,5,15 96:11 130:12 137:12,19 138:4 139:12 144:13</p> <p>sorted 81:23</p> <p>sorts 15:12 130:22 132:8 144:24</p> <p>sought 21:10 60:1</p> <p>sounds 40:17 142:1</p> <p>southern 141:22 143:21</p> <p>speak 30:20 42:21 91:14 98:4 112:23 126:7,8</p> <p>speaker 3:10 17:9 29:14 50:21 66:4</p> <p>speakers 3:4 57:14 65:12 105:5</p> <p>speaking 17:11 24:10 26:22 29:15 56:4 110:15</p> <p>special 96:21</p> <p>specialize 8:4</p> <p>specialties 8:6</p> <p>specific 7:11 11:11 16:8 36:21 51:23 62:15, 17,23 64:3 68:8,17 100:14 111:14 114:17 115:20 117:4 121:9,20 122:24 123:10 128:1 129:20 133:11 137:8 143:5</p> <p>specifically 55:9 56:6,14 60:2 68:14 73:2 86:7 95:15 98:7 107:15 111:16 112:7 117:17 126:7 128:7</p> <p>specifics 132:12</p> <p>speculate 125:1</p> <p>speculative 16:5</p> <p>spend 22:13 46:6,7</p> <p>spending 132:7</p> <p>spent 91:21</p> <p>spine 70:20</p> <p>split 31:17</p> <p>spoke 50:9 130:24</p>	<p>Springfield 108:24</p> <p>stack 86:24</p> <p>staff 110:12 114:9,14</p> <p>stage 16:1 26:19</p> <p>stake 28:11 78:6,9 81:17</p> <p>stakeholders 38:4 66:7</p> <p>stand 15:17 17:4</p> <p>standard 39:7 89:15 91:4</p> <p>standpoint 99:4</p> <p>start 18:6 48:2 57:2 115:1</p> <p>started 18:10 23:21 43:8,14 78:21 126:24</p> <p>Starting 127:23</p> <p>starts 86:23</p> <p>state 19:9 26:10 30:22 37:8,14,22 52:1 58:16 59:13 60:17 62:6 63:6 68:17 69:1,10,14 73:21 74:15 75:8 76:3 79:15 83:12 86:19 87:10 91:19,24 96:20 98:9,11 99:24 100:3,10 103:18 109:12 110:12,17 111:24 123:10 142:22 145:12</p> <p>State's 3:7</p> <p>stated 58:17 61:3 70:6 74:24 111:22 144:17</p> <p>statement 31:19 33:4 49:19 67:2 105:15 126:17 131:6</p> <p>statements 31:16 45:3,4 98:14 132:3 137:2</p> <p>states 26:5,12,16 43:1 59:10 120:3 128:4, 19</p> <p>statewide 38:14,22 39:7,8 59:21 64:9 70:24 83:5 91:4 144:1</p> <p>stating 141:3</p> <p>statistic 30:9</p> <p>statistical 15:15 72:16 81:11, 14 132:24</p> <p>statistics 13:15 27:10 131:23</p> <p>statute 56:23 58:22 94:23 98:6 127:2,10,12,14 130:15</p> <p>statutes 63:7 104:5 130:9</p> <p>statutorily 63:2</p> <p>step 36:2</p>
---	--	--	---	--	---



<p>stepfather 63:17</p> <p>Steve 42:15,19 110:8</p> <p>stopped 47:1 63:14</p> <p>stored 89:23,24</p> <p>stories 45:13</p> <p>story 63:11</p> <p>streamlines 117:21</p> <p>street 77:16</p> <p>stress 71:16</p> <p>strong 11:8</p> <p>strongly 14:4 17:19 22:2 32:2</p> <p>struck 33:12 115:8</p> <p>structure 5:12</p> <p>structured 11:16 16:16</p> <p>studies 26:4</p> <p>stuff 79:8</p> <p>subject 8:8 9:15 11:12 32:6 36:6 38:16 48:19,23 49:10 50:9 53:9 92:5,11 99:8,19 100:2 101:12 103:5, 8,10 104:13,21 112:18 118:7 124:13 130:15 136:18 138:17,18 143:3</p> <p>submissions 136:2</p> <p>submit 7:21 11:18 12:15 13:21 38:14 72:13 102:8 104:14 107:7 138:13</p> <p>submitted 34:22 72:10 95:3</p> <p>submitting 10:1</p> <p>subordinate 119:3</p> <p>subpoena 34:8 36:12 41:20,23 53:2 54:17 65:20,21 101:3 105:12 107:14,16,21 111:20 117:7,12,24 118:2, 13 119:7,17,18,20 120:16 121:11 125:14 128:8 133:18 134:2 135:3,22 140:15,17,22,24</p> <p>subpoenaing 54:13 78:22</p> <p>subpoenas 63:5 65:13 82:3 84:19 87:2 124:8,10 125:11 133:15 140:7,11 141:6</p> <p>subsequent 64:11 65:6 74:2</p> <p>subsequently 65:7 73:22</p> <p>substantial 7:22 12:20 34:18</p> <p>success 111:4</p>	<p>suffered 63:15</p> <p>suffers 55:12</p> <p>sufficient 62:17 118:2</p> <p>suggest 6:15 20:17 22:9 48:18 121:24 122:5</p> <p>suggested 10:20 38:1</p> <p>suggesting 20:6,21 103:16 105:5 140:5</p> <p>suggestion 55:14 66:3 70:23 134:17</p> <p>suggestions 64:13 106:13</p> <p>suggests 53:14</p> <p>suicidal 78:23</p> <p>suicide 80:24 85:9</p> <p>suit 93:3 94:14 138:15</p> <p>summarize 37:13</p> <p>summary 112:12</p> <p>super 58:13</p> <p>supplemental 24:1 28:20</p> <p>supplementary 5:5 28:16</p> <p>supplementing 42:4</p> <p>support 4:9 5:5 6:14,18,24 7:12 9:20,21 10:8,18 17:2,19 18:4 28:14 30:8 32:2 33:7 34:13 49:5,24 55:16 66:2</p> <p>supposed 52:13 85:11</p> <p>Supreme 3:3 4:11,13,22 5:3 6:23 8:11,13 9:11,16 13:16 17:20 18:7,14 19:3,9,23 21:14,15 22:19 23:24 25:7 26:8,12 43:1 49:14 53:10,18 58:4 73:23 74:2,3 84:6 93:7 95:2,21,22 99:4 109:10 111:21 123:12 125:7,19 134:6 141:9</p> <p>surgery 54:11 85:7</p> <p>surprise 131:14</p> <p>surprised 20:13</p> <p>Survivor 131:21</p> <p>suspect 87:9</p> <p>sword 84:1</p> <p>system 76:17 136:7</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table 80:13 131:9,13 145:7</p>	<p>tailored 54:21 124:4</p> <p>takeaway 133:6</p> <p>takes 13:17,22</p> <p>taking 21:7 25:15 46:13 110:20 137:17</p> <p>talk 21:15 42:23 45:7 79:15 80:14 111:2 138:10</p> <p>talked 37:15 54:23 87:9 124:8</p> <p>talking 25:2 49:12 54:8 57:2,3 61:15 79:3,8</p> <p>talks 49:16 88:22 101:15</p> <p>taping 43:14</p> <p>taxes 108:14</p> <p>Tazewell 34:19 42:7</p> <p>teams 97:7</p> <p>technical 112:1 118:23</p> <p>technology 43:7 44:11,13</p> <p>telling 43:2,6 142:1</p> <p>temporary 6:9</p> <p>ten 3:21 9:13 15:7 22:11,15 32:9 78:10 120:8 122:14 128:19 131:18,24 143:13</p> <p>tender 34:24</p> <p>tendered 39:12</p> <p>tendering 39:11</p> <p>tension 130:24</p> <p>term 19:23 56:23</p> <p>termination 68:20</p> <p>terminology 102:12</p> <p>terms 6:5 12:4 14:17 18:2, 4 19:7 22:6,7 57:7 66:16 85:3 113:6 114:7 116:10,16 131:14 136:9 139:1, 13 143:11 144:20</p> <p>terrified 63:18</p> <p>test 80:15 99:6</p> <p>testifying 134:16</p> <p>testimony 50:6 91:17</p> <p>text 139:7,22 143:20</p> <p>theories 28:18</p> <p>thereto 140:15</p> <p>thing 28:5 43:13 44:20 52:23 57:1 75:1 78:7</p>	<p>92:2 93:12 106:23 111:2 119:19 121:11,22 122:10 143:19</p> <p>things 12:20 18:18 23:6 32:8,10 34:2 35:23 36:18 40:6 42:24 44:17 45:13 52:14 53:15 57:24 65:11 68:16 69:9 74:10 77:12,13 79:20 81:15,22 92:21 96:5, 7,13 102:22 103:8 112:15 114:12 125:3 129:10 130:6,22 139:17</p> <p>thinking 28:17 79:7</p> <p>thinks 109:16 144:4</p> <p>third-party 115:17,22 116:20</p> <p>thought 14:17</p> <p>thoughts 51:18 86:1 110:22</p> <p>thousands 113:7</p> <p>threshold 5:21</p> <p>tied 47:9</p> <p>time 3:20 4:20 5:22 6:3,5, 14 8:19,21 9:3,7 11:2 16:13 27:4 28:12 31:22 35:21 36:1 45:12 46:8 48:6,17 49:17 50:2 65:6,22 70:14 77:3 85:2 89:24 93:1 95:12 106:13 108:3, 17 110:22 113:2 117:13 121:10,13,19 125:18,24 132:8 138:1</p> <p>times 15:7 30:17 44:5 138:12 142:9</p> <p>timing 4:23</p> <p>Timothy 17:10</p> <p>title 19:10 122:5 139:5, 18</p> <p>today 3:9 42:4 50:9 52:6 106:6 110:15,16 123:8 126:7,8 127:20 132:4 134:16,19 136:3,17</p> <p>today's 58:11</p> <p>told 78:23 134:14 138:12</p> <p>tool 43:19 44:2 46:9 55:15</p> <p>topic 19:10 108:22</p> <p>tort 131:20</p> <p>Torts 127:9</p> <p>tortured 35:11 68:6</p> <p>total 20:1</p>	<p>totally 69:11</p> <p>town 42:7</p> <p>transcript 143:1</p> <p>transfer 143:1</p> <p>transferred 83:9</p> <p>transient 83:7,8</p> <p>treated 89:5</p> <p>treating 96:4 107:10,12</p> <p>treatment 81:19 85:10 135:17, 18</p> <p>tremendous 38:18 79:10</p> <p>trenches 45:12</p> <p>trial 30:23 31:23 32:6 42:16,20 43:12 45:23 46:15 47:21 51:2,7 67:8 84:5,10, 14 99:10 104:3 109:21 131:7</p> <p>trouble 124:19</p> <p>true 27:22 28:7 43:13 76:4 105:17</p> <p>trump 55:16</p> <p>truncate 57:22</p> <p>trust 87:14,16</p> <p>Tucker 16:11,18 27:10,17, 19 28:15 29:8 50:8, 13,16 141:21</p> <p>Tuesday 20:2</p> <p>turn 85:18,19 88:4</p> <p>turned 85:16</p> <p>tweaked 123:15</p> <p>tweaks 123:17</p> <p>type 7:3 14:7 15:23 16:7 26:6 57:4 74:15 121:10 128:1,14 131:21 132:12,13 136:14 138:7</p> <p>types 13:22 26:18 130:20</p> <p>typical 131:21</p> <p>typically 15:9 25:3 118:1</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S. 21:14,15</p> <p>ultimately 43:12 77:18 107:16</p> <p>unaware 68:12</p> <p>unconscionable 72:2</p> <p>unconstitutional 55:11 72:2</p>	<p>underlying 6:12</p> <p>understand 16:12 34:12 40:8 44:3,15 45:15 46:17 47:10 93:17 94:13 98:3</p> <p>understandable 47:11</p> <p>understanding 6:21,22 13:2 29:19 40:21 44:14 115:21</p> <p>undoubtedly 12:13</p> <p>undue 84:3</p> <p>unequivocally 112:9</p> <p>unfairly 83:1</p> <p>unhappy 104:7</p> <p>unhelpful 11:20</p> <p>uniform 38:5</p> <p>uniformity 34:13 38:22 83:16</p> <p>uniformly 28:21 34:14</p> <p>uninstructive 11:19</p> <p>unique 132:4</p> <p>United 26:11 43:1</p> <p>universal 88:7</p> <p>universally 77:18 78:1</p> <p>University 135:1,4</p> <p>unlimited 55:10</p> <p>unpunished 126:10</p> <p>unqualified 60:20</p> <p>unreasonable 93:11</p> <p>unregulated 76:14</p> <p>unrelated 111:13</p> <p>unsuccessfully 53:17</p> <p>update 31:24</p> <p>upset 77:6 79:6</p> <p>urge 76:18</p> <p>user 52:10</p> <p>utilize 69:23</p> <p>utterly 69:12</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>VALDERAMMA 114:20</p> <p>VALDERRAMMA 115:19,23</p> <p>valid 45:6 60:19 74:13 75:11 106:7 119:9</p> <p>valuable 44:2</p>
---	--	---	--	---	---



<p>valve 6:1</p> <p>variety 132:11</p> <p>vast 125:12</p> <p>vehicle 37:3 85:6 137:16</p> <p>venue 83:10</p> <p>version 122:2</p> <p>versus 26:10 113:20 115:11</p> <p>viable 121:23 123:16</p> <p>vibrant 109:13</p> <p>VICE 12:2 13:7 25:24 37:4,13 38:17 39:16 56:1,11,17 124:7 126:11 139:15</p> <p>victim 71:22</p> <p>victimized 63:21</p> <p>video 32:4,8,12,19,24 33:3,6 46:24 48:6, 15,17,22</p> <p>videotape 45:21 46:3,4 50:4</p> <p>view 86:14</p> <p>viewed 45:4 96:3 120:24</p> <p>views 38:1 110:16,17</p> <p>vignettes 106:6</p> <p>violate 63:6 103:9</p> <p>violated 96:22</p> <p>violates 58:21 59:8</p> <p>violating 103:18 104:7,8</p> <p>violation 103:15</p> <p>violations 96:10</p> <p>visits 125:4</p> <p>voiced 61:14</p> <p>volume 29:4 95:7 133:10</p> <p>volunteer 50:18,19</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 21:11,12</p> <p>waive 78:13 129:18 144:11</p> <p>waived 40:11 52:19 53:1 55:3 94:1</p> <p>waiver 28:17 55:10 57:9 61:15 62:3,11 75:20 93:22,24 129:20 137:10 139:8,10,24 144:9,13</p> <p>waiving 58:19 61:19 81:6,9 93:5 94:4</p>	<p>walk 5:10 70:13</p> <p>wanted 3:5 22:12 71:16 80:16 81:16 92:17 126:8</p> <p>war 45:12</p> <p>warrants 17:2</p> <p>wave 133:5</p> <p>ways 43:15 44:19 83:17 86:14 90:5 100:19 101:24</p> <p>wear 37:6</p> <p>website 128:3</p> <p>week 20:4 24:10 68:24 131:22</p> <p>weeks 20:3 50:12</p> <p>weigh 19:9 71:24</p> <p>well-meaning 104:18</p> <p>whatsoever 94:22 138:2,18</p> <p>wholesale 125:6</p> <p>wholly 111:13</p> <p>widely 38:5</p> <p>William 47:20</p> <p>witnesses 48:8</p> <p>woman 54:10</p> <p>wonderful 79:21 105:22</p> <p>wondering 15:8 50:16 114:7</p> <p>woodshedded 47:13</p> <p>word 4:14,18 28:6 139:3, 21,24 140:1</p> <p>words 32:19 56:6,17 97:10 116:4 139:19</p> <p>work 7:23 38:18 41:22 50:10 52:24 70:7 77:11 82:8,9 133:8 143:17 145:7</p> <p>worked 80:10 82:7,20</p> <p>workers' 136:11</p> <p>working 38:3 66:5 67:16 69:2 77:7 81:3 91:21</p> <p>workload 14:17 18:2,5 28:7</p> <p>works 23:13 57:9 133:6 143:17</p> <p>world 25:10 37:20 64:7 65:15 106:6</p> <p>worries 50:23</p> <p>worth 20:24 64:3 65:21</p>	<p>worthwhile 38:7 82:9</p> <p>worthy 13:23</p> <p>Wright 74:3</p> <p>write 18:12 114:11</p> <p>writing 122:20</p> <p>written 34:23 121:23,24 132:21 136:2</p> <p>wrong 19:7 22:10</p> <p>wronged 20:20</p> <p>wrongful 131:20</p> <p>wrote 59:4</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>X-RAY 113:24 114:3</p> <p>X-RAYS 113:7,16</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year 14:13 18:9,12 19:24 52:2 133:22 134:15</p> <p>years 18:6 19:17 20:2 21:10 27:13 28:10 30:3,10 32:5 43:7 46:5 51:14 63:16 65:18 66:23 72:18 77:9 78:9 81:23 82:7,20 83:23 89:13, 23 91:21 97:1 102:7 111:12 112:5 113:2 121:15,18 124:23 127:1 131:5</p> <p>years' 65:21</p> <p>years-long 38:20</p> <p>young 77:10</p> <p>younger 29:19</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zneimer 71:8,9,10</p>
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